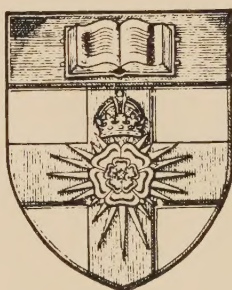


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THE ALL ENGLAND LAW REPORTS REPRINT

SCOTT v. AVERY AND OTHERS

[HOUSE OF LORDS (Lord Cranworth, L.C., Lord Campbell and Lord Brougham),
June 25, July 9, 1855, May 19, July 10, 1856]

[Reported 5 H.L.Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207;
2 Jur.N.S. 815; 4 W.R. 746; 10 E.R. 1121]

Arbitration—Ouster of jurisdiction of court—Award of arbitrator on dispute condition precedent to right of action—Dispute to be referred relating to matter other than quantum of damages.

Parties cannot by contract agree to oust the jurisdiction of the courts to deal with their rights under the contract, but a term in a contract which provides that, in the event of a dispute arising, it shall be referred to arbitrators whose award shall be a condition precedent to any right of action in respect of the matters agreed to be referred is valid. This is so not only where the provision for arbitration relates merely to the quantum of damages due from one party to the other, but also where it is stipulated that other matters, e.g., liability, shall be determined in the first instance by arbitrators.

Notes. Considered: *Livingston v. Ralli* (1855), 24 L.J.Q.B. 269; *Russell v. Pellegrini* (1856), 6 E. & B. 1020. Explained and Distinguished: *Scott v. Liverpool Corpn.* (1858), 3 De G. & J. 334; *Horton v. Sayer* (1859), 4 H. & N. 643. Distinguished *Roper v. Lendon* (1859), 1 E. & E. 825. Applied: *Braunstein v. Accidental Death Insurance Co.* (1861), 1 B. & S. 782. Explained: *Lee v. Page* (1861), 30 L.J.Ch. 857. Considered and Explained: *Turnbull v. Woolfe* (1861), 4 L.T. 236. Followed: *Tredwen v. Holman* (1862), 1 H. & C. 72. Considered: *Stoke v. Hall* (1864), 3 New Rep. 566. Followed: *Wright v. Deley* (1866), 4 H. & C. 209. Considered: *Cooke v. Cooke* (1867), L.R. 4 Eq. 77. Explained: *Elliott v. Royal Exchange Assurance* (1867), L.R. 2 Exch. 237. Considered: *Dawson v. Fitzgerald* (1876), 1 Ex.D. 257; *Edwards v. Aberayron Mutual Ship Insurance Society* (1876), 1 Q.B.D. 563; *Collins v. Locke* (1879), 4 App. Cas. 474; *Hart v. Hart* (1881), 18 Ch.D. 670. Explained and Distinguished: *Minifie v. Railway Passengers Assurance Co.* (1881), 44 L.T. 552. Considered: *Babbage v. Coulbourn* (1882), 52 L.J.Q.B. 50. Explained: *Spackman v. Plumstead Board of Works* (1885), 10 App. Cas. 229. Considered: *Metropolitan District Rail. Co. v. Metropolitan Rail. Co.* (1886), 5 Ry. & Can. Tr. Cas. 126. Followed: *Trainor v. Phoenix Fire Assurance* (1891), 65 L.T. 825; *Scott v. Mercantile Accident and Guarantee*

Insurance Co. (1892), 66 L.T. 811; *Caledonian Insurance Co. v. Gilmour*, [1893] A.C. 85. Considered and Applied: *Spurrier v. La Cloche*, [1900-3] All E.R.Rep. 277. Considered: *Pena Copper Mines, Ltd. v. Rio Tinto Co., Ltd.*, [1911-13] All E.R.Rep. 209. Distinguished: *Jureidini v. National British and Irish Millers' Insurance Co., Ltd.*, [1914-15] All E.R.Rep. 328. Followed: *Lock v. Army, Navy and General Assurance Association* (1915), 31 T.L.R. 297. Distinguished: *Dynamit Act. v. Rio Tinto Co.*, [1918] A.C. 292. Distinguished: *Czarnikow & Co., Ltd. v. Roth, Schmidt & Co.*, [1922] All E.R.Rep. 45. Considered: *Atlantic Shipping and Trading Co. v. Louis Dreyfus & Co.*, [1922] All E.R.Rep. 559; *Hallen v. Spaeth*, [1923] A.C. 684. Explained: *Cavcn v. Canadian Pacific Railway* (1925), 133 L.T. 774. Applied: *Board of Trade v. Cayzer, Irvine & Co.*, [1927] A.C. 610; *Freshwater v. Western Australia Assurance Co., Ltd.*, [1932] All E.R.Rep. 791. Explained: *Jones v. Birch Bros.*, [1933] All E.R.Rep. 251. Referred to: *Scott v. Liverpool Corpn.* (1857), 1 Giff. 216; *Hill v. South Staffordshire Rail. Co.* (1865), 12 L.T. 63; *Prestonjee Nussurwanjee v. Manockjee* (1868), 12 Moo. Ind. App. 112; *Gray v. Pearson* (1870), 23 L.T. 416; *Wright v. Ward* (1871), 24 L.T. 439; *Mulkern v. Lord* (1879), 48 L.J.Ch. 745; *Parry v. Liverpool Malt Co.*, [1900] 1 Q.B. 339; *Toronto Rail. Co. v. National British and Irish Millers Insurance Co.* (1914), 111 L.T. 555; *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.*, [1918] A.C. 260; *Woodall v. Pearl Assurance Co.*, [1918-19] All E.R.Rep. 544; *Gower v. Hales*, [1927] All E.R. Rep. 631; *Wales v. Iron Trades Employers' Association* (1928), 21 B.W.C.C. 316; *Hyman v. Hyman, Hughes v. Hughes*, [1929] P. 1; *Golding v. London and Edinburgh Insurance Co.* (1932), 43 Ll.L.Rep. 487; *Israelson v. Dawson*, [1932] All E.R.Rep. 877; *Cipriani v. Burnett*, [1933] A.C. 83; *R. & W. Paul, Ltd. v. Wheat Commission* (1935), 152 L.T. 352; *Groom v. Crocker*, [1937] 3 All E.R. 844; *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337; *Harman v. Crilly*, [1943] 1 K.B. 168; *Bruce, Ltd. v. Strong*, [1951] 1 All E.R. 1021; *Lee v. Showman's Guild of Great Britain*, [1952] 1 All E.R. 1175; *Re Wynn's Will Trusts, Public Trustee v. Newborough*, [1952] 1 All E.R. 341; *Getreide-Import-Gesellschaft m.b.H. v. Con-timar S.A. Compania Industrial Commercial y Maritima*, [1953] 2 All E.R. 223; *Baker v. Jones*, [1954] 2 All E.R. 553; *O'Connor v. Isaacs*, [1956] 2 All E.R. 417.

As to the effect of an agreement for arbitration, see 2 HALSBURY'S LAWS (3rd Edn.) 18-21; and for cases see 2 DIGEST (Repl.) 470-477.

Cases referred to :

- (1) *Kill v. Hollister* (1746), 1 Wils. 129; 95 E.R. 532; 2 Digest (Repl.) 465, 291.
- (2) *Thompson v. Charnock* (1799), 8 Term Rep. 139; 101 E.R. 1310; 2 Digest (Repl.) 466, 297.
- (3) *Tattersall v. Groote* (1800), 2 Bos. & P. 131; 126 E.R. 1197; 2 Digest (Repl.) 501, 483.
- (4) *Halfhide v. Fenning (Jenning)* (1788), 2 Bro.C.C. 336; Dick. 702; 29 E.R. 187; 2 Digest (Repl.) 465, 294.
- (5) *Wellington v. Mackintosh* (1743), 2 Atk. 569; 26 E.R. 741; 2 Digest (Repl.) 466, 295.
- (6) *Egerton v. Earl Brownlow* (1853), post; 4 H.L.Cas. 1; 8 State Tr.N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 12 Digest (Repl.) 269, 2072.
- (7) *Brown v. Overbury* (1856), 11 Exch. 715; 25 L.J.Ex. 169; 20 J.P. 454; 4 W.R. 252; 2 Digest (Repl.) 505, 510.

Also referred to in argument :

- Philips v. Bury* (1694), 2 Term Rep. 346; Comb. 265; Holt, K.B. 715; 1 Ld. Raym. 5; 4 Mod. Rep. 106; Show. Parl. Cas. 35; 1 Show. 360; Skin. 447; 100 E.R. 186; 13 Digest (Repl.) 185, 23.
- Street v. Rigby* (1802), 6 Ves. 815; 31 E.R. 1323; 2 Digest (Repl.) 466, 298.
- Waters v. Taylor* (1808), 15 Ves. 10; 33 E.R. 658; 2 Digest (Repl.) 466, 299.
- Harrison v. Douglas* (1835), 3 Ad. & El. 396; 1 Har. & W. 380; 5 Nev. & M.K.B. 180; 111 E.R. 463; 29 Digest (Repl.) 361, 2779.

- A *Thurnell v. Balbirnie* (1837), 2 M. & W. 786; Murp. & H. 235; 6 L.J.Ex. 255; 1 Jur. 847; 150 E.R. 975; 2 Digest (Repl.) 505, 517.
Squire v. Ford (1851), 9 Hare, 47; 20 L.J.Ch. 308; 17 L.T.O.S. 119; 15 Jur. 619; 68 E.R. 408; 35 Digest (Repl.) 698, 3708.
Furnivall v. Coombes (1843), 5 Man. & G. 736; 6 Scott, N.R. 522; 12 L.J.C.P. 265; 1 L.T.O.S. 80; 7 J.P. 322; 7 Jur. 399; 134 E.R. 756; 17 Digest (Repl.) 358, 1651.
B *Milnes v. Gery* (1807), 14 Ves. 400; 33 E.R. 574; 2 Digest (Repl.) 505, 513.

Appeal from a decision of the Court of Exchequer Chamber, reported 8 Exch. 487, in an action brought by the appellant, as assured, on a policy on a ship effected by him with the respondents as insurers.

- C The appellant, as plaintiff in the action, filed a declaration setting forth the policy in the ordinary way, and the defendant pleaded to that several pleas, the fifth of which set forth the following condition of the policy :

D “The sum to be paid by this association [the respondents] to any suffering member for any loss or damage shall in the first instance be ascertained and settled by the committee, and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before, which can only be claimed according to the customary mode of payment in use by the society; and if a difference shall arise between the committee [association] and any suffering member relative to the settling of any loss or damage, or to a claim for average, or any other matter relating to the insurance, in such case the member dissatisfied shall select one arbitrator on his or her behalf, and the committee shall select another; and if the committee refuse for fourteen days to make such selection, the suffering member shall select two; and in either case the two selected shall forthwith select a third, which three arbitrators, or any two of them, shall decide upon the claims and matters in dispute according to the rules and customs of the club, to be proved on oath by the secretary; and on such arbitration the party demanding it shall state the sum which he claims, and shall be allowed such proportion of the expenses occasioned by the arbitration as the sum awarded to him bears to the sum demanded, and the residue of such expenses shall be borne by him and deducted from the sum awarded to him. And in all cases where arbitration is resorted to, the settlement of the committee to be wholly rescinded, and the statement begun de novo. Provided always, and it is hereby expressly declared to be a part of the contract of insurance between the members of the association, that no member who refuses to accept the amount of any loss as settled by the committee in manner hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action at law or suit in equity on his policy, until the matters in dispute shall have been referred to and decided by arbitrators appointed as hereinbefore specified, and then only for such sum as the said arbitrators shall award; and the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit.”

- I The plea then stated that a difference had arisen between the plaintiff and the committee, and the loss had never been ascertained and settled, but that the defendants were willing to have it settled and the plaintiff was not willing.

The Court of Exchequer gave judgment for the plaintiff, but that decision was reversed by the Court of Exchequer Chamber, and the plaintiff appealed to the House of Lords.

Atherton, Q.C., and *Pollock* for the appellant.

Bramwell, Q.C., and *Manisty* for the respondents.

The following learned judges attended: ALDERSON, B., COLERIDGE, J., CRESSWELL, J., WIGHTMAN, J., MARTIN, B., CROMPTON, J., and CROWDER, J., and to them. at the conclusion of the argument, this question was left—whether, looking to the record, judgment ought to be given for the appellant or for the respondents.

Cur. adv. vult.

May 19, 1856. The learned judges delivered their judgments, COLERIDGE, J., CRESSWELL, J., WIGHTMAN, J., and CROWDER, J., being in favour of the respondents, and ALDERSON, B., MARTIN, B., and CROMPTON, J., in favour of the appellant.

Their Lordships took time for consideration.

July 10, 1856. The following opinions were read.

LORD CRANWORTH, L.C.—The question appears to me to be one merely of construction of the policy in question. For there is no doubt of the general principle, which was argued at your Lordships' Bar, that parties cannot by contract oust the ordinary courts of their jurisdiction.

That has been decided in many cases. Perhaps the first case I need refer to was a case decided about a century ago, *Kill v. Hollister* (1). That was an action on a policy in which there was a clause that in case of any loss or dispute it should be referred to arbitration. It was decided there that an action would lie, although no reference had been made to arbitration. After a lapse of about half a century, occurred a case before LORD KENYON—and probably many other cases, from the language that fell from that learned judge, had been decided, which are not reported—but in the time of LORD KENYON occurred a case which is considered the leading case upon this subject, *Thompson v. Charnock* (2). That was an action upon a charterparty, in which there was a stipulation that if any difference should arise it should be referred to arbitration. That clause was pleaded in bar to the action which had been brought upon a breach of the covenant with an averment that the defendant had been and always was ready to refer the matter to arbitration. That was held to be a bad plea upon the ground that a right of action had accrued, and that the fact that the parties had agreed that the matter should be settled by arbitration did not oust the jurisdiction of the courts. Just about the same time occurred a case in the Court of Common Pleas, when that court was presided over by LORD ELDON—*Tattersall v. Groote* (3). That was an action by the administratrix of a deceased partner against a surviving partner for not naming an arbitrator pursuant to a covenant in the deed of partnership. To that action there was a demurrer, and the demurrer was allowed. But that case I think can afford very little authority in the present action, or in actions similar to the present, because there the covenant was only that, if any dispute arose between the partners, they should name an arbitrator. One of the partners died, and his administratrix brought an action, and LORD ELDON pointed out that the covenant did not apply to a case where one of the partners was dead and an action was brought by his representative. Therefore, in truth, that amounts to no decision whatever upon the general question. There was a case before LORD KENYON at the Rolls, *Halfhide v. Fenning* (4), in which he held a different doctrine. That was a bill for an account of partnership transactions. The plea to that bill was that the articles contained an agreement that any differences which should arise should be settled by arbitration; and LORD KENYON allowed that plea. But I think that case cannot be relied upon, and it has been universally treated as having proceeded upon an erroneous principle, because, no doubt, where a right of action has accrued, parties cannot by contract say that there shall not be jurisdiction to enforce damages for a breach of that contract.

This doctrine depends upon the general policy of the law, that parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw the jurisdiction on such a case from the ordinary tribunals. But surely there can be no principle or policy of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference

A has been made to arbitration. It appears to me that in such cases as that the policy of the law is left untouched; and that, I take it, is what was alluded to by LORD HARDWICKE in *Wellington v. Mackintosh* (5), which was this. The articles of partnership in that case contained a covenant that any dispute should be referred. A bill was filed by one of the partners, and a plea set up that covenant to refer as a bar to the bill. LORD HARDWICKE overruled the plea, but said that the parties might have so framed the deed as to oust the jurisdiction of the court. I take it that what LORD HARDWICKE meant was, that the parties might have so framed the stipulation among themselves that no right of action or right of suit should arise until a reference had been previously made to arbitration. I think it may be illustrated thus. If I covenant with A. to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenant shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals, but if I covenant with A.B. that if I do or omit to do a certain act, then I will pay to him such a sum as I.S. shall award as the amount of damage sustained by him, then, until I.S. has made his award and I have omitted to pay the sum awarded, my covenant has not been broken and no right of action has arisen.

The policy of the law does not prevent parties from so contracting; and the question is here: What is the contract? Does any right of action exist until the amount of damage has been ascertained in the specified mode? I think, clearly not. The stipulation is that the sum to be paid to the suffering member shall be settled by the committee. If he does not agree with the committee as to what the amount is, then the committee shall name one arbitrator and he shall name another, and these two arbitrators shall name an umpire, and they shall determine what the amount is, and that shall be the amount recovered. There is the express stipulation that the obtaining of the decision of the arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit. That the meaning of the parties, therefore, was that the sum to be recovered should be only such a sum as, if not agreed upon in the first instance between the committee and the suffering member, should be decided by arbitration, and that the sum so ascertained by arbitration, and no other, should be the sum to be recovered, appears to me to be clear beyond all possibility of controversy; and, if that was their meaning, the circumstance that they have not stated that meaning in the clearest terms or in the most artistic manner is a matter utterly unimportant. What the court below had to do was to ascertain what was the meaning of the parties as deduced from the language they have used. It appears to me perfectly clear that the language used indicated this to have been their intention—that, supposing there was a difference between the person who had suffered loss or damage and the committee as to what amount he should recover, that was to be ascertained in a particular mode, and, until that mode had been adopted and the amount ascertained according to that mode, no right of action should exist—in other words, that the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say.

It was argued that here the arbitrators were to decide, not the mere amount, but other matters, as, for instance, what average was to be allowed, whether there had been a loss, and a variety of other matters, which were ingeniously argued at your Lordships' Bar. In the first place, if that were so, it would not necessarily change my view of the case. I am not at all clear that it is not so. I observe the learned judges differed about that. I do not think it necessary to go into that, because I am quite prepared to say that, in my view of the case, that makes no difference at all. If, in consideration of a sum of money paid to me by A.B., I agree with him that, in case I.S. should decide that he, A.B., had fulfilled certain conditions and had sustained certain damage, and I.S. should make his award

accordingly, I would pay to A.B. the sum so ascertained and awarded, no right of action would exist until I.S. had made his award. I do not go into the question, therefore, whether in this case, according to the true construction of the contract, the amount of damage alone is to be ascertained, because, in my view of the case, the principle goes much farther. A

It appears to me perfectly clear that, until the award was made, no right of action accrued, and consequently the judgment of the court below, reversing the judgment of the Court of Exchequer and allowing the plea, was a perfectly correct judgment. Your Lordships have had the benefit of having this case argued before the learned judges. The learned judges differed in their opinion. There was a majority, but a bare majority, in favour of the view which I have taken of this case. Whichever way the preponderance of opinion among the learned judges may be, and however great it may be either way, the ultimate decision rests with your Lordships, but it is always satisfactory to know that the view taken by your Lordships is in concurrence with the opinion of the learned judges. Here it is in concurrence with the opinion of a majority, though but a slender majority, of those learned judges. I, therefore, humbly move your Lordships that the judgment below be affirmed, and that judgment be given for the respondents, with costs. B C

LORD CAMPBELL.—After a very deliberate and dispassionate consideration of the case, I have come to the same conclusion as my noble and learned friend on the Woolsack. It appears to me, I confess, to be very clear (with great deference to the dissenting judges) that, upon principle, and without overturning any authority, your Lordships ought to affirm the judgment of the Exchequer Chamber. In the first place, I think that the contract between the shipowner and the underwriters in this case is quite clear—as clear as the English language could make it—that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between them. It is declared to be a condition precedent to the bringing of any action. There is no doubt that such was the intention of the parties; and, upon a deliberate view of the condition of the policy, I am of opinion that it embraces not only the assessment of damages, the computation of quantum, but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers as well as the amount to be paid. If there had been any question about want of seaworthiness, or deviation, or a breach of blockade had been committed, I am clearly of opinion that upon a just construction of this instrument, until those questions had been determined by the arbitrators, no right of action could have accrued to the insured. D E F

That being the intention of the parties, about which I believe there is no dispute, is the contract illegal? There is an express undertaking that no action shall be brought until the arbitrators have decided, and there is abundant consideration for that in the mutual contract into which the parties have entered. Therefore, unless there be some illegality in the contract, the courts are bound to give it effect. There is no statute against such a contract. Then on what ground is it to be declared to be illegal? It is contended that it is contrary to public policy. That is rather a dangerous ground to go upon. I say it with great deference before your Lordships after the view that was taken in a very important case lately decided in this House (*Egerton v. Earl Brownlow* (6)). But what pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject, if he were not allowed to enter into such a contract. Take the case of an insurance club, of which there are many in the north of England. Is there anything contrary to public policy in saying that the company shall not be harassed by actions to be brought against them, the costs of which might be ruinous, but that any dispute that arises shall be referred to a domestic tribunal, which may speedily and economically determine the dispute? I G H I

A can see not the slightest ill consequence that can flow from such a liberty, and I see great advantage that may arise from it. Public policy, therefore, seems to me to require that effect should be given to the contract.

When we come to the decided cases, if there were any decision that had not been reviewed by your Lordships which adjudged such a contract to be illegal, I should ask your Lordships to reverse it, for it would seem to me really to stand on no principle whatsoever. I know that there has been a very great inclination in the courts for a good many years to throw obstacles in the way of arbitration. I wish to speak with great respect of my predecessors the judges; but I must just let your Lordships into the secret of that tendency. There is no disguising the fact that as formerly the emoluments of the judges depended mainly or almost entirely upon fees and they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil, and hence the disputes between the different courts about the effect of a *latitat*, a *capias*, and a *quo minus*—the *latitat* bringing business into the Court of Queen's Bench, the *capias* into the Common Pleas, and the *quo minus* into the Exchequer. They had great jealousy of arbitrations, whereby Westminster Hall was robbed of those cases which came neither into the Queen's Bench, nor the Common Pleas, nor the Exchequer. Therefore, they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law. But, my Lords, that really grew up only subsequently to the time of Lord Coke, whose memory I revere, and whose authority I am always anxious to support where I can. There is a saying of Lord Coke's which is the original foundation of this doctrine. It is this:

E "If a man make a lease for life, and by deed grant that if any waste or destruction be done it shall be redressed by neighbours, and not by suit or plea, notwithstanding an action of waste shall lie, for the place wasted cannot be recovered without a verdict of the neighbour being first had and obtained."

Where an action is indispensable you cannot oust the court of its jurisdiction over the subject, because justice cannot be done without a plea. This is the foundation of the doctrine that the courts are not to be ousted of their jurisdiction.

I am glad to think that there is no case that I am aware of that will be overturned by your Lordships affirming the judgment now in dispute. Because all that has been hitherto decided in *Thompson v. Charnock* (2) and the other cases referred to is this—that if the contract between the parties simply contains a clause or covenant to refer to arbitration, and goes no further, then an action may be brought in spite of that clause, although there has been no arbitration. But there is no case that goes the length of saying that where the contract is, as it is here, that no right of action shall accrue until there has been an arbitration, then an action may be brought, although there has been no arbitration. In this contract of insurance, it is stipulated in the most express terms that, until the arbitrators have determined, no action shall lie in any court whatsoever. That is not ousting the courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined. Therefore, without overturning *Thompson v. Charnock* (2), and the other cases to the same effect, your Lordships may hold that in this case, where it is expressly, directly, and unequivocally agreed upon between the parties that there shall be no right of action whatever till the arbitrators have decided, it is a bar to the action that there has been no such arbitration.

It gives me great satisfaction to know that while this case has been pending, there has been a decision bearing on this question in the Court of Exchequer, in which this case arose. That case is expressly in point, and it seems to me further to show that this judgment of the Court of Exchequer Chamber ought to be affirmed. That case was decided in Hilary Term of the present year. It is *Brown v. Overbury* (7). It was an action on a horse-race. The winner, who had contributed to the sweepstakes, said that his horse had won, and he brought an action against

the stakeholder to recover the stakes. But it was a condition in the race that if any dispute arose the stewards should decide. He first attempted to say that the stewards had decided, but it turned out that the stewards had not decided, for they differed in opinion. Then he attempted to show that his horse had won, but the judge held that he could not go into that even if the horse could clearly be shown to have won, because the action had not accrued till the arbitrators, the stewards, had determined, and so the plaintiff was nonsuited. The case was brought before the Court of Exchequer, and they unanimously concurred in the ruling of the judge at nisi prius, and upon the very reason that it was part of the contract that the stewards should decide and not a jury, and that it could not be brought before a jury till the stewards had determined, and they would not allow the plaintiff to recover either the sweepstakes or his own contribution: and the nonsuit was confirmed. I cannot distinguish that case in principle from the present. Substitute stewards for arbitrators, and it is the same question, whether it is a contract of insurance or a contract upon a horse-race (which by Act of Parliament is legal). The Court of Exchequer held that in that case the action could not be maintained until the stewards had decided, and that, therefore, it was a good defence to the action that the stewards had not decided. Here the plea is, that the arbitrators have not decided as to the liability of the underwriters or the amount to be recovered, and, therefore, an action will not lie. That seems to me to be a strong authority in point, and calculated to remove any scruples that any of your Lordships may have in maintaining the judgment of the Court of Exchequer Chamber, which reversed the judgment of the Court of Exchequer.

For these reasons I am happy to say that I entirely concur in the view of this case taken by my noble and learned friend, the Lord Chancellor, and I think that the judgment ought to be affirmed.

LORD CRANWORTH, L.C.—I have communicated with **LORD BROUGHAM**, who is absent in consequence of illness, and he authorises me to say that he entirely concurs in the view which myself and my noble and learned friend have taken of this case.

Appeal dismissed.

A

TULK v. MOXHAY

[LORD CHANCELLOR'S COURT (Lord Cottenham, L.C.), December 21, 22, 1848]

[Reported 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83;

13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143]

B

Sale of Land—Restrictive covenant—Enforcement—Enforcement against person claiming under original purchaser.

A covenant between vendor and purchaser on the sale of land that the purchaser and his assigns shall use or abstain from using the land in a particular way will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers at law.

C

Per LORD COTTENHAM, L.C.: If an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from that of the party from whom he purchased.

Notes. Considered: *Patching v. Dubbins* (1853), Kay 1; *Child v. Douglas* (1854),

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Kay 560. Applied: *Coles v. Sims* (1854), 5 De G.M. & G. 1. Considered: *Western v. McDermott*, [1861-73] All E.R.Rep. 671. Applied: *Wilson v. Hart* (1866), 1 Ch. App. 463; *Moreland v. Cook* (1868), L.R. 6 Eq. 252. Considered: *Catt v. Tourle* (1869), 4 Ch. App. 654; *Keates v. Lyon* (1869), 4 Ch. App. 218; *Aspden v. Seddon*, *Preston v. Same* (1876), 1 Ex.D. 496; *Cooke v. Chilcott* (1876), 3 Ch.D. 694. Applied: *Birmingham Joint Stock Co. v. Lea* (1877), 36 L.T. 843; *Richards v. Revitt* (1877), 7 Ch.D. 224. Explained and Distinguished: *Haywood v. Brunswick Building Society* (1881), 8 Q.B.D. 403. Applied: *Patman v. Harland*, [1881-5] All E.R.Rep. 637. Distinguished: *London and South Western Rail. Co. v. Gomm*, [1881-5] All E.R.Rep. 1190. Applied: *London, Chatham and Dover Rail. Co. v. Bull* (1882), 47 L.T. 413; *Brown v. Inskip* (1884), Cab. & El. 231. Distinguished: *Austerberry v. Oldham Corpn.* (1885), 29 Ch.D. 750. Explained and Distinguished: *Hall v. Ewin* (1887), 37 Ch.D. 74. Distinguished: *Re Fawcett's Trustees and Holmes* (1889), 61 L.T. 105. Considered: *Mackenzie v. Childers* (1889), 43 Ch.D. 265. Applied: *Clegg v. Hands* (1890), 44 Ch.D. 503; *Mander v. Falcke*, [1891] 2 Ch. 554. Distinguished: *Holford v. Acton U.D.C.*, [1898] 2 Ch. 240. Considered: *John Bros. Abergarw Brewery Co. v. Holmes*, [1900] 1 Ch. 188; *Rogers v. Hosegood*, [1900-3] All E.R.Rep. 915. Distinguished: *Formby v. Barker*, [1900-3] All E.R.Rep. 445. Considered: *Re Nisbet and Potts' Contract*, [1904-7] All E.R.Rep. 865. Distinguished: *Powell v. Hemsley*, [1909] 2 Ch. 252. Considered: *Wilkes v. Spooner*, [1911] 2 K.B. 473. Discussed: *L.C.C. v. Allen*, [1914-15] All E.R.Rep. 1008. Distinguished: *Smith v. Colbourne*, [1914-15] All E.R.Rep. 800. Applied: *Lord Strathcona Steamship Co., Ltd. v. Dominion Coal Co., Ltd.*, [1925] All E.R.Rep. 87. Considered: *Marten v. Flight Refuelling, Ltd.*, [1961] 2 All E.R. 696. Referred to: *Marker v. Marker* (1851), 9 Hare, 1; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Brabant v. Wilson* (1865), 35 L.J.Q.B. 49; *Tulk v. Metropolitan Board of Works* (1867), 8 B. & S. 777; *McLean v. McKay* (1873), L.R. 5 P.C. 327; *Leech v. Schweder* (1874), 9 Ch. App. 465, n.; *Fairclough v. Marshall*, [1874-80] All E.R.Rep. 1261; *Bewley v. Atkinson* (1879), 13 Ch.D. 283; *Birmingham Canal Co. v. Cartwright* (1879), 27 W.R. 597; *Greaves v. Tofield* (1880), 14 Ch.D. 563;

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Andrew v. Aitken (1882), 22 Ch.D. 218; *Sheppard v. Gilmore*, [1886-90] All E.R.Rep. 1049; *Stuart v. Diplock* (1889), 43 Ch.D. 343; *Simpson v. Godmanchester Corpn.*, [1895-9] All E.R.Rep. 630; *White v. Southend Hotel Co.* (1897), 76 L.T. 273; *Ashby v. Wilson*, [1900] 1 Ch. 66; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37; *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799; *Holloway v. Hill*, [1902] 2 Ch. 612; *Jaeger v. Mansions Consolidated, Ltd.*, [1900-3] All E.R.Rep. 533; *Long Eaton Recreation Grounds Co. v. Midland Rail. Co.* (1902), 71 L.J.K.B. 837; *Noakes & Co., Ltd. v. Rice*, [1900-3] All E.R.Rep. 34; *Wilson v. Twamley* (1903), 88 L.T. 803; *Teape v. Douse* (1905),

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Andrew v. Aitken (1882), 22 Ch.D. 218; *Sheppard v. Gilmore*, [1886-90] All E.R.Rep. 1049; *Stuart v. Diplock* (1889), 43 Ch.D. 343; *Simpson v. Godmanchester Corpn.*, [1895-9] All E.R.Rep. 630; *White v. Southend Hotel Co.* (1897), 76 L.T. 273; *Ashby v. Wilson*, [1900] 1 Ch. 66; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37; *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799; *Holloway v. Hill*, [1902] 2 Ch. 612; *Jaeger v. Mansions Consolidated, Ltd.*, [1900-3] All E.R.Rep. 533; *Long Eaton Recreation Grounds Co. v. Midland Rail. Co.* (1902), 71 L.J.K.B. 837; *Noakes & Co., Ltd. v. Rice*, [1900-3] All E.R.Rep. 34; *Wilson v. Twamley* (1903), 88 L.T. 803; *Teape v. Douse* (1905),

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Andrew v. Aitken (1882), 22 Ch.D. 218; *Sheppard v. Gilmore*, [1886-90] All E.R.Rep. 1049; *Stuart v. Diplock* (1889), 43 Ch.D. 343; *Simpson v. Godmanchester Corpn.*, [1895-9] All E.R.Rep. 630; *White v. Southend Hotel Co.* (1897), 76 L.T. 273; *Ashby v. Wilson*, [1900] 1 Ch. 66; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37; *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799; *Holloway v. Hill*, [1902] 2 Ch. 612; *Jaeger v. Mansions Consolidated, Ltd.*, [1900-3] All E.R.Rep. 533; *Long Eaton Recreation Grounds Co. v. Midland Rail. Co.* (1902), 71 L.J.K.B. 837; *Noakes & Co., Ltd. v. Rice*, [1900-3] All E.R.Rep. 34; *Wilson v. Twamley* (1903), 88 L.T. 803; *Teape v. Douse* (1905),

92 L.T. 319; *Woodall v. Clifton*, [1905] 2 Ch. 257; *Schwann v. Cotton*, [1916-17] All E.R.Rep. 368; *Berton v. Alliance Economic Investment Co.*, [1922] 1 K.B. 742; *Atkin v. Rose*, [1923] 1 Ch. 522; *Grant v. Edmondson*, [1930] All E.R.Rep. 48; *Alfred Leney & Co. v. Whelan* (1936), 20 Tax Cas. 321; *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179. A

As to restrictive covenants, see 14 HALSBURY'S LAWS (3rd Edn.) 559 et seq.; and for cases see 40 DIGEST (Repl.) 337 et seq. B

Cases referred to :

- (1) *Duke of Bedford v. British Museum Trustees* (1822), 2 My. & K. 552; 1 Coop. temp. Cott. 90, n.; 2 L.J.Ch. 129; 39 E.R. 1055, L.C.; 40 Digest (Repl.) 360, 2887.
- (2) *Mann v. Stephens* (1846), 15 Sim. 377; 10 Jur. 650; 60 E.R. 665, L.C.; 40 Digest (Repl.) 344, 2784. C
- (3) *Keppell v. Bailey* (1834), 2 My. & K. 517; Coop. temp. Brough. 298; 39 E.R. 1042, L.C.; 31 Digest (Repl.) 240, 3746.

Also referred to in argument :

Whatman v. Gibson (1838), 9 Sim. 196; 7 L.J.Ch. 160; 2 Jur. 273; 59 E.R. 333; 40 Digest (Repl.) 355, 2846. D

Schreiber v. Creed (1839), 10 Sim. 9.

Appeal by the defendant from an order of LORD LANGDALE, M.R., in an action for an injunction.

In 1808 the plaintiff, being then the owner in fee of a vacant piece of ground in Leicester Square, London, as well as of several of the houses forming the square, sold the piece of ground by the description of E

"Leicester Square Garden or Pleasure Ground, with the equestrian statue then standing in the centre thereof and the iron railing and stone work round the same,"

to one Elms in fee. The deed of conveyance contained a covenant by Elms, for himself, his heirs, and assigns, with the plaintiff, his heirs, executors, and administrators F

"that Elms, his heirs, and assigns should, and would from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and square garden and the iron railing round the same in its then form, and in sufficient and proper repair as a square garden and pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, tenants of the plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time or times into the said square garden and pleasure ground." G

The piece of land so conveyed passed by divers mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with his vendor, but he admitted that he had purchased with notice of the covenant in the deed of 1808. The defendant having manifested an intention to alter the character of the square garden, and asserted a right, if he thought fit, to build upon it, the plaintiff, who remained owner of several houses in the square, filed this bill for an injunction. An injunction was granted by the Master of the Rolls, to restrain the defendant from converting or using the piece of ground and square garden and the iron railing round the same to or for any other purpose than as a square garden and pleasure ground in an open state, and uncovered with buildings. The defendant moved to discharge that order. H

Roundell Palmer for the defendant. I

Rolt for the plaintiff was not called on to argue.

- A LORD COTTENHAM, L.C.**—That this court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it that the purchaser shall either use or abstain from using the land purchased in a particular way is what I never knew disputed. Here there is no question about the contract. The owner of certain houses in the square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a square garden.
- B** It is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with the land, this court cannot enforce it, but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.
- D** That the question does not depend upon whether the covenant runs with the land is evident from this, that, if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it, for if an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from that of the party from whom he purchased. There are not only cases before the Vice-Chancellor of England, in which he considered that doctrine as not in dispute, but looking at the ground on which LORD ELDON disposed of *Duke of Bedford v. British Museum Trustees* (1), it is impossible to suppose that he entertained any doubt of it. In *Mann v. Stephens* (2) before me, I never intended to make the injunction depend upon the result of the action, nor does the order imply it. The motion was, to discharge an order for the commitment of the defendant for an alleged breach of the injunction, and also
- F** to dissolve the injunction. I upheld the injunction, but discharged the order of commitment on the ground that it was not clearly proved that any breach had been committed, but, there being a doubt whether part of the premises on which the defendant was proceeding to build, was locally situated within what was called the Dell, on which alone he had under the covenant a right to build, and the plaintiff insisting that it was not, I thought the pendency of the suit ought not to
- G** prejudice the plaintiff in his right to bring an action if he thought he had such right, and, therefore, I gave him liberty to do so.
- With respect to the observations of LORD BROUGHAM in *Keppell v. Bailey* (3), he never could have meant to lay down, that this court would not enforce an equity attached to land by the owner unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I
- H** cannot coincide with it. I think this decision of the Master of the Rolls perfectly right, and, therefore, that this motion must be refused with costs.

Appeal dismissed.

HOCHSTER v. DE LA TOUR

[COURT OF QUEEN'S BENCH (Lord Campbell, C.J., Coleridge, Erle and Crompton, JJ.), June 10, 25, 1853]

[Reported 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171;
17 Jur. 972; 1 W.R. 469; 1 C.L.R. 846; 118 E.R. 922]

Contract—Future contract—Repudiation—Repudiation before date of commencement of performance—Right of other party to sue immediately.

Where a party to an executory agreement, before the time fixed for performance, breaks the agreement either by disabling himself from fulfilling it, or by renouncing it, an action will lie at the suit of the other party for the breach before the time specified for the fulfilment of the agreement.

Accordingly, where the defendant engaged the plaintiff to render him certain services beginning on June 1, 1852, and on May 11 informed him that he would not employ him as agreed and refused him compensation,

Held: the plaintiff was entitled to bring an action for the breach of the contract by writ dated May 22.

Notes. Considered: *Roberts v. Brett* (1859), 6 C.B.N.S. 611; *Churchward v. R.* (1865), L.R. 1 Q.B. 173; *Re Agra Bank, Ex parte Tondeur* (1867), L.R. 5 Eq. 160; *Frost v. Knight*, [1861-73] All E.R.Rep. 221; *Roper v. Johnson* (1873), L.R. 8 C.P. 167; *Société Générale de Paris v. Milders* (1883), 49 L.T. 55; *Johnstone v. Milling* (1886), 16 Q.B.D. 460; *Gueret v. Audony* (1893), 62 L.J.Q.B. 633. Applied: *Rhymney Rail. Co. v. Brecon and Merthyr Tydfil Rail. Co.*, [1900-3] All E.R.Rep. 582; *Curtis v. B.U.R.T. Co.* (1912), 28 T.L.R. 353. Considered: *Bradley v. Newsum, Sons & Co., Ltd.*, [1918-19] All E.R.Rep. 625. Approved: *Martin v. Stout*, [1925] A.C. 359. Considered: *Guy-Pell v. Foster*, [1930] All E.R.Rep. 790; *Universal Cargo Carriers Corp., v. Citati*, [1957] 2 All E.R. 70; *White and Carter, Ltd. v. McGregor*, [1961] 3 All E.R. 1178. Referred to: *Burton v. Great Northern Rail. Co.* (1854), 9 Exch. 507; *Lewis v. Clifton* (1854), 14 C.B. 245; *Avery v. Bowden* (1855) 2 E. & B. 714; *Reid v. Hoskins* (1856), 26 L.J.Q.B. 5; *Crooke-wit v. Fletcher* (1857), 1 H. & N. 893; *Hall v. Wright* (1859), E.B. & E. 765; *Bartholomew v. Markwick* (1864), 15 C.B.N.S. 711; *Unwin v. Clarke* (1866), L.R. 1 Q.B. 417; *Wilkinson v. Verity* (1871) L.R. 6 C.P. 206; *Mersey Steel and Iron Co., Ltd. v. Naylor Benzon & Co.*, [1881-5] All E.R.Rep. 365; *Roth v. Taysen, Townsend & Co.* (1896), 1 Com. Cas. 240, 306; *Donkin v. Hastie* (1897), 61 J.P. 568; *James v. Evans* (1897), 77 L.T. 78; *Ellis v. Pond*, [1898] 1 Q.B. 426; *Fratelli Sorrentino v. Buerger*, [1915] 3 K.B. 367; *Veithardt and Hall v. Rylands* (1917), 86 L.J.Ch. 604; *Consorzio Veneziano di Armamento e Navigazione v. Northumberland Shipbuilding Co.* (1919), 88 L.J.K.B. 1194; *Huntoon Co. v. Kolynos (Incorporated)*, [1930] 1 Ch. 528.

As to anticipatory breach of contract, see 8 HALSBURY'S LAWS (3rd Edn.) 202-205, and cases there cited and at 12 DIGEST (Repl.) 377-382.

Cases referred to:

- (1) *Short v. Stone* (1846), 8 Q.B. 358; 3 Dow. & L. 580; 15 L.J.Q.B. 143; 6 L.T.O.S. 316; 10 Jur. 245; 115 E.R. 911; 12 Digest (Repl.) 388, 3015.
- (2) *Ford v. Tiley* (1827), 6 B. & C. 325; 9 Dow. & Ry.K.B. 448; 5 L.J.O.S.K.B. 169; 108 E.R. 472; 12 Digest (Repl.) 386, 3008.
- (3) *Bowdell v. Parsons* (1808), 10 East, 359; 103 E.R. 811; 39 Digest (Repl.) 663, 1633.
- (4) *Elderton v. Emmens* (1848), 6 C.B. 160; 17 L.J.C.R. 307, Ex. Ch.; affirmed sub nom. *Emmens v. Elderton* (1853), 4 H.L.Cas. 624; 13 C.B. 495; 22 L.T.O.S. 1; 18 Jur. 21; 10 E.R. 606, H.L.; 12 Digest (Repl.) 699, 5348.
- (5) *Leigh v. Paterson* (1818), 8 Taunt. 540; 2 Moore, C.P. 588; 129 E.R. 493; 39 Digest (Repl.) 818, 2804.

- A (6) *Phillpotts v. Evans* (1839), 5 M. & W. 475; 9 L.J.Ex. 33; 151 E.R. 200; 12 Digest (Repl.) 371, 2930.
 (7) *Startup v. Cortazzi* (1835), 2 Cr.M. & R. 165; 5 Tyr. 697; 4 L.J.Ex. 218; 39 Digest (Repl.) 813, 2769.
 (8) *Ripley v. M'Clure* (1849), 4 Exch. 345; 18 L.J.Ex. 419; 14 L.T.O.S. 180; affirmed sub nom. *M'Clure v. Ripley* (1850), 5 Exch. 140, Ex. Ch.; 12 Digest (Repl.) 380, 2974.
 B (9) *Planchè v. Colburn* (1831), 8 Bing. 14; 1 Moo. & S. 51; 1 L.J.C.P. 7; 131 E.R. 305; 12 Digest (Repl.) 393, 3043.

Also referred to in argument:

- Cort v. Ambergate, etc., Rail. Co.* (1851), 17 Q.B. 127; 20 L.J.Q.B. 460; 17 L.T.O.S. 179; 15 Jur. 877; 117 E.R. 1229; 12 Digest (Repl.) 490, 3682.
 C *Lovelock v. Franklyn* (1846), 8 Q.B. 371; 15 L.J.Q.B. 146; 10 Jur. 246; 115 E.R. 916; sub nom. *Frankland v. Lovelocke*, 6 L.T.O.S. 345; 12 Digest (Repl.) 387, 3009.
Cutter v. Powell (1795), 6 Term Rep. 320; 101 E.R. 573; 12 Digest (Repl.) 463, 3454.

- D **Rule Nisi** to enter a nonsuit or arrest judgment in an action for damages for breach of contract.

The plaintiff pleaded that by a contract dated April 12, 1852, he agreed that on June 1, 1852, he would enter into the service of the defendant in the capacity of a courier and travel with him on the continent of Europe for three months from June 1, 1852, on which day he undertook to be ready to start with the defendant on such travels, his remuneration being £10 a month. He alleged that on May 11 the defendant wrote to him stating that he had changed his mind and refusing to employ him as agreed or to give him any compensation. The plaintiff began the present action on May 22.

On the trial, before ERLE, J., these facts were proved, and also that, between the commencement of the action and June 1, the plaintiff obtained an engagement with Lord Ashburton, on equally good terms, but not commencing till July 4. The defendant's counsel contended that there could be no breach of the contract before June 1. The learned judge was of a contrary opinion, but he reserved leave to enter a nonsuit on this argument. The other questions were left to the jury, who found for the plaintiff. A rule nisi to enter a nonsuit, or arrest the judgment, was obtained on behalf of the defendant.

- G *Hannen* showed cause against the rule.
Hugh Hill and *Deighton* supported the rule.

Cur. adv. vult.

June 25, 1853. **LORD CAMPBELL, C.J.**, read the following judgment of the court.—On this motion in arrest of judgment, the question arises, whether, if there be an agreement between A. and B., whereby B. engages to employ A. on and from a future day for a given period of time, to travel with him into a foreign country as a courier and to start with him in that capacity on that day, A. being to receive a monthly salary during the continuance of such service, B. may, before the day, refuse to perform the agreement and break and renounce it so as to entitle A., before the day, to commence an action against B. to recover damages for breach of the agreement, A. having been ready and willing to perform it till it was broken and renounced by B.

The defendant's counsel very powerfully contended that, if the plaintiff was not contented to dissolve the contract and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin, and that there could be no breach of the agreement, before that day, to give a right of action. But it cannot be laid down as a universal rule that, where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the

day for doing the act has arrived. If a man promises to marry a woman on a future day and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage: *Short v. Stone* (1). If a man contracts to execute a lease on and from a future day for a certain term, and, before that day, executes a lease to another for the same term, he may be immediately sued for breaking the contract: *Ford v. Tiley* (2). So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them: *Bowdell v. Parsons* (3). One reason alleged in support of such an action is that the defendant has, before the day, rendered it impossible for the plaintiff to perform the contract at the day, but this does not necessarily follow, for, prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have re-purchased the goods so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be that where there is a contract to do an act on a future day there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do any thing to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage.

In the present case, of traveller and courier, from the day of the hiring till the day when the employment was to begin, the parties were engaged to each other, and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber in *Elderton v. Emmens* (4), which we have followed in subsequent cases in this court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract or done some act which rendered it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to June 1, 1852, it follows that, till then, he must enter into no employment which will interfere with his promise "to start with the defendant on such travels on the day and year," and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe.

But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on June 1, he is prejudiced by putting faith in the defendant's assertion, and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it.

Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July and August, 1852. According to decided cases the action might have been brought before June 1, but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance

A of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured: and it seems reasonable to allow an option to the injured party, either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.

B An argument against the action before June 1 is urged from the difficulty of calculating the damages, but this argument is equally strong against an action before Sept. 1, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial.

C We do not find any decision contrary to the view we are taking of this case. *Leigh v. Paterson* (5) only shows that, upon a sale of goods to be delivered at a certain time, if the vendor before the time gives information to the vendee that he cannot deliver them, having sold them, the vendee may calculate the damages according to the state of the market when they ought to have been delivered. If D this was a sale of specific goods, the action, according to *Bowdell v. Parsons* (3), might have been brought before that time, as soon as the vendor had sold and delivered them to another. *Phillpotts v. Evans* (6) was a similar case, and the only question there was as to the mode of calculating the damages on a breach of contract for the sale and delivery of wheat. The court very properly held that the plaintiff was entitled to damages according to the state of the market when the E wheat was to be delivered, the court professing to proceed upon the rule laid down in *Startup v. Cortazzi* (7), where no question arose as to the right to bring an action before the stipulated day of delivery on a renunciation of the contract. PARKE, B., whose dicta are entitled to very great weight, certainly does say in *Phillpotts v. Evans* (6), with reference to the notice by the defendants that they would not accept the corn:

F "I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it."

G But the learned judge might suppose that the notice did not amount to a renunciation of the contract, and, if he thought that after such a renunciation the plaintiffs were bound to proceed with the performance of the contract on their part, and to incur expense and loss in tendering the wheat before they could have any remedy on the contract, we cannot agree with him. In *Ripley v. McClure* (8) it is said that, under a contract for the sale and delivery of goods, a refusal to receive them at any time before they ought to be delivered was not necessarily a breach of the contract, but the court intimated no opinion upon the question whether, there H being a contract to do an act at a future day, if one party before the day renounces the contract, the other thereupon has a remedy for a breach of the contract. They held that a refusal by one party before the day when the act is to be done, if unretracted, would be evidence of a continual refusal down to, and inclusive of, the time when the act was to be done.

I The only other case cited in the argument which we think it necessary to notice is *Planché v. Colburn* (9), which appears to be an authority for the plaintiff. There the defendants had engaged the plaintiff to write a treatise for a periodical publication. The plaintiff commenced the composition of the treatise, but, before he had completed it, and before the time when in the course of conducting the publication it would have appeared in print, the publication was abandoned. The plaintiff, thereupon, without completing the treatise, brought an action for breach of contract. Objection was made that the plaintiff could not recover on the special contract for want of having completed, tendered and delivered the treatise, according to the contract. TINDAL, C.J., said (8 Bing. at p. 15):

"The fact was, that the defendants not only suspended, but actually put an end to, 'THE JUVENILE LIBRARY'; they had broken their contract with the plaintiff." A

The declaration contained counts for work and labour, but the plaintiff appears to have retained his verdict on the count framed on the special contract, thus showing that, in the opinion of the court, the plaintiff might treat the renunciation of the contract by the defendants as a breach and maintain an action for that breach without considering that it remained in force so as to bind him to perform his part of it before bringing an action for the breach of it. B

If it should be held that, upon a contract to do an act on a future day, a renunciation of the contract by one party dispenses with a condition to be performed in the meantime by the other, there seems no reason for requiring that other to wait till the day arrives before seeking his remedy by action, and the only ground on which the condition can be dispensed with seems to be that the renunciation may be treated as a breach of the contract. Upon the whole, we think that the declaration in this case is sufficient. It gives us great satisfaction to reflect that, the question being on the record, our opinion may be reviewed in a court of error. In the meantime we must give judgment for the plaintiff. C

Judgment for plaintiff. D

FOLEY v. HILL AND OTHERS

[HOUSE OF LORDS (Lord Cottenham, L.C., Lord Lyndhurst, Lord Brougham and Lord Campbell), July 31, August 1, 1848]

[Reported 2 H.L.Cas. 28; 9 E.R. 1002]

Bank—Banker and customer—Relationship—Debtor and creditor—No fiduciary relation.

The relation between a banker and his customer who pays money into the bank is that of debtor and creditor, the banker being liable to repay to the customer the money which he holds for him when required to do so by the customer. When a customer pays money into his account at a bank it ceases to be his money; it becomes the banker's money and he can deal with it as his own. He is not vis-à-vis the customer in the fiduciary position of a trustee or quasi-trustee holding the money for the customer as for a cestui que trust. G

Notes. It will be seen that a question was raised in this case whether in the circumstances the appellant's claim for an account was a fit subject for a suit in a court of equity. This would depend on whether at law there was no satisfactory remedy or whether from the complexity of the account it was not a fit case to be referred to a jury. But by s. 36 of the Supreme Court of Judicature Act, 1925, re-enacting s. 24 of the Judicature Act, 1873, law and equity are now to be administered concurrently, so that the discussion of the above question is no longer of value, and counsel's argument and their Lordships' observations on that matter have been omitted from this report. H

Considered: *Re Gibson and Sturt*, *Re St. Alban's Bank* (1850), 15 L.T.O.S. 95. Distinguished: *Pennell v. Duffell* (1853), 4 De G.M. & G. 372. Considered: *Padwick v. Hurst* (1854), 18 Beav. 575; *Jackson v. Ogg* (1859), 5 Jur.N.S. 976. Distinguished: *St. Aubyn v. Smart* (1867), L.R. 5 Eq. 183. Considered: *A.-G. v. Edmunds* (1868), L.R. 6 Eq. 381; *South Australian Insurance Co. v. Randell* (1869), L.R. 3 P.C. 101; *Burdick v. Garriek* (1870), 5 Ch. App. 233. Considered and I

- A Applied: *Banner v. Berridge* (1881), 18 Ch.D. 254. Distinguished: *Atkinson v. Bradford Third Equitable Benefit Building Society* (1890), 25 Q.B.D. 377; *Re Tidd, Tidd v. Overall* (1893), 62 L.J.Ch. 915. Considered: *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q.B. 715; *Re Derbyshire, Webb v. Derbyshire*, [1906] 1 Ch. 135; *Kerrison v. Glyn, Mills, Currie & Co.*, [1911-13] All E.R.Rep. 417; *N. Joachimson (a firm name) v. Swiss Bank Corp.*, [1921] All E.R.Rep. 92; *R. v. Davenport*, [1954] 1 All E.R. 602. Referred to: *Teed v. Beere* (1859), 33 L.T.O.S. 26; *Smith v. Leveaux* (1863), 2 De G.J. & Sm. 1; *Hill v. South Staffordshire Rail. Co.* (1865), 11 Jur.N.S. 192; *Moxon v. Bright* (1869), 4 Ch. App. 292; *Blyth v. Whiffin* (1872), 27 L.T. 330; *Summers v. City Bank* (1874), L.R. 9 C.P. 580; *Greenwell v. National Provincial Bank* (1883), Cab. & El. 56; *Marten v. Rocke, Eyton & Co.* (1885), 53 L.T. 946; *London Joint Stock Bank, Ltd. v. Macmillan*, [1918-19] All E.R.Rep. 30; *A.-G. of Canada v. A.-G. of Quebec*, [1947] A.C. 33.
- C [1918-19] All E.R.Rep. 30; *A.-G. of Canada v. A.-G. of Quebec*, [1947] A.C. 33.

As to the relation of banker and customer, see 2 HALSBURY'S LAWS (3rd Edn.) 166 et seq.; and for cases see 3 DIGEST (Repl.) 177-184.

Cases referred to in argument:

- (1) *Carr v. Carr* (1811), 1 Mer. 541, n.; 35 E.R. 799; 44 Digest 728, 5813.
- D (2) *Devaynes v. Noble, Sleech's Case* (1816), 1 Mer. 529, 539; 35 E.R. 767, 771; 3 Digest (Repl.) 340, 1101.
- (3) *Sims v. Bond* (1833), 5 B. & Ad. 389; 2 Nev. & M.K.B. 608; 110 E.R. 834; 3 Digest (Repl.) 178, 299.
- (4) *Pott v. Clegg* (1847), 16 M. & W. 321; 16 L.J.Ex. 210; 8 L.T.O.S. 493; 11 Jur. 289; 153 E.R. 1212; 3 Digest (Repl.) 178, 294.
- E (5) *Marzetti v. Williams* (1830), 1 B. & Ad. 415; 1 Tyr. 77, n.; 9 L.J.O.S.K.B. 42; 109 E.R. 842; 3 Digest (Repl.) 237, 613.

Appeal against an order of LORD LYNDBURST, L.C., reported 1 Ph. 399, reversing a decree of the Vice-Chancellor of England (KNIGHT-BRUCE, V.-C.) and dismissing the appellant's bill.

- In and previously to the year 1829, the appellant and Sir Edward Scott, owners of collieries in Staffordshire, kept a joint account at the respondents' bank at Stourbridge, in Worcestershire. In April, 1829, a sum of £6,117 10s. was transferred from that account to a separate account then opened for the appellant, and the respondents, in a letter enclosing a receipt for the sum so transferred, agreed to allow £3 per cent. interest on it. From 1829 to the end of 1834, when the joint account was closed, the appellant's share of the profits of the collieries was from time to time paid by cheques drawn by the colliery agents against the joint account. These cheques were, as the respondents alleged, paid in cash or by bills drawn by them on their London bankers in favour of the appellant, and none of them was entered in his separate account. The only items found in that account were the £6,117 10s. on the credit side, and two sums of £1,700 and £2,000 on the debit side, both being payments made to or on behalf of the appellant in 1830. There were also entries, in a separate column, of interest calculated on the sum or balance in the bank, up to Dec. 25, 1831, and not afterwards.
- H In January, 1838, the appellant filed his bill against the respondents, praying that an account might be taken of the sum of £6,117 10s. and all other sums received by the respondents for the appellant on his private account since April, 1829, with interest on the same at the rate of £3 per cent. per annum; and also an account of all sums properly paid by them for or to the use of the appellant on his account since that day, and that they might be decreed to pay the appellant what, upon taking such accounts, should be found due to him. A schedule annexed to the defendants' answer set forth the separate account of the appellant from the bank book, containing the items and entries before mentioned. The vice-chancellor, on the hearing of the cause, decreed for an account as prayed, being of opinion that the respondents were bound in duty to keep the account clear; that they were to be charged according to their duty, the neglect of which could be no excuse, and that the agreement to allow the interest was in effect the same, in answer to the
- I

Statute of Limitations, as if the interest had been regularly entered or paid. LORD A
LYNDHURST, taking a different view of the case, upon appeal, held, first, that the
Statute of Limitations was a sufficient defence; and, secondly, that the account,
consisting of only a few simple items, was not a proper subject for a bill in equity,
but a case for an action at law for money had and received, and his Lordship
reversed the decree, and dismissed the bill.

Stuart and G. L. Russell for the appellant.—The judgment appealed from pro- B
ceeded partly on the ground that the Statute of Limitations is a bar to the appel-
lant's demand, and partly on the ground that the account prayed for is a simple
account of debtor and creditor, and, therefore, not a fit subject for a suit in equity.
The question is: What is the nature of the relation between a banker and those
who deposit money with him, and who are called his customers? If it could be C
shown that a banker is in the position of a trustee for those who employ him, that
he is clothed with a fiduciary character in relation to them, and that there is a
personal trust and confidence in him, then the Statute of Limitations would be
inapplicable, and the second defence also must be held to fail. The respondents
were not in the relation of mere debtors to the appellant for the money deposited,
which, in ordinary cases, is considered to be a loan, and, therefore, a debt: *Carr v.*
Carr (1); *Devaynes v. Noble, Sleech's Case* (2) (1 Mer. at p. 568); *Sims v. Bond* (3); D
Pott v. Clegg (4). POLLOCK, C.B., in *Pott v. Clegg* (4), doubted whether in all
cases there was not an implied contract between a banker and his customer as to
the money deposited which distinguishes it from an ordinary case of loan, but he
yielded to the opinion of the other judges that it was a simple loan and debt.
It may be admitted that bankers are debtors, but they are debtors with superadded
obligations, as, for instance, to repay the money deposited by honouring the E
depositor's cheques: *Marzetti v. Williams* (5). In the present case there was an
additional obligation by the special contract to pay interest on the deposit. It was
the duty of the respondents to keep the accounts with the appellant clear and
intelligible, to calculate the interest on the balances in their hands from time to
time, to make proper entries of it in the account, and to preserve all vouchers and
other evidence of their transactions with him. These duties and transactions consti- F
tute a relation more complex than that of mere debtor and creditor, and an account
of them is a fit subject for a bill in equity, because the account here sought is of
moneys received by the respondents, the receipt of which is within their own
knowledge, and the entries and record of which they were bound to keep.

Bethell, Kenyon Parker and Craig for the respondents, were not called on to G
argue.

LORD COTTENHAM, L.C.—The bill in this case—as is usual in cases of this
description where bills state matters of account, and where there is concurrent
jurisdiction at law and equity—alleges that the account is complicated and consists
of a great variety of items, so that it could not be properly taken at law. If that
allegation had been made out, it would have prevented the necessity of considering H
any other part of the case. But that allegation has entirely failed of proof, for it
appears that the account consisted of only one payment of £6,117 10s. to a private
account of the customer, and that against that sum two cheques were drawn and
paid. That is the whole account in dispute as raised by these pleadings. There-
fore, there is certainly no such account as would induce a court of equity to
maintain jurisdiction as if the question had turned entirely upon an account so I
complicated, and so long, as to make it inconvenient to have it taken at law.
It has been attempted to support this bill upon other grounds, and one ground
is that the relative situation of the appellant and the respondents would give a
court of equity jurisdiction, independently of the length or the complexity of the
accounts. Although it is not disputed that the transactions between the parties
gave the legal right, it is said a court of equity, nevertheless, has concurrent juris-
diction, and that is attempted to be supported upon the supposed fiduciary character
existing between the banker and his customer.

A No case has been produced in which that character has been given to the relation of banker and customer, but it has been attempted to be supported by reference to other cases supposed to be analogous. These are cases where bills have been filed as between principal and agent, or between principal and factor. As between principal and factor, there is no question whatever that that description of case which alone has been referred to in the argument in support of the jurisdiction

B has always been held to be within the jurisdiction of a court of equity, because the party partakes of the character of a trustee. Partaking of the character of a trustee, the factor—as the trustee for the particular matter in which he is employed as factor—sells the principal's goods, and accounts to him for the money. The goods, however, remain the goods of the owner or principal until the sale takes place, and the moment the money is received the money becomes the property

C of the principal. So it is with regard to an agent dealing with any property. He obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is quasi a trustee for that particular transaction for which he is engaged. Therefore, in these cases the courts of equity have assumed jurisdiction.

D But the analogy entirely fails, as it appears to me, when you come to consider the relative situation of a banker and his customer, and for that purpose it is quite sufficient to refer to the authorities, which have been quoted, and to the nature of the connection between the parties. Money, when paid into a bank, ceases altogether to be the money of the customer; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that

E deposited with him when he is asked for it. The money paid into the banker's is money known by the customer to be placed there for the purpose of being under the control of the banker. It is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of

F bankers in other places. The money placed in the custody of a banker is to all intents and purposes the money of the banker, to do with it as he pleases. He is guilty of no breach of trust in employing it; he is not answerable to the customer if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of the customer, but he is, of course, answerable for the amount, because he has contracted, having received that money,

G to repay to the customer, when demanded, a sum equivalent to that paid into his hands. That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor. Then the analogy between that case and those that have been referred to entirely fails, and the ground upon which those cases

H have, by analogy to the doctrine of trusteeship, been held to be the subject of the jurisdiction of a court of equity, has no application here, as it appears to me.

[His LORDSHIP dealt with the question whether under the law existing in 1848 the case came within the jurisdiction of a court of equity, and he added :]

I There is nothing in the relative situations of banker and customer which gives, per se, the right to sue in equity. That is proved, I apprehend, by the consideration of the question whether, if there had been no money drawn out at all and simply a sum of money had been deposited with the banker—I will not say deposited, but paid to the banker—on account of the customer, the customer could file a bill to get that money back again. The learned counsel judiciously avoided giving an answer to that question. But that tries the principle, because, if it is merely a sum of money paid to a factor or an agent, the party has a right to recall it. He has a right to deal with the factor or agent in his fiduciary character. But the banker does not hold that fiduciary character, and, therefore, there is no such original jurisdiction; and if there be no original jurisdiction growing out of the

relative situations of the parties to see if the account is of such a nature that it cannot be taken at law. . . . The principle upon which my opinion is formed is that there is nothing to bring the demand within the precincts of a court of equity. Upon that ground I think the decree was right in dismissing the bill. A

LORD BROUGHAM.—My noble and learned friend, LORD LYNTHURST, who, from his right of precedence here, would naturally have addressed your Lordships before me—I, nevertheless, take leave, before he addresses your Lordships, to state my entire agreement in the reasons stated by my noble and learned friend, the Lord Chancellor, and in the opinion at which he has arrived through those reasons in favour of the decree of the court below. B

There is clearly no such account—whatever may be set forth by the bill—upon the facts of the present case which calls upon a court of equity, upon that head of jurisdiction, to give relief. . . . The account being excluded by the facts of this case, which show that there is no reason for this statement of account, there being but one sum paid in, and two sums of money drawn out, there is no reason for giving relief in equity. The question then comes to be, whether the appellant has succeeded on one or other of the two grounds, the first of which is, holding the banker to be in a quasi fiduciary position towards his customer and proceeding against him as if he were a trustee; and the other is whether the stipulation for interest by the banker makes any difference in the case? The latter question may be disposed of in a few words. It does not follow that because a banker contracts to pay any strictly legal demand, therefore that puts the case on a different footing. I should be very sorry if that should be so, because I am sure the Court of Chancery might have then a bill from every tradesman for payment of his account, for goods sold and delivered, and wherever there was a stipulation to pay after a certain time, as in many cases there is, in such a case a bill might be filed. But we know pretty well it is the ABC of the practice of a court of equity that no such bill can be filed. C D E

I come, then, to the only other ground, which was the main contention. As to the banker, is his position with respect to his customers that of a trustee with respect to his cestui que trust? Is it that of a principal with respect to an agent, or that of a principal with respect to a factor? I see no ground for contending that there is any identity in those two points. I am now speaking of the common position of a banker—the common case of his receiving money from his customer on condition of paying it back when asked for or when drawn upon, or of receiving money from other parties to the credit of the customer upon like conditions to be drawn out by the customer, or, in common parlance, the money being repaid when asked for, because the banker who receives the money has the use of it as his own, and in the using of it his trade consists, but for which no banker could exist, especially a banker who pays interest. Even a banker who does not pay interest could not possibly carry on his trade if he were to hold the money and to pay it back as a mere depository of the principal. But he receives it, to the knowledge of his customer for the express purpose of using it as his own, which, if he were a trustee, he could not do without a breach of trust. It is a totally different thing if we take into consideration certain acts which are often performed by a banker and put him in a totally different capacity. He may, in addition to his position of banker, make himself an agent or a trustee towards a cestui que trust. For example, suppose I deposit exchequer bills with a banker and he undertakes to receive the interest upon them, or to negotiate or sell them, and to credit my account with the proceeds of the sale, I do not stay to ask whether, in that case, he might not be in the position of a trustee, and might not partly sustain a fiduciary character, but he does that incidentally to his trade of a banker. His trade of a banker is totally independent of that, to it the other is an accidental addition. The trade of a banker is to receive money and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, for which money he is accountable as a debtor. F G H I

A That being the trade of a banker, and that being the nature of the relation in which he stands to his customer, I cannot, without breaking down the bounds between equity and law, confound the situation of a banker with that of a trustee, and conclude that the banker is a debtor with a fiduciary character. I, therefore, entirely agree with my noble and learned friend, thinking that the view taken of this case in the court below was a correct one, and, therefore, I move that this
B appeal be dismissed, and the decree appealed from be affirmed, with costs.

LORD CAMPBELL.—I cannot help thinking that when this case was before KNIGHT-BRUCE, V.-C., the decree he pronounced must have proceeded upon some incorrect statement of the facts, and that he had thought that several actions would have been necessary. When you come to examine the facts, it is quite clear that
C this is a purely legal demand, the relation between banker and customer, as far as the pecuniary dealings are concerned, being that of debtor and creditor. It has been said that the banker is liable to do something more than merely to repay the money. He is bound to honour cheques, and perhaps to accept bills of exchange, if drawn upon him, he having assets in his hands, but these are purely matters of legal contract, and, it seems to me, that there is nothing of a fiduciary character at all in the relation subsisting between them. I think the noble and learned
D Lord, LORD LYNDHURST, was perfectly right in reversing the decree of the vice-chancellor, and that we shall do right in dismissing this appeal.

LORD LYNDHURST.—I entirely concur in the view that has been taken by my noble and learned friends, with respect to jurisdiction in matters of account. I am of opinion, therefore, with my noble and learned friends, that this judgment
E must be affirmed.

Appeal dismissed.

F

GREY AND OTHERS v. PEARSON AND OTHERS

G [HOUSE OF LORDS (Lord Cranworth, L.C., Lord St. Leonards and Lord Wensleydale), March 5, 6, 9, 16, 1857]

[Reported 6 H.L.Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67;
3 Jur.N.S. 823; 5 W.R. 454; 10 E.R. 1216]

H *Will—Statute—Document—Construction—Grammatical, natural and ordinary meaning to be given to words—Modification to avoid absurdity or inconsistency with rest of instrument—Consideration of will as a whole and surrounding circumstances—Giving effect to intention of testator.*

I In construing wills, statutes and all written instruments, the grammatical, natural, and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further.

A testator devised the estates H. and S. to trustees in trust for R.W. and the heirs of his body, but in case R.W. should die under twenty-one and without issue, then H. should be in trust for A.W. and the heirs of her body, and in case she should die under twenty-one and without issue, then H. should be on the same trusts are thereafter declared as to S.; and if R.W. should die under twenty-one and without issue, then S. should be for the testator's son and daughter-in-law A. and B., for their lives, and subject to the trusts there-

inbefore declared for other persons. After the testator's death R.W. and A.W. both died without issue, but each attained twenty-one.

Held (LORD ST. LEONARDS dissenting): as the ordinary grammatical meaning of the words led to no absurdity or inconsistency, the devise over could not take effect, except on the double contingency of R.W. dying under twenty-one and without issue, which did not happen; and, therefore, there was an intestacy as to the H. estate.

Per LORD ST. LEONARDS: Nobody is more disposed than I am to abide by clear words and to give to them their natural and grammatical meaning, but I never did, and I never can, come to the conclusion that the words of a will will not admit of modification according to the real intention of the testator as you find it from other expressions or from the whole context of the will. It is difficult to lay down any abstract rule on the subject, but where I find words pointing out the intention, and that, if I give to the words their simple meaning according to grammar and according to their prima facie import, I defeat the intention, I hold that I am bound by every rule both of law and equity to see whether I cannot give to them by natural construction an import which will effectuate and not defeat the intention.

Per LORD WENSLEYDALE: In construing a will the only question is: What is the meaning of the words used in that writing? To ascertain that, every part of the will must be considered with the help of those surrounding circumstances which are admissible in evidence to explain the words and put the court as nearly as possible in the situation of the writer of the instrument. . . . In construing wills the events which might possibly have happened, as well as those which did happen, are to be considered.

Judgment—Judicial decision as authority—Decision on meaning of words in instrument—Value in construction of similar words in another instrument.

Per LORD WENSLEYDALE: We are bound by decided cases for the purpose of securing as much certainty in the administration of the law as the subject is capable of. But when the decision is not upon some rule or principle of law, but upon the meaning of words which differ so much in one instrument from those in another, and when the proper construction is so varied by the peculiar circumstances of each case, it seldom happens that the words of one will are a sure guide for the construction of words resembling them in another. Besides, the salutary rule of construction (that words in a document should be given their grammatical, natural and ordinary meaning) may have been misapplied in the particular cases, and then they are of no binding authority at all. When, by any course of decisions, words have acquired a particular signification it may be presumed that the framer of the instrument used them in the sense so acquired, and it is fitting so to construe them. But when there has been an instance or two only of the words being read in a different sense from that which they naturally bear, no such presumption can be made.

Notes. Considered: *Abbott v. Middleton*, *Ricketts v. Carpenter* (1858), 7 H.L.Cas. 68; *Baker v. Baker* (1858), 6 H.L.Cas. 616; *Slingsby v. Grainger* (1859), 7 H.L.Cas. 273; *Thellusson v. Rendlesham* (1859), 7 H.L.Cas. 429. Followed: *Secombe v. Edwards* (1860), 28 Beav. 440; *Reed v. Braithwaite* (1871), L.R. 11 Eq. 514. Considered: *Surtees v. Surtees* (1871), L.R. 12 Eq. 400; *Waring v. Currey* (1873), 22 W.R. 150; *Allgood v. Blake* (1873), L.R. 8 Exch. 160. Followed: *Lowther v. Bentinck* (1874), L.R. 19 Eq. 166. Applied: *Caledonian Rail. Co. v. North British Rail. Co.* (1881), 6 App. Cas. 114. Considered: *Re Levy, Ex parte Walton*, [1881-5] All E.R.Rep. 548; *Harding v. Preece* (1882), 9 Q.B.D. 281; *Rhodes v. Rhodes* (1882), 7 App. Cas. 192; *Faber v. Lathom* (1897), 77 L.T. 168; *The Suevic*, [1908] P. 292; *Cave v. Horsell*, [1912] 3 K.B. 533; *Vacher & Sons, Ltd. v. London Society of Compositors*, [1911-13] All E.R.Rep. 241; *Bodega v. Martin*, [1915] 2 Ch. 385; *Scott v. Northumberland and Durham Miners' Permanent Relief Fund Friendly and Approved Society*, [1920] 1 K.B. 174; *Victoria City*

- A** *Corpn. v. Bishop of Vancouver Island*, [1921] 2 A.C. 384; *The Ruapehu*, [1927] P. 47. Applied: *Re Jenkins*, *Jenkins v. Davies*, [1931] All E.R.Rep. 382. Considered: *Barras v. Aberdeen Trawling and Fishing Co., Ltd.*, [1933] A.C. 402; *Re Sassoon, I.R.Comrs. v. Raphael*, *Re Sassoon, I.R.Comrs. v. Ezra*, [1933] Ch. 858; *I.R.Comrs. v. L. B. (Holdings), Ltd.*, [1946] 1 All E.R. 598; *Re Lockwood, Atherton v. Brooke*, [1957] 3 All E.R. 520; *Re Rowland, Smith v. Russell*, [1962] 2 All E.R. 837. Referred to: *Roddy v. Fitzgerald* (1858), 6 H.L.Cas. 823; *Seeger v. Duthie* (1860), 6 Jur.N.S. 1095; *Coates v. Hart* (1863), 32 Beav. 349; *Re Sanders' Trusts* (1866), L.R. 1 Eq. 675; *Day v. Day* (1870), 18 W.R. 417; *Robinson v. Evans* (1873), 43 L.J.Ch. 82; *Keogh v. Keogh* (1874), 22 W.R. 508; *Sweeting v. Prideaux* (1876), 45 L.J.Ch. 378; *Edwards v. West* (1878), 38 L.T. 481; *Leach v. Jay* (1878), 39 L.T. 242; *Spencer v. Metropolitan Board of Works* (1882), 22 Ch.D. 142; *Hill v. East and West India Dock Co.* (1884), 9 App. Cas. 448; *Re Martin, Smith v. Martin* (1885), 54 L.J.Ch. 1071; *Mills v. Dunham*, [1891] 1 Ch. 576; *Rogers v. Maddocks* (1892), 62 L.J.Ch. 219; *R. v. Halliday*, [1917] A.C. 260; *Whitmore v. King*, [1918-19] All E.R.Rep. 1063; *Shaw v. Public Trustee*, [1929] All E.R.Rep. 368; *Reardon Smith Lines, Ltd. v. Black Sea and Baltic General Insurance Co.*, [1938] 2 All E.R. 706; *Swami (Pakala Narayame) v. King-Emperor*, [1939] 1 All E.R. 396; *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60.

As to the construction of wills, see 39 HALSBURY'S LAWS (3rd Edn.) 950 et seq.; and for cases see 44 DIGEST 530 et seq.

Cases referred to:

- E** (1) *Sowell v. Garret* (1596), Moore, K.B. 422; 72 E.R. 671; sub nom. *Soulle v. Gerrard*, Cro. Eliz. 525; 44 Digest 1155, 9989.
- (2) *Fairfield v. Morgan* (1805), 2 Bos. & P.N.R. 38; 127 E.R. 535, H.L.; 44 Digest 1155, 9993.
- (3) *Malcolm v. Taylor* (1832), 2 Russ. & M. 416; 39 E.R. 452, L.C.; 44 Digest 1134, 9813.
- F** (4) *Brownsword v. Edwards* (1751), 2 Ves. Sen. 243; 28 E.R. 157, L.C.; 44 Digest 1156, 10,003.
- (5) *Doe d. Usher v. Jessep* (1810), 12 East, 288; 104 E.R. 113; 44 Digest 1152, 9970.
- (6) *Mortimer v. Hartley* (1851), 6 Exch. 47; 3 De G. & Sm. 328, n.; 20 L.J.Ex. 129; 16 L.T.O.S. 551; 155 E.R. 448; 44 Digest 577, 3953.
- G** (7) *Newburgh v. Newburgh* (1825), Sugden's Law of Property, 367, H.L.; 44 Digest 600, 4266.
- (8) *Bell v. Phyn* (1802), 7 Ves. 453; 32 E.R. 183; 44 Digest 1152, 9962.
- (9) *Woodward v. Glasbrook* (1700), 2 Vern. 388; 23 E.R. 849; 44 Digest 1215, 10,507.
- (10) *Warburton v. Loveland d. Ivie* (1828), 1 Hud. & B. 623; affirmed (1832), 6 Bli.N.S. 1; 2 Dow. & Cl. 480; 5 E.R. 499, H.L.; 17 Digest (Repl.) 277, *371.
- H**

Also referred to in argument:

- Earl of Fingal v. Blake* (1829), 2 Mol. 50, 80; 44 Digest 460, 2806ii.
- Doe d. Lees v. Ford* (1853), 2 E. & B. 970; 2 C.L.R. 654; 23 L.J.Q.B. 53; 22 L.T.O.S. 184; 18 Jur. 420; 118 E.R. 1029; 44 Digest 1183, 10,227.
- I** *Garde v. Garde* (1843), 3 Dr. & War. 435; 38 Digest (Repl.) 792, *62.
- Quicke v. Leach* (1844), 13 M. & W. 218; 13 L.J.Ex. 348; 153 E.R. 91; 44 Digest 1182, 10,224.
- Key v. Key* (1853), 4 De G.M. & G. 73; 1 Eq. Rep. 82; 22 L.J.Ch. 641; 22 L.T.O.S. 67; 17 Jur. 769; 43 E.R. 435, L.J.J.; 44 Digest 580, 3999.
- Napper v. Sanders* (1632), Hut. 118; 123 E.R. 1142; 38 Digest (Repl.) 836, 491.
- Lethieullier v. Tracy* (1753), 3 Atk. 774; Amb. 204; Keny. Ch. 40; 26 E.R. 1243; 44 Digest 1182, 10,220.

Horton v. Whittaker (1786), 1 Term Rep. 346; 99 E.R. 1131; 44 Digest 1182, A
10,222.

Helliard v. Jennings (1699), 1 Ld. Raym. 505; sub nom. *Helier v. Jennings*,
Freem.K.B. 509.

Walsh v. Peterson (1744), 8 Atk. 193; 26 E.R. 913; sub nom. *Walsh v. Pat-
terson*, 9 Mod. Rep. 444, L.C.; 44 Digest 1155, 9992.

Denn d. Wilkins v. Kemeys (1808), 9 East, 366; 103 E.R. 612; 44 Digest 1157, B
10,008.

Right d. Day v. Day (1812), 16 East, 67; 104 E.R. 1014; 44 Digest 1141, 9869.

Belliard v. Uthwatt (1737), 1 Atk. 426; West temp. Hard. 273; 26 E.R. 271; sub
nom. *Billingsley v. Eckershall and A.-G.*; 2 Eq. Cas. Abr. 570, L.C.; 44
Digest 1171, 10,138.

Bradford v. Foley (1779), 1 Doug.K.B. 63; 99 E.R. 45; 44 Digest 1177, 10,183. C

Sheffield v. Earl of Coventry (1852), 2 De G.M. & G. 551; 22 L.J.Ch. 498; 20
L.T.O.S. 193; 17 Jur. 289; 42 E.R. 987, L.C. & L.J.J.; 37 Digest (Repl.) 236,
21.

Doc d. Watson v. Shipphard (1779), 1 Doug.K.B. 75; 99 E.R. 52; 44 Digest 1182,
10,221.

Appeal from a decision of LORD CRANWORTH, L.C., varying a decree of TURNER, D
V.-C.

By his will Richard Watson, being possessed of the estate of Stainton and the
estate of Hemlington, in Yorkshire, after making several provisions by way of
annuity and legacy, gave those real estates to trustees in fee and directed :

“And subject to the trusts aforesaid, all the said premises hereinbefore devised E
shall be in trust for my grandson Robert Watson and the heirs of his body; but
in case he shall die under the age of twenty-one years and without issue, my
said messuage or dwelling-house and farm at Hemlington aforesaid, and my
said six messuages or cottages at Stainton aforesaid (subject to the trust herein-
before thereof respectively declared) shall be in trust for my said granddaughter F
Ann Watson and the heirs of her body, but in case she shall die under the age
of twenty-one years and without issue, the said last-mentioned premises shall
be upon such and the same trusts as are hereinafter declared concerning my
said messuage or dwelling-house and farm at Stainton aforesaid. And I declare
and direct that if my said grandson Robert Watson shall die under the age of
twenty-one years, and without issue, then and in that case the said Robert
Watson Darnell and Watson Chapman, their heirs and assigns, shall stand and
be seised of my said messuage or dwelling-house at Stainton aforesaid, now in my
own occupation, and the said farm at Stainton aforesaid, now in the occupation
of the said John Sherwood, upon the trusts following (that is to say), in trust
to pay the rents issues and profits of the same premises to or for the use of my
son Richard Watson, for and during his natural life, at the same times and in
like manner, and subject to such restrictions as are hereinafter mentioned with
regard to an annuity to him of £60, and from and after his decease or other
sooner determination of his life-interest therein, in trust, to pay the same rents,
issues and profits unto my daughter-in-law Mary Watson during her life, if she
shall so long continue the widow of the said Richard Watson. And subject to
the trusts hereinbefore thereof declared, the said messuage and farm at Stainton
aforesaid shall be in trust for my grandson Wm. Darnell and the said Robert
Watson Darnell, and my granddaughter Elizabeth Darnell, in equal shares.” I

When the testator died, he left his grandson Robert Watson, who afterwards
attained the age of twenty-one years and died without issue. His granddaughter
Anne Watson also attained twenty-one and died without issue. A bill was filed by
the trustees seeking the direction of the court as to how the trusts under the will
were properly to be executed. TURNER, V.-C., held that the two persons named
tenants in tail, the grandson Robert Watson and the granddaughter Anne Watson,
having both died without issue of their body, the ultimate trust in favour of W.,

- A R.W., and E. Darnell took effect, viz., the trust under "and subject to the trusts hereinbefore thereof declared, the said messuage and farm at Stainton aforesaid, shall be in trust for my grandson William Darnell," and so on, and that, therefore, the Darnells were entitled. From that decree there was an appeal to the Lord Chancellor, who was of opinion that the decree was partly right and partly wrong—i.e., as to the Stainton estate it was right, but that as to the Hemlington estate it was wrong; and he made a decree varying the former decree as to the Hemlington estate. With respect to the Stainton estate, there was no complaint of his decree, but with respect to the Hemlington estate the present appeal was brought.

Walker, Q.C., Malins, Q.C., and G. Y. Robson for the appellant.

Rolt, Q.C., and Faber for the respondents.

- C Their Lordships took time for consideration.

Feb. 16, 1857. **LORD CRANWORTH, L.C.**—The question as to the Hemlington estate turns upon this. Subject to certain trusts for raising legacies and annuities, the trustees were to stand possessed of the estate upon those trusts,

- D "and subject to the trusts aforesaid, all the said premises hereinbefore devised shall be in trust for my grandson Robert Watson and the heirs of his body; but in case he shall die under the age of twenty-one years and without issue,"

then to Anne in like manner. Robert Watson died without issue of his body, but he did not die under the age of twenty-one years. The real and important question is, there being that condition, if he should "die under the age of twenty-one years and without issue," whether that "and" is to be read according to its natural

- E import, so as not to give the estate over unless he died both without issue and under the age of twenty-one years, or whether, he having died without issue, the trust over was to take effect, rejecting, as it were, the words "under the age of twenty-one years." Supposing this case had been unaffected by prior decisions, I conceive there could have been no doubt upon the subject, because the rule of construction which, in modern times more particularly, the courts have been
- F anxiously inclined to follow has been to adhere as rigidly as possible to the precise words that are found, whether in wills or in deeds, and to give to those words their natural and ordinary meaning, unless by so doing it appears from the context that you are using them in a different sense from that which the testator or the maker of the deed intended to use them, or unless by so using them you would be doing something which would manifestly tend to an inconsistency which could not have
- G been the intention of the party making the instrument. Applying that rule to the present case, supposing it to be untouched by decisions, the question is, whether in construing that word "and" copulatively in its natural sense, you are doing anything which is either inconsistent with what else appears upon the face of the will, or are doing something which manifestly must be going contrary to the real objects of the testator. I confess I can see no ground whatever for thinking that

- H the word "and" was not what the testator intended, for he gives the estates to his grandson Robert Watson and the heirs of his body. That gives him an estate tail, and all persons familiar with the subject know, and probably this testator knew, that when his grandson attained twenty-one, he would have the absolute power of disposing of the property just as he might think fit, because a century has elapsed since it was settled that a tenant in tail has in truth the absolute control over the
- I property. He may, by suffering a recovery, or without suffering recovery by doing something analogous to it, make himself absolute owner of the property. When you give an estate to a tenant in tail in that way, it makes him substantially the absolute owner of the property. But the testator declares that, if the grandson dies under the age of twenty-one years and without issue, it shall go over. It appears to me that that was not an irrational mode of disposing of the property. Therefore, I should feel at a loss—indeed I should feel it impossible—to hold that that could not be what the testator intended. So, independently of authority, I should have felt myself bound to adhere to the strict meaning of the words, and to say that the

testator, having given the estate over in the event of his grandson dying "under twenty-one and without issue," inasmuch as he died over twenty-one but without issue, there was no gift over. A

Then the question arises whether this mode of construing the will has been affected by previous authorities, because there is another rule of construction which is quite reasonable—that where words have for a long series of years had a well-known technical construction, although it might not be that construction which, if the case were untouched by decisions, the court might now arrive at, yet it would be unsafe, and render property insecure, if we were to depart from that construction. B
The cases which, by way of analogy, were mainly relied upon as authorities, were cases of which there is a great number in the books, beginning at one reported in the reign of Queen Elizabeth I, and found in CROKE'S REPORTS (*Soulle v. Gerrard* (1)) I say, beginning with that case, for I am not clear that there may not have been prior cases; but, beginning there, the same doctrine is carried down through a variety of cases, and was ultimately approved of and sanctioned by your Lordships' House in a well-known case in the early part of this century, *Fairfield v. Morgan* (2), which arose on a writ of error from Ireland. C

In that case the doctrine was enunciated and approved that when a testator devises an estate so as to give the control of the fee-simple to his son, or to any person, but if he dies under the age of twenty-one years or without issue, then over—in that case "or" must there have been meant, though it is improperly used, to have been used conjunctively and not disjunctively, because it never could have been the testator's intention in giving an estate to a person and his heirs to give it away from his issue, if he should happen to die under twenty-one leaving issue. I confess that, if that were now to be decided for the first time, I should rather have doubts even upon that case, whether it was not more likely to be the safe rule to adhere to the strict meaning of the words used, than to speculate upon what the testator intended. However, I only throw that out, not as meaning to cast any doubt upon the rule that where those words do occur they must be prima facie at least so understood—that is to say, if an estate is given to a person and his heirs with a limitation over in case he dies "under twenty-one or without issue," then in that case, if he dies under twenty-one leaving issue, it is meant that the issue should take, and if he attains twenty-one and does not have issue, still it can only be an estate tail. That has been the construction adopted for the purpose of preserving the estate to the issue, which otherwise would be defeated. The ground of that, as I have already pointed out, is that any other construction would defeat that which must be presumed to have been the intention of the testator, and that when he gave the estate to a person and his heirs, or in a way which amounts to giving to a person and his heirs, that construction must be wrong, which, if the person died leaving issue, would take it away from that issue. To depart from that long-established rule, and to adopt a stricter rule of construction, would probably cause more evil than it would remedy, as was very ably pointed out by LORD BROUGHAM, when he held the Great Seal, in *Malcolm v. Taylor* (3) (2 Russ. & M. at p. 447). F

The question, therefore, which your Lordships have to consider is whether there is any such well-recognised technical rule which applies to a case like the present, where the devise is not to a person and his heirs with a limitation over if he dies under twenty-one or without issue, but where a testator gives an estate tail to a person and the heirs of his body, with a limitation over if he dies under twenty-one and without issue. Is there any rule of construction which says that, in that case, it is to go over if he does not fulfil both conditions—that is to say, if he does not die under twenty-one and without issue, that it is to go over if he dies at any time without issue? G H

In support of that proposition great reliance was placed upon the well-known case of *Brownsword v. Edwards* (4), a case of very high authority which was decided by LORD HARDWICKE, L.C. In that case there was a devise to trustees in fee upon trust to receive the rents till John Brownsword should attain the age of twenty-one or have issue, and then the testator devised the estate to John Brownsword and the I

A heirs of his body, but, if he should die under twenty-one and without issue, then to Sarah Brownsword. John Brownsword attained the age of twenty-one, but afterwards died without issue. LORD HARDWICKE held that the remainder over to Sarah Brownsword took effect. That case has often been cited, and certainly quite erroneously cited, as an authority for the proposition that LORD HARDWICKE held that the word "and" was to be read as "or." That is clearly not the ground upon which LORD HARDWICKE proceeded, as is manifest from his own language. What LORD HARDWICKE proceeded upon, whether correctly or not, was this. He said:

"This is an alternative gift: if John Brownsword attains twenty-one or has issue, it is a gift to him and the heirs of his body; and, as an alternative, if he dies under twenty-one and without issue, there is a gift to Sarah Brownsword."

C He did not fulfil that condition; he did not die under twenty-one, though he died without issue. LORD HARDWICKE held, nevertheless, that by implication the gift was to go over to Sarah Brownsword in any event if he died without issue. But that was not by altering "and" into "or." For unquestionably LORD HARDWICKE never would have held that, if he died under twenty-one leaving issue, it was to go away from his issue. That never could have been his meaning, because it was an express devise to him and the heirs of his body. To make it quite clear that LORD HARDWICKE did not proceed upon that ground, I will read what he says. Speaking of those cases in which "or" has been held to mean "and," he says (2 Ves. Sen. at p. 249):

E "If the first limitation had been in tail there would be no occasion to resort to that [the alteration of the word], but the court would have made the construction I do now, viz., if he dies without issue before twenty-one, then over by way of executory devise; if he dies without issue after twenty-one, when the estate had vested in him, it would go by way of remainder, because he had made his original devise capable of a proper remainder, in which case the court will always construe it a remainder."

I do not know that it is necessary for me absolutely to say that I think that LORD HARDWICKE is not in that case rightly deciding. I confess, however, that if I were bound to express an opinion on the subject, I should be obliged to say that I do not think that is a decision founded upon correct principles. Because, unquestionably, there LORD HARDWICKE, though he does not change the word "and" into "or," which would not have answered his view at all, does imply that there was an intention to give a remainder in case the estate tail in the son John took effect, whereas there are no words that express such a meaning. In the present case, however, that principle cannot apply, because here the words are clearly sufficient to give an absolute estate tail in the first instance, which was not the case in *Brownsword v. Edwards* (4). In *Brownsword v. Edwards* (4) it may be said that in the expression "if he dies under twenty-one and without issue," the words "under twenty-one" were not unnaturally introduced—though perhaps unnecessarily, still not unnaturally—because the object was to provide for a contingency exactly the opposite of that which LORD HARDWICKE points to, that is to say, if he died under twenty-one and without issue there is the alternative of either attaining twenty-one or having issue. But in the present case the words found in this will "if he dies under the age of twenty-one years, and without issue," are absolutely meaningless, unless full effect is to be given to the word "and," after the expression "if he dies under twenty-one." The argument is that it is to be read as if he died without issue, whether under the age of twenty-one years or after the age of twenty-one years. So that the words "under twenty-one years," it is contended, have no meaning at all. Not being called upon to say whether upon the grounds pointed out by LORD HARDWICKE *Brownsword v. Edwards* (4) was or was not rightly decided, I conceive that either it was not rightly decided, or, that if rightly decided, it was so decided upon principles not governing the present case.

Whether I should have felt myself warranted in adopting such a construction, if *Brownsword v. Edwards* (4) had been entirely unshaken, is a matter upon which I

need not speculate, because I conceive that the precise view which I take of the law upon this subject was discussed in *Doe d. Usher v. Jessep* (5), in the Court of Queen's Bench in 1810, when LORD ELLENBOROUGH presided in that court. I confess that to my mind, and indeed it was pretty well admitted at the Bar, that the present case is undistinguishable from *Doe d. Usher v. Jessep* (5). There was a devise to trustees in fee "in trust to and for my natural son John," "whom I had by" such and such a woman, "and the heirs of his body lawfully issuing for ever." It was a gift in tail in the first instance, "and my will further is, that, if the said John Jessep shall happen to die before he attains his age of twenty-one years, and without issue lawfully to be begotten, then I devise" the property over to certain persons, who were the claimants. The question was whether the persons claiming upon that gift over were entitled, the facts being, as in this case, that John Jessep had attained twenty-one but never had any issue. When the case came before the court, *Brownsword v. Edwards* (4) having been pressed as being directly in point, LORD ELLENBOROUGH says (12 East, at p. 293):

"The cases certainly run very near, the only distinction seems to be that the limitation in *Brownsword v. Edwards* (4) was in favour of a daughter who, without such a construction as was there put on the word, would have been left without any provision, and here the limitation over is to other relatives."

I think it is better not to make such nice distinctions in one's own mind in order to save the necessity of saying that you go against a prior decision, because really the distinction only comes to this, that in one case it was a gift over to collaterals, and in the other to nearer relations. That appears to me a distinction that one cannot understand. LORD ELLENBOROUGH goes on to say, having remarked that the cases do run very close:

"But is there not a rule of common sense as strong as any case can be, that words in a will are to be construed according to their natural sense, unless some obvious inconvenience or incongruity would result from so construing them? Now here the testator has used the copulative word 'and,' and has devised this estate over in case his son die before twenty-one 'and' without issue, that is, if both those events happened; why then should we read 'and' as 'or,' and give the estate over upon the happening of one only of the events, when no inconvenience will ensue by construing the word used in its natural sense?"

That was the decision of the court.

That case was decided in 1810, just sixty years after *Brownsword v. Edwards* (4) had been decided. Whether that case is now entirely unquestioned, I do not stop to inquire. As far as I have been able to discover, it has not been seriously questioned. It has been in force for between forty and fifty years. When the present case came before me by way of appeal, it appeared to me that either *Doe d. Usher v. Jessep* (5) overruled *Brownsword v. Edwards* (4) or that, if it did not overrule it, it is by reason of there being some distinction, which same distinction exists in the present case. I thought the rule laid down in *Doe d. Usher v. Jessep* (5) a more sensible and convenient rule than that in *Brownsword v. Edwards* (4) and I acted upon it. I confess, though I have considered the case in every point of view, and have looked to see how far subsequent authorities have at all shaken this decision, I cannot come to any other conclusion than that the decision at which I arrived is the safe and correct conclusion.

There was one case which had been decided when the present case was argued before me, bearing some relation to it, but it was not quoted in the argument before me, and I dare say the counsel were not aware of it. On looking, however, at that case, I confess, so far from leading me to doubt the propriety of my decision, it rather confirms me. I allude to *Mortimer v. Hartley* (6), in the Exchequer. In that case there was some doubt as to what estate was meant to be given to the son John and the daughter Ann, but it was held that by the construction estates tail were given, and then it was said:

A "If it shall please God to take away both John and Ann under age [i.e., under the age of 25 years], or without issue, then to Joseph Westerman."

B John, to whom the previous estate tail had been given, attained the age of twenty-five, and then died without issue. He had had issue, but the issue died during his life. It was held that the devisee over was entitled, that the word "or" must have its natural meaning. The estate was given to John and the heirs of his body, and if he died under twenty-five or without issue, to Joseph Westerman. The contention there was that "or" was to be altered into "and," and that inasmuch as he had attained twenty-five, there was no gift over to Joseph Westerman. The Court of Exchequer, after a very elaborate argument, and fully considering the case, were of opinion that the natural meaning was to be given to the word "or," and that the rule as to construing "or" as meaning "and," could not hold universally. The C testator having said, "I give the estate to John and the heirs of his body, but if he dies under twenty-five or without issue, it is to be given over," and he having died without issue, the court held that the gift over was, therefore, to take effect. I confess I do not see that that case would have shaken me in the opinion I have formed. I confess it does not at all—on the other hand, it rather appears to me to confirm the view I have taken, as showing that the ordinary meaning of words is, if possible, D to be adhered to.

It remains only to advert to another argument. TURNER, V.-C., was of opinion that, quacunq̃ue via data, this estate was to go over to the ultimate devisees, for that there was as to the estate of Stainton a direction that, in case the grandson died under the age of twenty-one years, there was to be a life-interest given to his E parents which never took effect, because that life-interest expired in the lifetime of the grandson. There was then a direction given, "and subject to the trust hereinbefore thereof declared, the said messuage and farm at Stainton aforesaid shall be in trust for" the Darnells, the persons litigating the case. In the devise of Hemlington there was a declaration that, if Robert the grandson died under twenty-one and without issue, it was to go to Ann and the heirs of her body, but that in case F she should die under twenty-one and without issue, then the same trusts as were declared as to Stainton should take effect as to Hemlington. TURNER, V.-C., thought that that carried the Hemlington estate as well as the Stainton estate. I had occasion to consider this point when the case came before me on appeal from his decision, and I have considered it since, but I cannot see how that ultimate limitation as to Stainton can by any possibility be applicable. The limitations as to G Stainton are only to be applied to Hemlington in case Robert and Ann both die under the age of twenty-one years, and without issue. In neither of these two cases did the contingency as to dying under twenty-one happen, and, therefore, the same principle which induces me to say that there was no gift over after the death of Robert Watson when he attained the age of twenty-one, induces me also to say that there is no declaration in the will, that the ultimate trusts of Stainton shall be applicable to Hemlington. For these reasons it is my duty to move your Lordships H that the judgment below be affirmed.

LORD ST. LEONARDS read the following opinion.—I have the misfortune to differ from my noble and learned friend who has just spoken, and from my noble and learned friend, LORD WENSLEYDALE, and as I thought it necessary, in order to be precise, to write what my opinion was in this case, I shall now take the liberty I of reading what I wrote.

The legal fee-simple in this case is given to the trustees upon the trusts afterwards declared of the same. Upon the whole of the will I have arrived at the conclusion that the testator intended to dispose of the equitable fee-simple, and did not die intestate as to any portion of it. There is no residuary devise, unless the declarations of trust, to which I shall presently refer, operate in effect as such. Looking at the provisions in the will, I am satisfied that the testator never intended, in an event not unlikely to happen soon after his own death, viz., the death of his grandson Robert, after attaining twenty-one without issue, to allow his estate to descend

to his son in fee. If the will is open to that construction, it must be that the expressions which he has used fail to give effect to his intention. The first trust is (subject to the directions to raise annuities and a contingent legacy) for his grandson Robert Watson and the heirs of his body, an equitable estate tail by apt words of limitation. But in case he shall die under twenty-one and without issue, then a part of the estate is to be in trust for his granddaughter Ann Watson (Robert's sister) and the heirs of her body. And in case she should die under twenty-one and without issue, over. And the testator directs the trustees out of the rents to raise during the infancy of his grandchildren respectively such maintenance money for them as the trustees should think fit. A B

To stop here. Robert died without issue, but attained twenty-one, so that he did not die under twenty-one and without issue. Did then the devise over to Ann take effect? The devise of the equitable estate was clearly to Robert in tail, and no construction can be put upon the devise which would narrow or restrict his estate tail. No one can take under the will until that estate tail is exhausted by Robert's failure of issue, whenever that might happen, without reference to the period of his death. So that the construction of the gift over is wholly immaterial to Robert and his issue. It is only material as between the granddaughter Ann and the heir-at-law of the testator, Ann's father. If the first devise had been to Robert in fee, it is clear not only that the word "and" could not be read "or," but that if the disjunctive conjunction had been used by the testator, the conjunctive one would have been introduced in its stead, because the testator could not be understood to mean to give the estate over from his first devisee's children in the event of such devisee dying under twenty-one, leaving children, and they might not be entitled, if the estate went over in consequence of his dying under twenty-one without regard to his leaving issue behind him. In such cases, therefore the court does more than reject a word, for it substitutes one word for another, and indeed one that is directly opposed in its import to the one which is rejected. It is owing to the infirmity of our language, that we have no word to express in a combined sense the two conjunctions "or" and "and." In devises where the first taker, although confined by the testator in words to a life-estate, has been held to take an estate tail under a subsequent gift to the heirs of his body, the courts have disregarded words annexed to the words "heirs of the body," such as that they were to take as tenants in common, in favour of the general intention. Upon the whole will the paramount intent is regarded, and directions contrary to that view are in effect struck out of the will. So when the testator's intention is clear, but he fails in words to provide for the precise event which happens, the courts supply the words. For example, on a gift to a woman during her life, if she shall so long continue his widow, and, in case she marry, to A. in fee, he will take upon either the death or marriage of the widow. C D E F G

In *Newburgh v. Newburgh* (7) in introducing gifts over in a will by an enumeration of the estates, the estate in one country was by mistake struck out by the conveyancer in settling the draft, and an attempt was made, but failed, to be allowed to prove the mistake by parol evidence, and to have it corrected. When the case reached this House, it was ultimately decided that the clause in which the county was omitted might be rejected, or the missing county be considered as inserted in it, so as to give all the estates over to the countess for life, upon the evidence furnished by the context of the will of the intention of the testator. Where the expression is in a gift over in case of a death "without being married," it has in favour of the intention been construed "without ever having been married": *Bell v. Phyn* (8). I will not multiply the instances in which words have been rejected, or altered, or supplied in a will, in order to give effect to the clear intention. But, as a general rule, words should be received in their natural grammatical import, and effect given if possible to every word in the will. H I

In the present case the primary intention of the testator was to give an estate tail to Robert, and I hold that we are not at liberty to cut down or affect that gift in any way. This at once removes the difficulty where the first devisee is to take the fee. The gift over is in case he dies under twenty-one and without issue. It is

A agreed that you cannot simply read "or" for "and," for if you did, and Robert died under twenty-one leaving issue, such issue could not take, and that would defeat the declared intent of the testator. It is argued that you must provide for the naked case of his dying under twenty-one, for you cannot reject those words as surplusage or add to them. You may not, it is urged, read them as a gift over if he die under twenty-one without issue. In my opinion, the testator intended what he has already expressed, that his son should take an estate tail, and I think that he meant, what is not so clearly expressed, that the estate should go over if his son died at any time without issue. The reason why the age of twenty-one was introduced was, I think, because he did not intend the son to take the estate itself, that is, to enter into the enjoyment of it, until he attained twenty-one, for the legal estate was in the trustees, and they are to supply maintenance for the son while under twenty-one out of the rents. He, therefore, intended to give the estate over in case his son never, in this view, became entitled to it, viz., if he died under twenty-one, but still, not unless there was a failure of issue. And he also intended it to go over if his son did attain twenty-one and enter upon the enjoyment of the estate, but should afterwards die without issue; and I think that we are enabled by the rules of law to give effect to that intention.

D The first case cited at the Bar, *Soulle v. Gerrard* (1), was decided, when executory devises were not allowed—a fee could not be engrafted upon a fee—but still the case is instructive as to the way in which we are at liberty to deal with the case before us. The devise was to the testator's son Richard, in fee, and if he died within the age of twenty-one or without issue, then the land should be equally divided among the testator's other sons. Richard died within age, leaving issue.

E ANDERSON, C.J., said, that, if the limitation had been single, viz., if he died without issue, etc., it was an estate tail and explained the former limitation, and he conceived that this part of the limitation "if he die within age" was utterly void, for a remainder could not depend upon a fee, and then it was all one as if the limitation had been single if he die without issue; so Richard had an estate tail. WALMSLEY, J., agreed, and he added that if the remainder might pass upon his dying within age, yet it could not be until he died without issue also, for, the words being "if he died within age or died without issue, then," etc. This "then," which shows the beginning of the remainder, shall be when he dies without issue, and not before, so that it is all one as if the disjunctive "or" had been a copulative. BEAUMONT and OWEN, JJ., agreed, and the latter added that if the remainder might commence upon the first limitation, yet it ought not to commence by the words and intent until the other part be performed also, viz., that the devisee died without issue. This is an important authority, for, although it would be decided differently now, because executory devises within due limits are valid, yet it shows that where the first devise is expressly or by implication a devise in tail, a gift over in case the devisee die under twenty-one or without issue may be read without alteration, and yet a death under twenty-one will not carry the estate over unless also there is a failure of issue. If necessary to this construction the words "if he die under twenty-one" may be rejected; and still further, that "or" may be read "and," and yet the estate will go over if the first devisee die under age leaving issue.

H *Woodward v. Glasbrook* (9) is also an authority bearing on this case. The devise was to the testator's children as tenants in common in tail, and if any of them should die before twenty-one or unmarried, his part should go over to the survivors.

I HOLT, C.J., held that one dying unmarried, though he attained the age of twenty-one, his share went over. If the death had been under twenty-one, but the devisee had married, the estate, I apprehend, would not have gone over so as to defeat any issue of the devisee tenant in tail. So HOLT, C.J., appears to have held that the words "shall die before twenty-one" were immaterial, and the estate would go over whenever the devisee died unmarried.

This brings me to *Brownsword v. Edwards* (4), which was so much discussed at the Bar. I must, without reserve, say that I consider it a binding authority; and I entirely subscribe to LORD HARDWICKE's doctrine in it. I cannot, upon any sound

ground, distinguish it from the case now before the House. The estate was devised to trustees and their heirs to receive the rents until John Brownsword should attain twenty-one in trust to place them out to improve the estate, and if he should live to attain twenty-one, or have issue, then to him and the heirs of his body, but if he should happen to die before twenty-one, and without issue, then a like gift to a female child, etc., and over just in the same way. The children were considered to be the testator's legitimate offspring. John attained twenty-one, and died without issue.

It was said that this case differs from the one under appeal, inasmuch as the former was a gift upon a contingency, while in this case an estate tail is at once given. But if that difference has any weight, I think that it is in favour of the appellant. LORD HARDWICKE relied upon the gift being in tail, and upon the plain intention of the testator to give it over, and not to let in the testator's right heirs. He held that John took an estate tail when he attained twenty-one, and that he would have done so had he had issue, though he had died before twenty-one. The construction was to give him an estate tail in either event. As to the subsequent words, in the construction of wills the court has construed the words conformably to the intent of the testator as much as possible, ranging them in a different order, and transposing them to comply therewith. But in this case there was no such necessity (this is what LORD HARDWICKE said), for there was a plain natural construction upon these words, viz., if John shall happen to die before twenty-one and also shall happen to die without issue, which construction plainly makes the dying without issue to go through the whole, and fully answers the intent in that manner. LORD HARDWICKE added that an estate tail is capable of a remainder, and it is natural to expect a remainder after it. It appears, therefore, that, in a case I think more difficult to manage than this, LORD HARDWICKE, after "an estate tail," read the words "if John should happen to die before the age of twenty-one years and without issue," thus, "if John should happen to die before twenty-one, and [also should happen to die] without issue." This effected the intention of the testator, by plainly construing the words "dying without issue," to go through the whole sentence. This construction I am prepared to adopt and to apply to this case. LORD HARDWICKE did not convert "and" into "or," although that may be done in favour of the intention, just as "or" may be read "and" where the intention requires it: *Bell v. Phyn* (8). It is said that the construction in *Brownsword v. Edwards* (4) gave no effect to the words "die under twenty-one." But full effect was given to them by reading them as connected with the subsequent words "without issue," and it is no objection that by this construction the words give no additional force to the devise, for the construction does, taking the words altogether and giving full effect to them all, effectuate the clear intention of the testator.

The later case of *Doe d. Usher v. Jessep* (5), may be considered as similar to the one before the House, and the Court of King's Bench, not in words overruling the well-considered case of *Brownsword v. Edwards* (4) decided in direct opposition to the principle upon which it was determined that "and" was to receive its natural construction, and, therefore, that, although the first devise was to an infant in tail, yet the gift over, if he should happen to die under twenty-one and without issue, required both events to happen, and the devise over was held to fail, as the first devisee attained twenty-one although he died without issue. My noble and learned friend the Lord Chancellor considered that he had to elect between LORD HARDWICKE's decision and the later decision of the Court of King's Bench, and he felt himself bound by the later decision. The cases were well calculated to embarrass the court. But now that the case has been more fully considered, I think that your Lordships will be inclined to support the earlier authority. *Doe d. Usher v. Jessep* (5) was hastily decided, and not well considered. Independently of what must occur to every one who reads it, which has been pointed out by my noble and learned friend, that the distinction there drawn by LORD ELLENBOROUGH is one that cannot be maintained for a moment—I say, independently of that, the court actually decided this important point of law without hearing both sides, and their reasons show

A that they did not accurately distinguish between cases where the first devise was in fee and the case before them where the devise was in tail. This is proved by what fell from two of the learned judges during the argument. In delivering judgment the Chief Justice thought that inconvenience would ensue by construing the word "and" in its natural sense, so that he considered it unimportant that the gifts over were all destroyed by this construction. LE BLANC, J., said that the case was so far distinguished from *Brownsword v. Edwards* (4) that there the word "and" was construed "or" (which we have seen was not the case) to prevent the working of an injury to the issue: here "and" is required to be construed "or," in order to work the very injury, to avoid which in other cases the courts have construed "or" to be "and." Reading it in the natural sense of the word, the son having attained twenty-one, the limitation over, which was only to take effect if he died before

C twenty-one and without issue, was defeated. BAYLEY, J., added:

"If the son had died under twenty-one leaving issue, the construction contended for by the plaintiff's counsel would leave the testator intestate as to such issue, which was clearly against his intention."

D These observations prove that the real nature of the case was misunderstood, for, as the first devisee took an estate tail, and not an estate in fee, the construction adopted by LORD HARDWICKE would not have defeated the issue in any case which could happen. I submit, therefore, to your Lordships that *Doe d. Usher v. Jessep* (5) cannot be relied on as an authority.

E It so happened, when the case now before the House was heard upon appeal in the court below, that the authority of *Brownsword v. Edwards* (4) had recently come before the Court of Exchequer in *Mortimer v. Hariley* (6), and in an elaborate written judgment, delivered by my noble and learned friend, LORD WENSLEYDALE, *Brownsword v. Edwards* (4) was recognised as a clear binding authority, and *Doe d. Usher v. Jessep* (5), which had been relied upon in the argument, was manifestly passed over as of no weight. It unfortunately happened that this case was not referred to before my noble and learned friend, the Lord Chancellor, and

F he had not, therefore, the benefit of the opinion of the Court of Exchequer. In the case in the Exchequer, after successive estates tail to a son and daughter, the testator declared that if both of them should die under twenty-five or without leaving lawful issue, he gave the estate to his brother in fee. The second devisee in tail died an infant, and without having been married. The first devisee in tail attained twenty-five and died without issue. The Court of Exchequer relied upon

G the first gift being in tail, and, acknowledging *Brownsword v. Edwards* (4) as a binding authority, they followed it strictly and read the words as they found them, because by that construction in the event which happened the estate would go over to the brother according to the testator's intention. But they observed that if in the case before them any change in the language should be made, the one which would be most likely to effectuate the intent of the testator would be to read the words as

H if they had been, "and if John and Ann should die under age or at any time without issue." By so reading them the issue would take if their parents died under twenty-five, and the brother would succeed on the determination of the estate tail. But if this could not be done they thought they should make no change at all. They did not, therefore, as the event did not require it, construe the words as embracing every event without varying them, but they clearly intimated that they would have fully

I followed out the decision of LORD HARDWICKE if the circumstances had required it.

I need not say that I now entertain great doubt how the decision would have been, because my noble and learned friend, LORD WENSLEYDALE, now thinks that the present case below was rightly decided. He, of course, could not have been aware of the construction which I have now put upon the judgment which was delivered by him in the Court of Exchequer. As I understand, the ground upon which this appeal is now to be dismissed is one that really goes back to *Fairfield v. Morgan* (2). LORD WENSLEYDALE, as I understand him—of course not overruling it—because it is impossible to do so (it is the established law of the country, and we

have not the power to overrule it)—but giving an opinion that, if that case were now to be decided, he should be inclined to come to a different decision, and relying simply upon the words of the devise, not to give effect to the gift over in a case very likely to happen, and which nobody denies that the testator intended to provide for. That would bring us back to a rule of law which I believe, as I understand the law at present, does not exist. Nobody is more disposed than I am to abide by clear words, and to give them their natural and grammatical meaning, but I never did, and I never can, come to the conclusion that the words of a will will not admit of modification according to the real intention of the testator as you find it from other expressions or from the whole context of the will. It is difficult to lay down any abstract rule upon the subject, but where I find words pointing out the intention, and that, if I give to the words their simple meaning according to grammar and according to their prima facie import, I defeat the intention, I hold that I am bound by every rule both of law and equity to see whether I cannot give to them by natural construction an import which will effectuate and not defeat the intention.

Take *Fairfield v. Morgan* (2). There one word is substituted for another, and the word substituted is directly opposite in meaning to the one for which it is substituted; that is the law of this country, decided in this House, which has been followed ever since, and no one doubts it. There, so far from giving the words their natural meaning, you feel yourself at liberty to change the words. The testator has expressed what he meant in case two events shall happen, using the copulative conjunction *and* instead of the disjunctive *or*. You say he could not mean that. He has given an estate in fee, and that estate would go over if the party died under twenty-one, unless you alter the word. Then you take the liberty of altering the word by introducing another word in order to effect that which this House, as a judicial tribunal, is bound to do, in order to effect the intention of the testator. It appears to me, therefore, that the decision in the present case will go very far—I will not say to overrule *Fairfield v. Morgan* (2), because it cannot be overruled—but to shake the principle of it. It will lead simply to looking at the words superficially in order to ask: What do the words mean?—we will abide by the words, and take them as we find them. That would, no doubt, avoid a great many difficulties, but I confess I do not think that that is a rule by which we, as a judicial tribunal, should be guided.

I can only say, therefore, with great respect for my noble and learned friend, that I entertain as clear an opinion as I ever did in any case that, according to the true construction of the rule of law as applied to this case, the gift over is a perfectly good one, and that it falls directly within the authority of *Brownsword v. Edwards* (4). And I never can press too much upon your Lordships' attention that the whole depends upon the first gift being in tail—not being in fee—and that, therefore, we are at liberty, without affecting in any manner the estate given to the first devisee in tail, to read the words introducing the gift over without violence at all. By a natural, and I think an easy construction, adopting the rule laid down by Lord Hardwicke, we are at liberty to give effect to the gift over. That case, upon that very elaborate judgment, was for many years considered an authority.

With regard to *Doe d. Usher v. Jessep* (5), we cannot read without respect the names of the very learned persons by whom that case was decided; but, seeing the way in which it was decided, and the evidently mistaken reasons that were given for the decision, I cannot think that that is an authority which can overrule the well-considered case of *Brownsword v. Edwards* (4); and, although it is true, as my noble and learned friend has remarked, that *Doe d. Usher v. Jessep* (5) has been decided a good many years, I would observe that *Brownsword v. Edwards* (4) was decided a good many years before that, and I have no hesitation in saying that it appears to me a decision that is entitled to much greater weight as an authority.

Then, my Lords, considering, as I must consider, the matter in the way I have submitted it to your Lordships, which I have done in justification of the opinion which I entertain and in order, so far as any statements of the opinion which I really

A entertain can go, that the law may be kept as far as may be within the course in which it has usually flowed, I come to the second question, and upon that I have an equally clear opinion, unfortunately differing also from that of my noble and learned friends. I did not understand, in listening to my noble and learned friend's explanation, and I do not at this moment understand, where the distinction between Hemlington and Stainton is. But if I am wrong as to the operation of the devise, B the question then arises whether the two estates by force of the ultimate trust do not go over to the Darnells. The Vice-Chancellor decided that they did not, and did not give any opinion on the point of law which I have already considered. My noble and learned friend held that the Stainton estate did pass to the Darnells under the ultimate trust, but that the Hemlington estate (which also is in the parish of Stainton) did not, but descended to the heir-at-law. He expressed considerable C doubt upon each point, but felt himself bound to defeat what, as it appears to me, was the testator's intention. In considering this point, we assume that the limitations over already considered were contingent, and that the contingency did not happen. In that view, the case stands thus, and perhaps we shall the more readily apprehend the point if we put the trusts of the two estates in juxtaposition.

First the two estates are given to Robert and the heirs of his body.

D "But in case he shall die under the age of twenty-one years and without issue [the Hemlington estate] shall be in trust for Ann Watson and the heirs of her body, but in case she shall die under the age of twenty-one years and without issue . . . upon such and the same trusts as are hereinafter declared concerning my [property] at Stainton aforesaid,"

E viz., to be in trust to pay the rents to his son Richard for his life subject to conditions, and after his decease or other sooner determination of his life-interest, in trust to pay the rents to Richard's wife during her widowhood, "and subject to the trusts hereinbefore thereof declared, the same [property] shall be in trust" for F his three grandchildren (the Darnells) as tenants in common, their respective heirs and assigns for ever. So that in the event provided for the two estates originally given to Robert would be reunited and go to the Darnells. It admits of no doubt that the ultimate trust of the Stainton estate must be added to the previous declared trusts of the Hemlington estate. It seems difficult to maintain that the same trust of both estates will not, if the events happen, carry over both of them. The Stainton estate was held to go over on solid grounds. The ultimate trusts being subject to the trusts hereinbefore declared, carried every interest which the testator had not G before parted with. The devisees, of course, took subject to the contingencies and estates, whatever they were, before declared or given, but they did not take upon the contingencies, or, in other words, their remainder in fee did not depend upon the contingency taking effect. We have seen that the devise of the Stainton estate was in case Robert should die under twenty-one and without issue. That was a contingency which we assume never happened; yet that contingency was held not to H override the ultimate devise to the Darnells. Therefore, the circumstances that the gift over was the last in the series which followed the expression of the contingency upon which the estate was given over did not operate to confine this ultimate gift, like the gifts which precede it, to the happening of the contingency.

What, then, is the distinction between the ultimate gift of Hemlington and the ultimate gift of Stainton? The gifts over, in the first instance, were both upon a I contingency, and upon the same contingency, viz., Robert's death under twenty-one and without issue, and that contingency, although it was held to have failed, did not prevent effect being given to the ultimate gift to the Darnells. The only distinction as to Hemlington is, that, after an estate tail in Ann, the like condition is repeated, viz., in case she shall die under twenty-one and without issue; and that I assume failed like the former one to take effect. But this contingency was held upon appeal to govern the trust for the Darnells and to make it dependent upon that contingency, which not having happened, the trust failed and the estate went to the heir-at-law. But the like contingency as to both estates was held not to affect

the ultimate trust of Stainton. If, therefore, both estates had been given to the son and his wife, and then to the Darnells, they would have taken both, as they have taken one of them, notwithstanding the contingency had not happened.

This, I think, was rightly decided. The simple question then is whether the introduction into the trusts of Hemlington of another limitation with a contingent gift over in all respects similar to the one and with the like contingency which preceded the gift of Stainton, can vary the construction. Can it matter whether there be one contingent gift over or two such gifts? In either case the gifts all follow a contingency, but that does not affect the ultimate trust, because it is not dependent upon any contingency, but is only subject to the trusts before declared. The construction would be the same if twenty different contingencies had before been provided for. I should hold this opinion if the gift of Hemlington stood alone, but I consider the decision as to the Stainton estate, of which I approve, as an authority for the like construction as to the Hemlington estate. I could not hold that the ultimate trust of the latter estate took effect, notwithstanding that Robert attained twenty-one, and yet was prevented from having that operation because Ann attained twenty-one. To sustain that view we must, I think, overrule the decision in both of the courts below as to the Stainton estate, and that I am not prepared to do.

I am bound to add, though I have great respect for what has fallen from my noble and learned friend, I cannot see the distinction he draws between the two estates. I understand him to say that there were two contingencies, but I have not heard any distinction as to the general effect of a gift over being open to a different construction according to whether there be one contingency or two contingencies. One contingency has been held not to affect the gift over; "subject to the trusts before declared," you take everything that is not disposed of. Two contingencies have been held to prevent the estate from going over. Yet it is given in exactly the same words, "subject to the trusts before declared." Therefore, although I have no doubt I am wrong, because both my noble and learned friends think so—they have seen what I have written and it has failed to make any impression upon them—yet I must say that, having carefully considered this case, I am utterly unable to see where I am wrong.

LORD WENSLEYDALE.—I have paid the closest attention to this case and to the arguments at your Lordships' Bar, and also to the opinion of my noble and learned friend, LORD ST. LEONARDS. I have fully considered the reasoning on both sides, and have determined that I ought to concur in recommending your Lordships to affirm the order of my noble and learned friend on the Woolsack—though with the hesitation that one must naturally feel when such authorities disagree.

I think my noble and learned friend on the Woolsack was right in the construction which he put upon the clause in the will on which the case depends. I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted—at least, in the courts of law in Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further. This is laid down by BURTON, J., in a very excellent opinion, which is to be found in *Warburton v. Loveland d. Ivie* (10), 1 Hud. & B. at p. 648. The expression that the rule of construction is to be the intention of the testator is apt to lead into error, because that word is capable of being understood in two senses, viz., that which the testator intended to have done, and that which is the meaning of the words which he has used. The will must be in writing, and the only question is: What is the meaning of the words used in that writing—to ascertain which, every part of it must be considered with the help of those surrounding circumstances which are admissible in evidence to explain the words and put the court as nearly as possible in the situation of the

A writer of the instrument according to the principle laid down in the excellent work of SIR JAMES WIGRAM on that subject?

Adopting that rule, I think that the words of the clause in question ought to be read in their ordinary sense, viz., that the trust estate was to go over in the double event of Robert Watson dying before twenty-one and without issue, which event not having happened, the limitation over would not take effect. It cannot certainly
 B be said, that such construction would lead to any absurdity whatever or any absolute inconsistency with the context. Who shall say that the testator might not have thought that, if Robert attained twenty-one, he would be able to cut off the entail and provide for his family, and so no ulterior limitations would be necessary? If the words were quite clear, we could not alter them in order to carry into effect what might reasonably be conjectured (but it would be conjecture only) to have been the
 C design of the testator. If, for instance, the words had been "should die under twenty-one without issue," omitting the word "and," they could not have been understood in any other sense, and the limitation over would, in the event which has happened, have been defective. The whole difficulty in this case arises from the expression "but in case he shall die under the age of twenty-one and without issue," which expression is capable of being read, as a similar expression
 D was by LORD HARDWICKE in *Brownsword v. Edwards* (4) (2 Ves. Sen. at p. 247); and the simple question is, whether, in the present case, we are bound to read the words in the same way as was done in that case.

I must say that, having heard the observations of my noble and learned friend, LORD SR. LEONARDS, so fully and distinctly stated, I have had a great doubt as to the propriety of the opinion I have formed, and with the high respect I feel for the
 E opinion of my noble and learned friend, have hesitated in coming to a conclusion at variance with his. But the principle of construction which I have laid down is, in my mind, of such paramount consequence that I think it much more important to adhere to it than to follow the authority of the previous decisions of courts upon words in other wills resembling these. We are bound by decided cases for the purpose of securing as much certainty in the administration of the law as the subject
 F is capable of. But when the decision is not upon some rule or principle of law, but upon the meaning of words which differ so much in one instrument from those in another, and when the proper construction is so varied by the peculiar circumstances of each case, it seldom happens that the words of one will are a sure guide for the construction of the words resembling them in another. Besides, the salutary rule of construction I have mentioned may have been misapplied in the particular
 G cases, and then they are no binding authority at all. When, indeed, by any course of decisions, words have acquired a particular signification, it may be presumed that the framer of the instrument uses them in the sense so acquired, and it is fitting so to construe them. But when there has been an instance or two only of the words being read in a different sense from that which they naturally bear, we cannot make any such presumption.

H There is only one case of such a construction of these words—that of *Brownsword v. Edwards* (4) (2 Ves. Sen. at p. 247)—which bears upon this question. There the testator gave his estates to trustees and their heirs in trust to receive the rents and profits and place them out at interest for the improvement of the estate till his son (for he must be so considered) should attain twenty-one, and if he should live to attain twenty-one or have issue, then to his son and the heirs of his body, but if his
 I son should happen to die before the age of twenty-one, and without issue, then in trust till his daughter should attain twenty-one, and if she should happen to die (using exactly the same words), then over. Consequently, as soon as John attained twenty-one or had issue, though he died before twenty-one, a fee tail vested in the son. He did attain twenty-one, and had that fee tail as he would have had if he had had issue. LORD HARDWICKE held that the subsequent words could by a natural construction be read as importing that if John should happen to die before twenty-one, and also should happen to die without issue, so providing for the determination of the estate tail, the estate should go by way of remainder to the daughter. The

observation sometimes made on this case, that LORD HARDWICKE read "or" for "and," is not correct, and this is pointed out and explained in *Mortimer v. Hartley* (6) (6 Exch. at p. 60). If he had done so, and read "or" for "and," he would have deprived the son's issue of the estate in case the son had died before twenty-one with issue, which would have been a strong objection to that construction, for in construing wills, the events which might possibly have happened, as well as those which did happen, are to be considered. The decision, however, is not open to this objection, for this, as has been already stated, is obviated by putting a somewhat forced construction on the words which LORD HARDWICKE adopted.

Upon fully considering that case, I think it may be well doubted whether the true construction of the words was not, after all, the natural and ordinary one, viz., that if the son should attain twenty-one or have issue, then he should have an estate tail, but that, on the other hand, if he died under twenty-one and had no issue, the estate should go on to the daughter. This is the simple and natural meaning of the words. There was nothing in the least unreasonable in it, and it was unnecessary to recur to the very unusual construction adopted by LORD HARDWICKE. Be this as it may, this case has not been followed by a uniform course of other decisions so as to make it binding upon us in the construction of similar words in this will, upon the principle above explained. On the contrary, it is directly infringed upon by *Doe d. Usher v. Jessop* (5), where the natural and ordinary sense of the same words was adopted. In that case LORD ELLENBOROUGH expressed himself in very strong terms in favour of the rule of construction above stated. He said (12 East, at p. 293):

"Is there not a rule of common sense as strong as any case can be, that words in a will are to be construed according to their natural sense, unless some obvious inconvenience or incongruity would result from so construing them."

The criticisms which have been made on that case—that the other side was not heard, that it was not argued at full length, and that the short observations of LE BLANC and BAYLEY, JJ., were not correct—do not appear to me to detract from its authority. The opinions did not affect the principle of the decision, nor did it require a long argument to enforce and apply the sound rule of construction so forcibly expressed by LORD ELLENBOROUGH. I think that there is no rule more useful and important in the construction of written instruments than this, and that it is by much the wiser course to abide by it.

The result is, that, the event not having happened of Robert Watson having died under twenty-one and without issue, none of the remainders expectant upon his estate has taken effect, and the ultimate remainder is undisposed of by the first part of his will. Upon the second part of the case I concur with my noble and learned friend on the Woolsack in the opinion he has expressed as to the Hemlington estate being undevised by the last clause. I am inclined to think that not only the Hemlington estate, but also the Stainton estate was undevised, but as the part of the decree made below relating to Stainton is not appealed against, that part becomes immaterial. I, therefore, concur in the opinion of my noble and learned friend on the Woolsack, that this appeal ought to be dismissed.

Appcal dismissed.

ESPOSITO v. BOWDEN

[COURT OF EXCHEQUER CHAMBER (Jervis, C.J., Sir Frederic Pollock, C.B., Cresswell, Crowder and Willes, JJ., and Alderson, B.), May 1, 29, 1857]

[Reported 7 E. & B. 763; 8 State Tr.N.S. 807; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 3 Jur.N.S. 1209; 5 W.R. 732; 119 E.R. 1430]

Contract—Frustration—Declaration of war—Charterparty—Loading of cargo rendered illegal—Parties absolved from performance.

A declaration of war between Great Britain and a foreign country renders illegal any commercial intercourse between a British subject and an inhabitant of the enemy country. A contract, e.g., a charterparty, involving trading by a British subject with the enemy, which is made before, but is unexecuted when, war is declared is thereupon dissolved and both parties are absolved from its further performance.

Notes. Followed: *Barrick v. Buba* (1857), 2 C.B.N.S. 563. Considered: *Danube and Black Sea Railway and Kustendjie Harbour Co. v. Xenos*, *Xenos v. Danube and Black Sea Railway and Kustendjie Harbour Co.* (1862), 31 L.J.C.P. 284; *The Teutonia* (1871), L.R. 3 A. & E. 394; *Zink Corp'n., Ltd. v. Aron Hirsch und Sohn*, [1914-15] All E.R.Rep. 487; *Horlock v. Beal*, [1916-17] All E.R.Rep. 81. Applied: *Karberg v. Blythe, Green, Jourdain & Co.*, *Schneider v. Burgett and Newsam*, [1916] 1 K.B. 495. Distinguished: *Halsey v. Lowenfield*, [1916] 1 K.B. 143. Considered and Distinguished: *Clapham Steamship Co. v. Handels-en Transport Maatschappij Vulcaan of Rotterdam*, [1917] 2 K.B. 639. Considered: *Metropolitan Water Board v. Dick, Kerr & Co.*, [1917] 2 K.B. 1; *Orconera Iron Ore Co. v. Fried, Krupp Akt.* (1917), 86 L.J.Ch. 613. Applied: *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.*, [1918-19] All E.R.Rep. 127. Considered: *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331. Distinguished: *Sargant v. Paterson* (1923), 129 L.T. 47. Considered: *Aktieselskabet Reidar v. Arcos, Ltd.*, [1926] All E.R.Rep. 140. Referred to: *Santos v. Illidge* (1859), 6 C.B.N.S. 841; *Tamvaco v. Lucas* (1861), 1 B. & S. 185; *Janson v. Driefontein Consolidated Mines, Ltd.*, [1900-3] All E.R.Rep. 426; *Jager v. Tolme and Runge* (1915), 31 T.L.R. 381; *Porter v. Freudenberg*, *Kreglinger v. Samuel and Rosenfeld*, *Re Merten's Patents*, [1914-15] All E.R.Rep. 918; *British and Foreign Marine Insurance Co. v. Samuel Sanday & Co.*, [1916-17] All E.R.Rep. 134; *Halsey v. Lowenfield*, [1916-17] All E.R.Rep. 1044; *Daimler Co., Ltd. v. Continental Tyre and Rubber Co. (Great Britain), Ltd.*, [1916-17] All E.R.Rep. 191; *Leiston Gas Co. v. Leiston-cum-Size-well U.D.C.*, [1916] 1 K.B. 912; *Millar v. Taylor*, [1916] 1 K.B. 402; *Hugh Stevenson & Sons, Ltd. v. Akt. für Cartonnagen-Industrie*, [1917] 1 K.B. 842; *Tingley v. Müller*, [1916-17] All E.R.Rep. 470; *Blackburn Bobbin Co. v. Allen* (1918), 87 L.J.K.B. 1085; *Re Badische Co., Bayer Co., etc.*, [1921] 2 Ch. 331; *Jebara v. Ottoman Bank*, [1927] 2 K.B. 254; *Sovracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij*, [1943] 1 All E.R. 76; *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] 1 All E.R. 36; *Arab Bank, Ltd. v. Barclays Bank (D.C. & O.)*, [1953] 2 All E.R. 263.

As to the doctrine of frustration, see 8 HALSBURY'S LAWS (3rd Edn.) 185-194; and for cases see 12 DIGEST (Repl.) 436 et seq.

Cases referred to:

- (1) *Bell v. Gilson* (1798), 1 Bos. & P. 345; 126 E.R. 942; 2 Digest (Repl.) 256, 556.
- (2) *Potts v. Bell* (1800), 8 Term Rep. 548; 101 E.R. 1540; 2 Digest (Repl.) 256, 562.
- (3) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest (Repl.) 276, 639.
- (4) *Gist v. Mason* (1786), 1 Term Rep. 88; 99 E.R. 987; 12 Digest (Repl.) 324, 2498.

- (5) *Furtado v. Rodgers* (1802), 3 Bos. & P. 191; 127 E.R. 105; 2 Digest (Repl.) 254, 550. A
- (6) *Clementson (Clementson) v. Blessig* (1855), 11 Exch. 135; 25 L.T.O.S. 186; 3 W.R. 510; 156 E.R. 775; 2 Digest (Repl.) 257, 568.
- (7) *Barker v. Hodgson* (1814), 3 M. & S. 267; 105 E.R. 612; 12 Digest (Repl.) 439, 3347.
- (8) *Atkinson v. Ritchie* (1809), 10 East, 530; 103 E.R. 877; 41 Digest 464, 2955. B
- (9) *Griswold v. Waddington*, 15 Johnson, 57; on appeal 16 Johnson, 438.
- (10) *The St. Philip* (1747), cited in 8 Term Rep. at p. 556.
- (11) *The St. Lawrence*, 1 Gallison (U.S.), 467.
- (12) *The Joseph*, 1 Gallison (U.S.), 545.
- (13) *The Juffrow Catharina* (1804), 5 Ch. Rob. 140; 2 Digest (Repl.) 277, 643.
- (14) *The Madonna delle Gracie* (1802), 4 Ch. Rob. 195; 2 Digest (Repl.) 256, 560. C
- (15) *Reid v. Hoskins* (1855), 4 E. & B. 979; 24 L.J.Q.B. 315; 1 Jur.N.S. 732; subsequent proceedings (1855), 5 E. & B. 729; 25 L.J.Q.B. 55; 26 L.T.O.S. 149; 2 Jur.N.S. 135; 4 W.R. 95; 3 C.L.R. 1174; 119 E.R. 653; affirmed (1856), 6 E. & B. 953; 26 L.J.Q.B. 5; 28 L.T.O.S. 145; 3 Jur.N.S. 238; 5 W.R. 45; 119 E.R. 1119, Ex. Ch.; 12 Digest (Repl.) 440, 3351.
- (16) *Avery v. Bowden* (1855), 5 E. & B. 714; 25 L.J.Q.B. 49; 1 Jur.N.S. 1167; 4 W.R. 93; affirmed (1856), 6 E. & B. 953, 962; 26 L.J.Q.B. 3; 28 L.T.O.S. 145; 3 Jur.N.S. 238; 5 W.R. 45; 119 E.R. 1119, 1122, Ex. Ch.; 12 Digest (Repl.) 381, 2978. D
- (17) *The Bernon* (1798), 1 Ch. Rob. 102; 165 E.R. 112; 37 Digest (Repl.) 467, 162.
- (18) *O'Mealey v. Wilson* (1808), 1 Camp. 482; 2 Digest (Repl.) 218, 311.
- (19) *Touteng v. Hubbard* (1802), 3 Bos. & P. 291; 127 E.R. 161; 41 Digest 647, 4788. E

Also referred to in argument :

Willison v. Patteson (1817), 7 Taunt. 439; 1 Moore, C.P. 133; 129 E.R. 176; 12 Digest (Repl.) 275, 2109.

The Rapid, 8 Cranch (Sup. Ct. U.S.), 155.

Holland v. Hall (1817), 1 B. & Ald. 53; 106 E.R. 20; 12 Digest (Repl.) 313, 2412. F

Appeal from a decision of the Court of Queen's Bench in an action brought by the owner of the ship *Maria Christina* for breach of a charterparty by which it was agreed between him and the defendant as charterer that the ship should sail to Odessa and there load a cargo of grain for carriage to Falmouth.

The charterparty stipulated, among other things, that thirty-five running days were to be allowed the charterer for loading and unloading, to commence at the port of loading on the ship being ready to load, laying days at port of discharge to commence the day after her arrival and report at Custom House, and being ready to unload; and for demurrage over and above the laying days at the rate of £4 per day. The shipowner pleaded that he was ready and willing to perform the charterparty, but that the charterer made default in loading the agreed cargo, detained the ship on demurrage at Odessa for ten days over and above the laying days mentioned in the charterparty, and refused to pay the sum of £4 per day due and payable for demurrage. By his defence the charterer said that after the making of the charterparty, and before the ship arrived at Odessa and he had purchased any cargo to be loaded in her, namely, on Mar. 29, 1854, Her Majesty the Queen declared war against the Emperor of Russia, and from that time war existed between the Queen and the Emperor and Odessa was a hostile port in the possession of the Queen's enemies, so that it became impossible for him to perform his agreement and fulfil the terms of the charterparty without trading with the Queen's enemies, and as a result the charterparty was wholly rescinded. G H I

When the case came before the Court of Queen's Bench the court held that the charterer's plea was no answer to the action, because it was possible, and even probable, that a cargo might have been furnished and loaded at Odessa by the charterer's factors without illegally trading with the subjects of Russia, and that,

A supposing the plea to mean that a cargo had not been obtained before the arrival of the ship and could not afterwards be procured without purchasing from Russian subjects, still it did not result in a dissolution of the contract, as the purchase of a cargo before the arrival of the ship was a mode of dealing under the contract open and probable. Therefore, the charterer, having by his own choice disabled himself from performing his contract, could not set up his omission to procure a cargo before the ship's arrival as an excuse for the alleged breach of the charterparty.

B The charterer appealed.

Mellish (W. H. Watson with him) for the charterer.

Manisty (Baylis with him) for the shipowner.

Cur. adv. vult.

C May 29, 1857. **WILLES, J.**, read the following judgment of the court.—This case was argued before our lamented colleagues, JERVIS, C.J., and ALDERSON, B., together with SIR FREDERIC POLLOCK, C.B., CRESSWELL, J., CROWDER, J., and myself. Upon the argument all the members of the court were unanimous as to the result of the judgment we ought to pronounce; but in consequence of the importance of the case, we took time to consider and state our reasons for that judgment.

D The principal question in the case is, in effect, whether the charterparty made before the late Russian war between an English merchant and a neutral shipowner, whereby it was agreed that the neutral vessel should proceed to Odessa, a port of Russia, and there load from the charterer's factors a complete cargo of wheat, seed or other grain, and proceed therewith to Falmouth, with usual provisions as to laying days and demurrage, was dissolved by the war between England and Russia, taken as true, for the purpose of the present discussion, to have broken out before the vessel arrived at Odessa, and to have continued up to and during the time when the loading was to have taken place, it being further alleged in the plea that from the time war was declared it became and was impossible for the charterer to perform his agreement without dealing and trading with the Queen's enemies. It is now fully established that, inasmuch as the presumed object of the war is as much

E to cripple the enemy's commerce as to capture his property, the declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal.

F Doubt was thrown upon the law on this subject by *Bell v. Gilson* (1), where BULLER and HEATH, JJ. (ROOKE, J., dissentiente) held that the insurance of goods purchased in Holland during hostilities between England and Holland, on board a neutral ship, was lawful. That case, however, was, in the year 1800, overruled (LORD KENYON being Chief Justice) by the Court of Queen's Bench in *Potts v. Bell* (2), which, together with the great case of *The Hoop* (3) (1799), before LORD STOWELL, then SIR WILLIAM SCOTT, upon the authority of which *Potts v. Bell* (2) was decided, restored and finally established the rule already mentioned—that one

G of the consequences of war is the absolute interdiction of all commercial intercourse or correspondence between the subjects of the hostile countries, except by the permission of their respective sovereigns. *The Hoop* (3) and *Potts v. Bell* (2) further established that it is illegal for a subject, in time of war, without licence, to bring from the enemy's port, even in a neutral ship, goods purchased in the enemy's country after the commencement of hostilities, although not appearing to have been

H purchased from the enemy—in effect, that trading with the inhabitants of an enemy's country is trading with the enemy.

I In *The Hoop* (3), LORD STOWELL, after laying down the rule that trading with the enemy, except under a royal licence, works the property to confiscation, and citing numerous cases in support of that rule, proceeds to say (1 Ch. Rob. at pp. 216, 217) :

"The cases which I have produced prove that the rule has been rigidly enforced where Acts of Parliament have on different occasions been made to relax the Navigation Law and other revenue Acts; where the government has authorised,

under the sanction of an Act of Parliament, a homeward trade from the enemy's possessions, but has not specifically protected the outward trade to the same, though ultimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced where strong claims, not merely of convenience but almost of necessity, excused it on behalf of the individual; that it has been enforced where cargoes have been retained before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been enforced not only against the subjects of the Crown, but likewise against its allies in the war, upon the supposition that the rule was founded on the strong and universal principle which allied States in war have a right to induce and apply mutually to each other's subjects. Indeed, it is less necessary to produce these cases, because it is expressly laid down by LORD MANSFIELD, as I understand him (see *Gist v. Mason* (4)), that such is the maritime law of England; and he who for so long a time assisted at the decisions of that court [Prize Appeals], and at that period, could hardly have been ignorant of the rule of decision on this important subject, though none of the instances which I happen to possess proves him to have been personally present at those particular judgments. What is meant by the addition 'but this does not extend to a neutral vessel,' it is extremely difficult to conjecture, because no man was more perfectly apprised that the neutral bottom gives, in no case, any sort of protection to a cargo that is otherwise liable to confiscation, and, therefore, I cannot but conclude that the words of that great person must have been received with some slight degree of misapprehension."

The force of a declaration of war has been equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence. As an act of State done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law. It is founded upon the *jus belli*, which LORD COKE (Co. Litt. 11, b) states to be a portion of the law of England, adding "in republica maxime conservanda sunt jura belli."

This force has been attributed to it, among other cases, in *Furtado v. Rodgers* (5), where LORD ALVANLEY, C.J., said (3 Bos. & P. at p. 198):

"We are all of opinion that, on the principle of the English law, it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country, and that such a contract is as much prohibited as if it had been expressly prohibited by Act of Parliament. It is admitted that if a man contracts to do a thing which is afterwards prohibited by Act of Parliament, he is not bound by his contract. . . . And on the same principle, where hostilities commence between the country of the underwriter and the assured, the former is forbidden to fulfil his contract."

Accordingly, in that case it was held that an insurance effected in Great Britain on a French ship, though before the commencement of hostilities between Great Britain and France, did not bind the insurers to indemnify the assured against a loss by British capture in a subsequent war, although the policy contained general words of insurance against all captures and detentions of prizes without any exception of the acts of the insurer's own government. These remarks as to the force of a declaration of war furnish a complete answer to the dictum attributed to MARTIN, B., in the report of *Clementson v. Blessig* (6) (11 Exch. at p. 141), relied upon by the plaintiff. That case itself was decided upon the ground that, by the terms of the declaration of war, the performance of the contract there in question was permitted, and, therefore, it does not affect the present discussion, and we need not give any opinion upon the point there decided.

As to the mode of operation of war upon contracts of affreightment made before, but which remain unexecuted at the time war is declared, and of which it makes the granting execution unlawful or impossible, the authorities establish that the effect is to dissolve the contract and to absolve both parties from further perform-

A ance of it. Such was the opinion of LORD ELLENBOROUGH at a time when the question must necessarily have often arisen, and was well considered and understood in *Barker v. Hodgson* (7), where it was held that the prevalence of an infectious disorder at the port of loading and consequent prohibition of intercourse by the law of the port were not sufficient to excuse the charterers from loading. LORD ELLENBOROUGH, in delivering judgment, said (3 M. & S. at p. 270):

B "The question here, is, on which side the burden is to fall. If, indeed, the performance of this covenant had been rendered unlawful by the government of the country, the contract would have been dissolved on both sides; and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the nonperformance of it, and not liable to damages; but if, in consequence of the events which happen at a foreign port, C the freighter is prevented from furnishing or loading that which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages."

A similar opinion was expressed by the same eminent judge in *Atkinson v. Ritchie* (8).

D LORD TENTERDEN also, in his work on SHIPPING, in the edition by SHEE, J., states the law thus (10th Edn., p. 426):

E "Another general rule of law furnishes a dissolution of these contracts [for the carriage of goods in merchant ships] by matter extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the govern- F ment of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or hostilities should take place between the State to which the ship or cargo belongs, and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end; the merchant must unload his goods, and the owners find another employment for their ship. And probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage, although a different rule is laid down in this case by the French ordinance."

It may be added that the cases above put by LORD TENTERDEN cannot be treated as isolated propositions, but as instances of the general principle of law to which they G are prefaced.

H CHANCELLOR KENT, in his COMMENTARIES (4th Edn.), vol. 3, p. 248, after stating that the contract of affreightment may be dissolved without execution, not only by the act of the parties, but also by the act of the law, proceeds to state that, inter alia, war making performance unlawful or impossible, either before or after the commencement, dissolves the contract. The same distinguished person held, in the I court of errors in New York, that a contract of partnership with a foreigner was absolutely dissolved by the breaking out of war between the two countries: *Griswold v. Waddington* (9). Further, there is very high authority for saying that the removal of merchandise, even though acquired before the war, from the enemy's country after knowledge of the war, without a royal licence is, as a general rule, illegal. This was laid down in *The St. Philip* (10), referred to and stated by SIR JOHN NICHOLL in his admirable argument in *Potts v. Bell* (2), where the Lords Commissioners of Appeal, refused to give the claimants liberty to prove that their goods were bought before the war. The same law was laid down by STORY, J., in *The St. Lawrence* (11), and *The Joseph* (12): see also WILLARD PHILLIP's very able work on INSURANCE (3rd Edn.), vol. 1, 136, et seq. The cases before LORD STOWELL of the *Juffrow Catharina* (13), and *Madonna delle Gracie* (14), in which that great judge fastened upon peculiar circumstances to except the claimants from the operation of the general rule, tend strongly to confirm its applicability in all cases in which trade or intercourse with the enemy after knowledge of the war is involved in the shipment.

And in such cases the circumstance of a previous purchase seems, as a general rule, to be matter for the consideration of the Crown in its clemency alone. A

The law as to trading with the enemy was considered and acted upon by the Court of Queen's Bench in *Reid v. Hoskins* (15)—a case identical in its facts with the present, except that the shipowners in that case were British subjects. It was there decided that the contract was dissolved, and the parties absolved from its performance, among other reasons stated, because, without any previous default on the charterers' part, the performance had become illegal by the declaration of war, and its consequences. But it was also in that case stated in the judgment of the court to be material that the owners of the ship were British subjects, and it was said (4 E. & B. at p. 985): B

"It was, therefore, the duty of the captain of the ship, as soon as he had heard of the declaration of war, to make his escape and to seek a place of safety, instead of lingering at Odessa in the hope of obtaining a cargo, although he might safely have done so if he had not been a British subject, and the ship had been neutral property;" C

see the result of that case in the Queen's Bench, and in the Exchequer Chamber; and also *Avery v. Bowden* (16). We entirely concur in the decision of *Reid v. Hoskins* (15) and in the reasons advanced in the arguments, either of which, however, would, in our opinion, have been sufficient. The fact that it was the duty of the master in that case to leave Odessa and that he could not have received a cargo without dealing and trading with the enemy, was a sufficient ground for the decision that his owners could not recover against the charterers for not loading a cargo which he could not rightfully have received. D

But that was not the only reason stated in the judgment by which it could have been supported. The argument, which was again urged in this case—that, apart from any considerations affecting the shipowner only, the defence was valid by reason of the law also forbidding the charterer to load a cargo, and, as a consequence of that prohibition, dissolving the charterparty, and absolving both parties from further performance—remains to be considered. In order to escape the application of this latter argument, founded upon the principles above stated, it is necessary for the shipowner to establish that the plea of the charterer cannot be true in alleging the impossibility of performance without dealing and trading with them, or, in other words, that the charterer could but for some reason of his own, and notwithstanding the war, have fulfilled his contract in a lawful manner. E

We proceed to consider the argument advanced for that purpose. In the first place, it is said that the contract admitted of being fulfilled after the war broke out, by purchasing the cargo from her Majesty's subjects, or those of her allies at Odessa who may have had wheat, seed or other grain which they were willing to dispose of; it may have been contrary to the law of the enemy's country, and it is assumed that the charterers might lawfully have purchased a cargo from such persons and lawfully have shipped it when so purchased. Assuming, for argument's sake, that this conclusion is correct in point of law (which, independently of express authority, we should have doubted, inasmuch as persons inhabiting an enemy's country are *prima facie* enemies (*The Bernon* (17)), and even the Queen's subjects become absolutely enemies if they remain and trade in the enemies' country after they know of the breaking out of war: *O'Mealey v. Wilson* (18), still it should seem a harsh and unreasonable position that the charterer who, by no wrongful act or default of his own, but by the unquestionably rightful act of his Sovereign in declaring war in the exercise of her undoubted prerogative against the public enemy, should be reduced to the necessity of seeking out at his peril in an enemy's country persons who had acquired the goods before war and were possessed of them under circumstances which established a right to remove them from the enemy's country without a licence. But if it had happened, as was by no means unlikely, that there were no British or French subjects in the enemy's country having such property in their possession to sell, or if there were, that the charterer had pur- F
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A chased from one professing at the time of the sale that he was about to depart, but who afterwards remained so as to acquire the character of an alien enemy—without resorting to that supposition, it is enough to refer to the decision in *Potts v. Bell* (2) where it was expressly held that goods purchased in the enemy's country since the war, though not from native enemies, could not without a licence be lawfully shipped from an enemy's port, even in a neutral vessel.

B Moreover, it is not correct to say that the charterer, even if he could have succeeded in lawfully acquiring the goods, could have lawfully shipped them, if doing so involved dealing or trading with the enemy. It is more than likely that the cargo could not have been put on board without being passed through the enemy's Custom House, and paying export duties. The passing it through the Custom House and obtaining a Russian permit for its shipment might have been a slight case of dealing with the enemy, but still it would have been a dealing with the enemy. The payment of export duty would have been supplying him directly with the means of carrying on the war. If it were proved to be necessary in point of fact, it would constitute a good defence. The attention of the court below was not directed to this argument, which may be considered one of more practical importance, since we find it was proved at the trial at York, before PLATT, B., in this very case, that the cargo could not have been shipped without payment of export duties to the Russian government. That it is not a far-fetched supposition appears by the fact mentioned in ABBOTT ON SHIPPING, in a note by SHEE, J., 10th Edn., p. 437. This fact, which, though not directly admissible into the argument, suggests a case capable of proof under this plea, in which the charterer would, according to the principles already stated, be absolved from his contract.

E Another case may be put to illustrate the extreme hardship and injustice of enforcing a British subject into such straits as those suggested in the argument for the shipowner, namely, that of one who had chartered several neutral ships before the war, for which, after the war, he had purchased cargoes as they arrived, through himself or any other British subjects remaining in Odessa for that purpose. Whatever British subject had so remained and traded in the enemy's country would be in imminent danger of acquiring the character of an enemy. In our opinion, therefore, the first argument on behalf of the shipowner is not maintainable.

It was further argued on behalf of the shipowner that the breach of contract in question was brought about, not altogether by the war, but partly by the default of the charterer himself in not providing a cargo before the war, and keeping it until the war, and, therefore, until the arrival of the neutral vessel, then to be lawfully loaded in pursuance of the charterparty. Again, assuming, for the sake of argument, that this result would follow in point of law if the charterer had provided a cargo before the war, is it true that he has been guilty of any default? A default, to affect him with injurious consequences, ought to be either a breach of contract with the person who claims to benefit by it, or a breach of some duty imposed by law. Not buying the corn was not the former, because it was expressly stipulated by the charterer that he should lie the laying days within which to provide a ship and cargo, and no breach of that contract had been committed when the war took place; and so far from its being a wrong or default in point of duty, apart from the contract, not to have so provided a cargo, it might have been a prudent and rightful act for the charterer, anticipating the war, to abstain from trading with the inhabitants of the enemy's country and to deprive himself of his property before the war began. To impose upon the charterer the necessity of providing a cargo before the war and of keeping that cargo until the war, and afterwards until the arrival of the vessel, apart from any difficulty as to dealing with the enemy in shipping it, would be to compel one of Her Majesty's subjects to do what he has not contracted to do in order to save himself from being unable to perform his contract by reason of the possible event of a declaration of war intended to injure the Queen's enemies, not her own subjects.

As was stated in the argument, the dictum of LORD ALVANLEY in *Touteng v. Hubbard* (19), that a man cannot rely on his own default to absolve him from the

performance of his contract, seems to us to be inapplicable as it was applied by A
 him to a totally different state of facts. LORD ALVANLEY was there dealing with
 a case in which a Swedish vessel had been chartered by a British subject to pro-
 ceed to a port abroad and take in a cargo there; an embargo was laid by the
 British government upon the Swedish vessel as a hostile measure against the
 Swedes; and, by reason of the embargo, the Swedish vessel was unable to proceed
 to her destination for such a period as would, by reason of dealing in the absence B
 of excuse, have entitled her to receive the cargo at the port of lading, as contracted.
 The Swedish vessel proceeded further, nevertheless, after the embargo, but did
 not receive a cargo from the charterer; and in an action subsequently brought by
 the Swedish shipowner against the British charterer, for not loading a cargo, it
 was held that the former could not recover by reason of his default being a breach
 of contract in delaying to proceed on the outward voyage, and that he could not C
 set up the British embargo as a justification for such default. That dictum, ex-
 plained by the subsequent matter, is, therefore, inapplicable in a case where there
 has been no breach of contract and no breach of legal duty. In this case, again,
 supposing that the charterer had obtained the property before the war, and kept
 it in the enemy's country with the intention of fulfilling his contract when his
 vessel arrived, whether there were war or whether there were not, the same diffi- D
 culty as I before pointed out would arise as to its shipment without passing it
 through the enemy's custom-house, and possibly by paying export duties to the
 hostile government. It is clear that the charterer could maintain no action
 against the shipowner for refusing to take on board a cargo which the charterer
 could only load by dealing and trading with the enemy; and, on the other hand,
 neither ought the shipowner to maintain an action against the charterer for not E
 doing so. This is not an unequal law, because, if war had broken out between the
 Czar and the King of the Two Sicilies instead of Her Majesty, the vessel would,
 according to the principles stated above, have been absolved from going to Odessa,
 and might forthwith have proceeded on another voyage, and even the common
 principles of reciprocity point out, therefore, that a similar indulgence ought to be
 allowed to a merchant when, in consequence of war declared by his Sovereign, he F
 is involved in like difficulty.

Under such circumstances, in all ordinary cases, the more convenient course for
 both parties would seem to be that both should be at once absolved, so that each,
 on becoming aware of the fact of a war, the length of which cannot be foreseen,
 making the voyage or the shipment presumably illegal for an indefinite period,
 may at once be at liberty to engage in another adventure without waiting for the G
 bare possibility of the war coming to an end in sufficient time to allow of the con-
 tract being fulfilled, or some other opportunity of lawfully performing the contract
 perchance arising. The law upon this subject was doubtless made, according to the
 well-known rule, to meet cases of ordinary occurrence, and in times when to permit
 trading with the enemy, even though neutral, was the exception, not the rule.
 These considerations may explain the origin of the law, authoritatively laid down H
 in the books as to war at once working an absolute dissolution.

A distinction was suggested between the first alleged breach of contract in not
 loading the vessel, and the second breach, for demurrage. Inasmuch, however, as
 the second breach would be proved by the plaintiff showing that the vessel re-
 mained in the loading port without being loaded during the demurrage days, no
 one being there to act on the part of the charterers, we think that that breach I
 amounts to nothing more than an averment that the vessel was not loaded during
 those days, and so it stands upon the same footing as the first alleged breach for
 not loading the vessel during the laying days. We are of opinion that, for a
 British subject not domiciled in a neutral country—which the charterer cannot be
 presumed to be—to ship a cargo from an enemy's port, even in a neutral vessel,
 without licence, is an act *prima facie* and under all ordinary circumstances of deal-
 ing and trading with the enemy, and, therefore, forbidden by the law; that it lies
 on the person alleging it to be legal to establish the fact; and that, in the absence

A of proof that it would be legal, neither a British subject nor an alien friend can find any action upon the fact of its not having been performed. The Sovereign of this country has the right to proclaim war, with all its consequences, enforcing or mitigating them, either generally or in particular instances, as may be thought best by the government. One of those consequences not removed or dispensed with by any treaty, order in council or licence, or by any special circumstances of necessity in the particular case, is that trade and dealing with the enemy, unless expressly permitted, are forbidden. The plea alleges that the contract could not, from the time of the declaration, have been fulfilled without such dealing and trade. That, as we have already shown upon grounds not considered in the judgment of the Court of Queen's Bench, may be true. If it may be, then, inasmuch as the law justifies what it commands, and inasmuch as it effects that purpose by dissolving

C the contract which, presumably, cannot within any reasonable time be executed without dealing and trading with the enemy, the plea founded upon that state of the law is sufficient. We are, therefore, of opinion that the judgment of the court below ought to be reversed, and judgment given for the charterer.

Appeal allowed.

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LASSENCE v. TIERNEY

[LORD CHANCELLOR'S COURT (Lord Cottenham, L.C.), November 28, December 6, 7, 10, 11, 1849]

[Reported 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557;
14 Jur. 182; 41 E.R. 1379]

F

Trust—Rule in Lassence v. Tierney—Question of construction—Regard to be paid to whole of trust instrument.

If a testator leaves a legacy absolutely, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, on the failure of those objects the absolute gift prevails, but, if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate. In the latter case the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee. In every case, therefore, the question must be one of construction, and on construction the intention that the gift should be absolute as between the legatee and the estate is to be collected from the whole of the will, and not from there being words which, standing alone, would constitute an absolute gift.

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I **Notes.** Applied: *Surcome v. Pinniger* (1853), 3 De G.M. & G. 571. Considered: *Barrow v. Barrow* (1858), 4 K. & J. 409; *Salmon v. Salmon* (1860), 29 Beav. 27. Distinguished: *Whiteway v. Fisher* (1861), 9 W.R. 433. Considered: *Kellett v. Kellett* (1868), L.R. 3 H.L. 160. Followed: *Re Richards, Williams v. Gorvin* (1883), 50 L.T. 22. Considered: *Re Houghton, Houghton v. Brown* (1884), 53 L.J.Ch. 1018; *Cooke v. Cooke* (1887), 38 Ch.D. 202. Applied: *Re Boyd, Nield v. Boyd* (1890), 63 L.T. 92. Considered: *Re Wilcock, Kay v. Dewhirst*, [1898] 1 Ch. 95; *Spencer v. Registrar of Titles*, [1906] A.C. 503. Applied: *Re Currie's Settlement, Re Rooper, Rooper v. Williams*, [1908–10] All E.R.Rep. 274. Considered:

Re Walter, Turner v. Walter (1912), 56 Sol. Jo. 632. Applied: *Re Connell's Settlement*, *Re Bennett's Trusts*, *Fair v. Connell*, [1915] 1 Ch. 867; *Re Harrison, Hunter v. Bush*, [1918-19] All E.R.Rep. 785; *Moryoseph v. Moryoseph*, [1920] All E.R.Rep. 216. Distinguished: *Re Payne, Taylor v. Payne*, [1927] All E.R.Rep. 223. Applied: *Re Marshall, Graham v. Marshall*, [1928] All E.R.Rep. 694; *A.-G. v. Lloyds Bank, Ltd.*, [1935] All E.R.Rep. 518. Distinguished: *Re Cohen's Will Trusts*, *Cullen v. Westminster Bank, Ltd.*, [1936] 1 All E.R. 103. Considered: *Re Coleman, Public Trustee v. Coleman*, [1936] Ch. 528. Applied: *Re Gatti's Voluntary Settlement Trusts*, *De Ville v. Gatti*, [1936] 2 All E.R. 1489; *Fyfe v. Irwin*, [1939] 3 All E.R. 271; *Re Litt's Will Trusts*, *Parry v. Cooper*, [1946] 1 All E.R. 314. Considered: *Re Walker's Will Trusts*, *Stuart v. Pitman*, [1949] Ch. 91. Applied: *Re Bland-Sutton's Will Trust*, *National Provincial Bank v. Middlesex Hospital*, [1951] 1 All E.R. 494; *Re Burton's Settlement Trust*, *Public Trustee v. Montefiore*, [1955] 1 All E.R. 433. Considered: *Re Atkinson's Will Trusts*, *Prescott v. Child*, [1956] 3 All E.R. 738; *Re Macandrew's Will Trusts*, *Stephens v. Barclay's Bank, Ltd.*, [1963] 2 All E.R. 919. Referred to: *Field v. Moore*, *Field v. Brown* (1855), 7 De G.M. & G. 691; *Warden v. Jones* (1857), 6 W.R. 180; *Re Skinner's Trusts* (1860), 1 John. & H. 102; *Goldicutt v. Townsend* (1860), 28 Beav. 445; *Caton v. Caton* (1866), 1 Ch. App. 137; *Churchill v. Churchill* (1867), L.R. 5 Eq. 44; *Savage v. Tyers* (1872), 7 Ch. App. 356; *McDonald v. McDonald* (1875), L.R. 2 Sc. & Div. 482; *Cahill v. Cahill* (1883), 8 Ch. App. 420; *Maddison v. Alderson*, [1881-5] All E.R.Rep. 742; *McManus v. Cooke* (1887), 35 Ch.D. 681; *Re Crawshaw, Crawshaw v. Crawshaw*, [1886-90] All E.R.Rep. 724; *Johnstone v. Mappin* (1891), 60 L.J.Ch. 241; *Sharman v. Sharman* (1892), 67 L.T. 834; *Re Pinhorne, Moreton v. Hughes* (1894), 42 W.R. 438; *Re Whitehead, Peacock v. Lucas*, [1891-4] All E.R.Rep. 636; *Re Holland, Glegg v. Holland*, [1902] 2 Ch. 360; *Re Witty, Wright v. Robinson*, [1911-13] All E.R.Rep. 1009; *Re Jones, Last v. Dobson*, [1915] 1 Ch. 246; *Re Monk, Giffen v. Wedd*, [1927] All E.R.Rep. 157; *Re Hodson's Settlement*, *Brookes v. A.-G.*, [1938] 3 All E.R. 341; *Greenwood v. Greenwood*, [1939] 3 All E.R. 150; *Re Bickerton's Settlement*, *Shaw v. Bickerton*, [1942] 1 All E.R. 217; *Re May, Cockerton v. Jones*, [1943] 2 All E.R. 604; *Re Bennett-Stanford Settlement Trusts*, *Atwood v. Bennett-Stanford*, [1947] 1 All E.R. 888; *Re Mill's Declaration of Trust*, *Midland Bank Executor and Trustee Co. v. Mill*, [1950] 2 All E.R. 292; *Re Rogers' Settlement*, *Arnott v. Rogers*, [1951] 1 All E.R. 236; *Re Rooke's Will Trusts*, *Taylor v. Rooke*, [1953] 2 All E.R. 110; *Re Hubbard's Will Trusts*, *Marston v. Angier*, [1962] 2 All E.R. 917.

As to the rule in *Lassence v. Tierney*, see 39 HALSBURY'S LAWS (3rd Edn.) 979; and for cases see 44 DIGEST 554-556.

Cases referred to:

- (1) *Scawin v. Watson* (1847), 10 Beav. 200; 16 L.J.Ch. 404; 11 Jur. 576; 50 E.R. 559, L.C.; 44 Digest 555, 3720.
- (2) *Gompertz v. Gompertz* (1845), 14 L.J.Ch. 442; affirmed (1846), 2 Ph. 107; 16 L.J.Ch. 23; 10 Jur. 937; 41 E.R. 882, L.C.; 44 Digest 555, 3718.
- (3) *Campbell v. Brownrigg* (1843), 1 Ph. 301; 13 L.J.Ch. 7; 41 E.R. 646, L.C.; 44 Digest 554, 3713.
- (4) *Winckworth v. Winckworth* (1845), 8 Beav. 576; 5 L.T.O.S. 536; 50 E.R. 227; sub nom. *Winkworth v. Winkworth*, 9 Jur. 793; 44 Digest 917, 7754.
- (5) *Hulme v. Hulme* (1839), 9 Sim. 644; 59 E.R. 507; 44 Digest 554, 3711.
- (6) *Mayer v. Townsend* (1841), 3 Beav. 443; 10 L.J.Ch. 216; 5 Jur. 91; 49 E.R. 174; 44 Digest 554, 3712.
- (7) *Whittell v. Dudin* (1820), 2 Jac. & W. 279; 37 E.R. 634; 44 Digest 920, 7772a.
- (8) *Carver v. Bowles* (1831), 2 Russ. & M. 301; 9 L.J.O.S.Ch. 91; 39 E.R. 409; 37 Digest (Repl.) 129, 564.
- (9) *Kampf v. Jones* (1837), 2 Keen, 756; Coop. Pr. Cas. 13; 7 L.J.Ch. 63; 1 Jur. 814; 48 E.R. 821; 37 Digest (Repl.) 118, 463.

A (10) *Leake v. Robinson* (1817), 2 Mer. 363; 35 E.R. 979; 37 Digest (Repl.) 94, 299.

Also referred to in argument:

Arnold v. Congreve (1830), 1 Russ. & M. 209; Taml. 347; 8 L.J.O.S.Ch. 88; 39 E.R. 80; 44 Digest 767, 6256.

B *Saumarez v. Saumarez, De Havilland v. Saumarez* (1839), 4 My. & Cr. 331; 41 E.R. 129, L.C.; 44 Digest 755, 6141.

Ring v. Hardwick (1840), 2 Beav. 352; 4 Jur. 242; 48 E.R. 1217; 44 Digest 918, 7763.

Leeming v. Sherratt (1842), 2 Hare, 14; 11 L.J.Ch. 423; 6 Jur. 663; 67 E.R. 6; 44 Digest 589, 4121.

C *Ridgway v. Woodhouse* (1844), 7 Beav. 457; 3 L.T.O.S. 19; 49 E.R. 1134; 44 Digest 462, 2826.

Saunders v. Vautier (1841), Cr. & Ph. 240; 10 L.J.Ch. 354; 41 E.R. 482, L.C.; 44 Digest 444, 2691.

Appeal from the decree of WIGRAM, V.-C., in the original and supplemental causes made on further directions, by which it was decided that, in the events which had happened, the real and personal estates of the testator in the cause, Matthew Kannan, after the life interest of Catherine Lassence, were undisposed of; that C. Lassence's interest, as heiress-at-law in the undisposed of real estate, did not pass by her will, but descended to her heir-at-law; and that a sum of £420 consols, produced by the sale to a railway company of part of the testator's real estate, was to be deemed real estate. From this decision the plaintiff and defendant in the same interest appealed.

E By his will dated June 14, 1821, the testator, Matthew Kannan, who died in 1823, after directing the payment of all his just debts, funeral expenses, and the charges of proving his will, gave his residuary estate and effects to his wife and two other persons as trustees for certain purposes, and then, after directing the payment of several pecuniary and specific legacies, gave, devised, and bequeathed as follows:

F "I give and bequeath unto my only daughter, Catherine Read, wife of Joseph Read, the residue and remainder of my property wheresoever and whatsoever to receive the interest thereof during her lifetime both in funds, houses and the interest of money arising from any other source . . . without being subject to any control or restraint of her present or any future husband, for her sole use and purpose, her receipts alone to be taken as legal for the money she receives.

G It is also my will that she shall not have any power to dispose of any part of my property during her life unless for the purpose of transferring it from one stock to another or of disposing or selling any houses or moneys in the Funds for the sole purpose of investing it in some other concern or purchase which may be deemed more eligible than where it is already placed out, but this must be done with the entire consent of the executors and executrix. It is also my will that

H the whole property shall be divided between her children after her decease, share and share alike, in the following manner—viz. that the males shall have one half of the property bequeathed to them when they arrive at the age of twenty-three years and to receive the interest of the other or remaining half of their shares during life and to equally divide it among their children after their decease or to the next relation or to their husbands so long as they live, if they should have no issue. I also wish the property or share coming to the females

I to remain invested where it was placed, if secure, or if not deemed so to be placed in any other way the executors may deem proper without incurring risk of its being lost or misplaced and to receive the interest only during their lives without being subject to any restraint or control from their husbands. And if it can be proved that they shall even attempt to dispose or sell their life interest in it it is my will that the property do go over to their brothers and that they shall be entirely deprived of it; after their decease their part of the property to be divided, share and share alike, between their children, and if they have no



issue among their husbands during their lifetime, then go to the nearest relation on their mother's side. It shall and may be lawful to and for the said trustees or the survivor or survivors of them or the executors or administrators of such survivors in case of the death of any of them or his or their desire to be discharged from the trusts reposed in them before the accomplishment of the said several trusts to nominate one trustee or trustees for the purposes aforesaid to keep up the number of the said trustees with like power to them and such new trustee or trustees in case of their death or wish to be discharged from the said trusts to keep up the same number of trustees, and each trustee to be only accountable for his own act and deed."

Catherine Read had four children, three of whom died in the lifetime of her husband, Joseph Read, infants and unmarried, and the fourth of whom died shortly after him, also an infant and unmarried. Joseph Read died in April, 1833, having, by his will, given all his property to his wife for her own use and benefit, and appointed her his sole executrix. On Aug. 12, 1834, Catherine Read became the wife of J. G. Lassence. There were no children of this marriage, and previously to filing the bill next hereinafter mentioned, Catherine Lassence took out administration to her four children by Joseph Read, all then deceased. On Jan. 20, 1842, Catherine Lassence, by her next friend, filed her bill against the executors of Matthew Kannan, stating, among other things, that upon the occasion of her marriage with J. G. Lassence, and before the solemnization thereof, it had been agreed between her and J. G. Lassence that he should invest a sum of £3,000, part of her property, in the purchase of a governmental annuity for his life, in his own name and for his own use and benefit, and that she should be entitled to hold and enjoy all the residue of her property, whether derived from the testator, Matthew Kannan, or from her former husband, or in any other manner, for her sole and separate use, and that, if necessary, a proper settlement thereof should be executed by them respectively; and further stating, that, in pursuance of such agreement, £3,000, part of the property of Catherine Lassence, had been laid out and invested by Catherine Lassence in the purchase of a government life annuity, in the name and for the benefit of J. G. Lassence, and that he had received and enjoyed the same accordingly ever since their marriage, but that no settlement had been made upon Catherine Lassence of the other part of her property, and that in the events which had happened, and in case she should not have any other issue, she would be entitled in remainder, expectant upon the life estate given to her by the will of the testator, Matthew Kannan, to the corpus of his real and personal estate; and that she, Catherine Lassence, was then in the fiftieth year of her age, and, according to the course of nature, was not likely to have any other child; and that, under such circumstances, she was then entitled to have the corpus of the personal estate transferred to her, and praying that the trusts of the will of the testator, Matthew Kannan, might be declared, and so far as the same remained to be performed, that such trusts might be carried into execution by and under the direction and decree of the court; that all proper and necessary accounts might be taken, and directions given for ascertaining of what the clear residue of the testator's estate then consisted, and that the rights of the plaintiff therein might be declared.

On Mar. 7, 1843, the cause came on before the Master of the Rolls, who made an order referring it to the Master to make the usual inquiries relative to the family of the testator, and further ordered, among other things, that the defendants should transfer into court, to an account to be entitled "the account of the produce of the testator's real estate the sum of £420 15s. 2d. Bank £3 per cent. annuities, which had arisen from the sale to the Blackwall Rail. Co., as hereinbefore stated." On Oct. 21, 1843, after the filing of this bill, an indenture was made between J. G. Lassence, of the first part, James Fawcett, of the second part, and Catherine Lassence, of the third part, purporting to be a settlement made in pursuance of the parol agreement entered into between J. G. Lassence and Catherine Lassence, previously to their marriage, as before mentioned. By this indenture, which was

A signed by Catherine Lassence and the other parties, J. G. Lassence assigned to J. Fawcett all the interest of Catherine Lassence in the estate of Matthew Kannan upon trust among other things to pay, transfer, and assign the same unto such person or persons and in such manner and form and to and for such uses intents and purposes as she the said Catherine Lassence by any instrument in writing under her hand and seal attested by two or more credible witnesses or by her last will

B and testament should direct and appoint; and in default of such direction or appointment unto such person or persons as should be entitled thereto (if the said Catherine Lassence had not intermarried with J. G. Lassence) according to the Statute of Distributions.

This indenture was never acknowledged by Catherine Lassence as required by the Fines and Recoveries Act, 1833. She died on May 14, 1847, without having had

C any child by J. G. Lassence, and having, by her will dated May 12, 1847, made in pursuance of the power given her by the indenture of Oct. 21, 1843, given the residue of her property unto J. G. Lassence and James Fawcett in trust for J. G. Lassence, S. Read, and R. Read, in equal thirds, and appointed J. G. Lassence and J. Fawcett, her executors. On July 20, 1847, J. G. Lassence and James Fawcett filed their bill of revivor and supplement against the surviving trustee and executor

D of the testator, Matthew Kannan, the heir-at-law of Catherine Lassence, and other parties, including S. Read and R. Read, stating the several facts above mentioned, and that they had procured administration de bonis non to the deceased children of Joseph Read, and praying a revival of the original suit, and that the agreement entered into between J. G. Lassence and Catherine Lassence previously to their marriage might be decreed to be carried into effect so far as it remained to be

E carried into effect, under the direction of the court, and for that purpose that the heir-at-law of Catherine Lassence might be decreed to convey all his estate and interest in her real estates to the aforesaid appointees, or as they should direct; and that (if necessary) the want of an acknowledgment of the indenture of Oct. 21, 1843, by Catherine Lassence, might be supplied by the court, in favour of her appointees, and, if necessary for that purpose, that the will of Catherine Lassence

F might be established and declared to be a good execution of the power given to her in and by the settlement of Oct. 21, 1843. The suit having been revised, the Master, on Mar. 26, 1849, made his general report, finding the various classes of relations of the testator Matthew Kannan and his family.

Rolt and F. S. Williams for the appellants.

G *Sir John Romilly (Solicitor-General)* and *William James* for the heir-at-law of C. Lassence.

J. Parker and Bailey for parties claiming the personal estate of the testator, Kannan.

Goldfinch for the trustees.

Cur. adv. vult.

H Dec. 10, 1849. **LORD COTTENHAM, L.C.**, read the following judgment.—There is no doubt as to the rule upon which the principal question in this case—the title to the personalty—must be decided. In this and the many similar cases which have occurred, the only question is the application of the rule to the facts.

I If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, on the failure of such objects the absolute gift prevails, but, if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate. In the latter case the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee. In every case, therefore, the question must be one of construction, and except for the purposes of such construction, very little assistance can be derived from former

decisions. It is, however, obvious that the intention that the gift should be absolute as between the legatee and the estate is, as in all cases of construction, to be collected from the whole of the will, and not from there being words which, standing alone, would constitute an absolute gift. A

In *Scawin v. Watson* (1) there were words of absolute gift of the £1,000, but LORD LANGDALE, M.R., considered the whole direction to amount to a gift of the £1,000 for the benefit of the daughter to pay her the interest for life, with remainder to her children, and, upon appeal, I concurred in this opinion, and affirmed his lordship's order. In *Gompertz v. Gompertz* (2) there were words which, standing alone, would have amounted to an absolute gift, but special provisions followed, which failing, SHADWELL, V.-C., held that the fund was undisposed of, and upon appeal I affirmed that decision, stating that in the cases cited there was a gift and then a direction as to the manner in which the legacy was to be applied for the benefit of the legatee, not a qualification or diminution of the original gift, but merely a direction as to the mode in which it was to be dealt with and enjoyed in a certain case. Upon again examining the earlier cases, I adhere to this description of them. In *Campbell v. Brownrigg* (3) there was a direct gift of the 50,000 sicca rupees, to be employed for the use of the legatee in the following manner. That manner of employment having failed, LORD LYNDEHURST, reversing the decision of SHADWELL, V.-C., held that the legatee's title was absolute, saying that to the extent prescribed the use was controlled, but no further. The other cases cited for the appellant, *Winckworth v. Winckworth* (4), *Hulme v. Hulme* (5), *Mayer v. Townsend* (6), *Whittell v. Dudin* (7) (in which case SIR THOMAS PLUMER, M.R., very clearly expounds the rule) proceeded upon the same distinction. *Carver v. Bowles* (8) and *Kampf v. Jones* (9), which was founded upon it, were cases of the execution of powers in which there were absolute appointments within the powers and attempts to modify the enjoyment beyond the powers, and it was held that the absolute appointments were to prevail. B C D E

Looking, therefore, at this will for the purpose of considering whether the testator intended an absolute gift with directions as to the mode in which the property so given should be enjoyed by the legatee, or that the gift should only take effect in the several cases and for the several purposes specified, it appears to me sufficiently clear that the latter was his intention. The will itself, although extremely inaccurately worded, and, therefore, creating a difficulty in ascertaining with any great certainty what in particular passages was the real intention of the testator, when carefully examined, leaves no doubt of what his intention was. In the first place, he appoints his wife and two other persons executors and trustees, and gives the property to them. There were certain specific purposes to be answered, annuities and debts to be paid, and other directions to be followed; then he disposes of the residue, and, having appointed three persons executors and those same three persons trustees for the earlier purposes of his will, he deals with that residue in these terms: F G

"I give and bequeath to my only daughter, Catherine Read, wife of Joseph Read, the residue and remainder of my property whatsoever and where-soever . . ." H

On the part of the appellants it is desired that it should be read as if this was an end of the gift, and in that case, no doubt, it would be an absolute gift, capable of being controlled, perhaps, by other parts of the will, but still in terms an absolute gift. It appears, however, to me quite clear that this is not a gift of the beneficial interest in the property, but a gift to the legatee for certain purposes, which are afterwards prescribed. If there was any doubt about that, the words that follow, "to receive," would tend to remove it. A further proof is afforded by the provision under which the legatee has the power of transferring or disposing of the principal of the funds, which she may do only for the purpose of changing from one security to another; and in the exercise of that discretion she is to call in aid the opinion of the other executors. I

A It is a gift to her, therefore, of the residue, but it is a gift of the residue in trust, and the trusts are afterwards declared. If the words, instead of being "to receive," had been "in trust," there could have been no question raised, and the first point that occurs is whether it is not sufficiently evident on the face of the will that, the primary object being answered of paying debts and legacies, the gift to her was not in trust to carry the further purposes of the will into effect? The gift is to her
B to receive the interest during her lifetime. If the words had been "in trust to retain her interest during her lifetime," there would have been an end of the question. She is, however,

"to receive the interest during her lifetime both in funds houses and the interest of moneys arising from any other source . . . without being subject to any control or restraint."

C Then come those provisions which were obviously intended to protect her against the marital authority in the event of her having a husband, which is followed by the prohibition against selling.

Having thus directed her to retain the interest for life, the testator says :

D "It is also my will that the whole property shall be divided between her children after her decease, share and share alike."

Here, again, the appellants would stop and say there is an absolute gift to the children, but that is stopping in the middle of a sentence, and in ascertaining the intention of the testator, words cannot be struck out which are so immediately connected with the gift as to show exactly what is meant. Here the direction is
E to divide among the children in manner following, that is to say, sons when they shall attain twenty-three. Taking that as one direction, which undoubtedly it is, because the effect of the words "in manner following" is the same as if the manner had been incorporated in the gift—it was a gift to the children of the tenant for life when they shall attain twenty-three; it is a gift to a class of persons some of whom may be born after the testator's own death, and who are not to have the gift till
F they are twenty-three, then, and not till then, and among such children, and not other children, the property is to be divided. A gift to divide property among unborn children at twenty-three, is a gift void for remoteness : *Leake v. Robinson* (10); and, consequently, it appears to me quite plain that the moiety given to the sons falls within this rule. It is the same as if none of the sons had attained twenty-three; it is, therefore, undisposed of, and goes with the residue of the property.

G It is not now in dispute that all the ulterior limitations are void, because they are not only to children's children, but to children born, not only after the death of the tenant for life, but after the death of a tenant for life not in being. On this point all parties are agreed.

Then comes a most important part of this will, as it appears to me, bearing upon the question whether there is an absolute gift to Catherine Read or only a direction
H to her to retain the income for her life. The testator contemplates there being children of his daughter, and children of those children, and, having provided for these events, he next provides for the only other event which could happen, namely, there not being children, and says, "and if they have no issue . . . then go to the nearest relation on their mother's side," thus disposing of all beneficial interest after the life estate given to the daughter. There is a gift to the daughter for life and then
I to her children; the testator also endeavours to provide for her children's children; and if there are no children, then he makes a gift over. How is this consistent with the intention that there should in any event be an absolute gift to the daughter and merely a mode of enjoyment prescribed by providing for her and her family? That he has given everything away in every possible event is totally inconsistent with such an intention.

During the argument I asked if there was any case in which such a construction had prevailed. The point can only be material when the first expressions are ambiguous, for if there is a distinct positive gift, and the intention is express, of

course nothing that afterwards follows can affect the construction of the positive gift; but where the first gift is capable of two constructions, other parts of the will are to be looked at to see what the testator's intention was, and no doubt a disposition of the whole property under all circumstances that can arise is an important consideration in putting a construction on ambiguous expressions. I have looked at every case referred to, and have endeavoured to find others, but I find no case in which the question has arisen where there has been an attempt to give away the whole interest in every possible event that the testator contemplated, nor does it seem possible that these two intentions could exist together. If they are both found in the same will, the court may have to decide which is to prevail, but, if the first is ambiguous and the other is not, the unambiguous expression must have great effect in controlling that which is ambiguous, in order, if possible, to make every part of the will coincide, and that there may not be a violation of any provision in any part of it. No case exactly like the present has arisen.

In *Kampf v. Jones* (9) the question arose on the execution of a power, and the court held that the gift to the first taker was within the power, and, therefore, good, but that the attempt there made to regulate and control the future enjoyment of the property by limiting it over to the unborn children of the first taker was beyond the power, and therefore bad, thus deciding that the appointment, when good for the benefit of the first taker, could not be controlled by that which followed which was beyond the reach of the power. It is quite true that there, as here, the court had to look to what was the intention, because if it appeared from the whole of the will that there was no intention to appoint absolutely to the first taker, undoubtedly it would operate on the question before the court. It seems that the opinion of the court was very much regulated by the fact that it was an execution of a power, and that that part of the will which ineffectually attempted to execute the power, being beyond the power, could not control an absolute and antecedent gift in the early part of the will. The argument, however, which there seemed to operate on the mind of the court was that there was an absolute, positive, and undoubted exercise of the power so as to amount to an appointment in the first instance, and that, therefore, the subsequent part of the will, if inconsistent with it, could not be considered as controlling an unquestionable gift. So, if there had been in the present case an unquestionable gift in the early part of the will, I should have attached some weight to it; but it is because the first part of the will is doubtful and ambiguous and capable of a different construction that we are to look at other parts of the will to see what construction is most consistent with the apparent intention of the testator.

Looking at this will, and without at all infringing on any one of the cases that have occurred, it appears to me that there is not in this case that absolute positive gift in the first instance which would bring it within the principle of any of the decided cases. I think, on the contrary, that the whole provision, taken together, is sufficient to show there was no intention that the original legatee should take the absolute interest, subject to any control for her own benefit as to the mode of enjoyment, but that the intention was that she should have an estate for life, and life only, and a provision for her family, which, from the mode in which it is to be carried into effect, becomes inoperative in law, and that, consequently, on her death the property becomes undisposed of, and forms part of the testator's residue.

Appeal dismissed.

SUSSEX PEERAGE CASE

[COMMITTEE FOR PRIVILEGES (the Earl of Shaftesbury, Lord Lyndhurst, L.C., Lord Brougham, Lord Denman, C.J., Lord Cottenham, Lord Langdale, M.R., and Lord Campbell), June 7, 13, 25, 28, July 9, 1844]

[Reported 11 Cl. & Fin. 85; 6 State Tr.N.S. 79; 3 L.T.O.S. 277; 8 Jur. 793; 8 E.R. 1034]

Crown—Marriage—Royal marriage—Prohibition against contracting without consent of Sovereign—Marriage celebrated abroad.

By the Royal Marriages Act, 1772, s. 1: "No descendant of the body of his late Majesty King George 2, male or female (other than the issue of princesses who have married or may hereafter marry into foreign families), shall be capable of contracting matrimony without the previous consent of His Majesty, his heirs or successors signified under the Great Seal, and declared in Council (which consent, to preserve the memory thereof, is hereby directed to be set out in the licence and register of marriage, and to be entered in the books of the Privy Council); and every marriage or matrimonial contract of any such descendant without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever." This enactment applies to a marriage celebrated abroad.

Evidence—Declaration—Marriage—Prayer-book inscribed by bride—Proof of fact of marriage.

On the hearing of a claim to a peerage the claimant sought to prove the legal marriage of his parents by putting in evidence a prayer-book containing an undated entry in his mother's handwriting stating that the prayer-book was one "by which I was married at Rome" to the claimant's father on April 4, 1793.

Held: the entry was admissible as a declaration by the claimant's mother of the fact of the marriage, but not as proof of its validity.

Evidence—Declaration—Marriage—Will of deceased person—Declaration in solemn form of marriage and legitimacy of son—Declaration made post litem motam—Inadmissibility.

The will of a deceased peer, declaring in the most solemn form his marriage and the legitimacy of his son (the claimant to the peerage), was proposed to be read as a declaration made by one of the parties, but it was rejected as being post litem motam, the date and certain expressions in it showing it to have been executed after a suit to annul the marriage of the deceased peer had been instituted by his father.

H Evidence—Declaration against pecuniary interest—Subject-matter within peculiar knowledge of declarant—Statement made in course of business—"Against interest"—Fear of prosecution for criminal offence—Declarant in extremis—Danger and fear of death and death in fact following.

The declaration of a deceased person is receivable in evidence when it was made against the proprietary or pecuniary interest of the person making it and the subject-matter of the declaration was within the peculiar knowledge of that person, or when it was made, orally or in writing, in the course of the business of the person making it. A statement made by a person who at the time he made it apprehended his being prosecuted for a criminal offence relating to the subject-matter of the statement would not render the statement admissible as being made against his interest.

A declaration by a person in extremis is admissible in evidence when there was actual danger of death, a full apprehension of death, and death in fact followed.

Evidence—Foreign law—Proof by expert witness—Right of witness to refer to books and documents.

A

What is foreign law is a question of fact provable by a witness having knowledge of the law in question. The witness can refer to books and documents which, he states, correctly set out the foreign law to refresh his memory and assist him in stating what the law is.

Statute—Construction—According to intent of Parliament—Words to be given natural and ordinary meaning—Ambiguous words—Consideration of ground and cause of making statute—Recourse to preamble.

B

By THE JUDGES: The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the legislature. If, however, any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute and to have recourse to the preamble which is "a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress": per DYER, C.J., in *Stowel v. Lord Zouch* (1) (1569), 1 Plowd. 353.

C

D

Statute—Operation—Binding effect on British subjects abroad—Intention of legislature.

While an Act of the British legislature can have no obligatory force on the subjects of a foreign State it will bind British subjects both within or without the jurisdiction if such is the intention of the statute.

E

Notes. Considered: *A.-G. v. Sillem* (1864), 2 H. & C. 431. Applied: *The Argos, Gaudet v. Brown, The Hewsons, Geipel v. Cornforth* (1873), L.R. 5 P.C. 134. Considered: *River Wear Comrs. v. Adamson*, [1874-80] All E.R.Rep. 1. Applied: *Income Tax Special Purposes Comrs. v. Pemsel*, [1891-4] All E.R.Rep. 28. Considered: *R. v. City of London Court Judge*, [1892] 1 Q.B. 273; *Vacher & Sons, Ltd. v. London Society of Compositors*, [1911-13] All E.R.Rep. 241. Applied: *Re Boaler, Re Vexatious Actions Act, 1896*, [1914-15] All E.R.Rep. 1022. Considered: *Great Western Rail. Co. and Midland Rail. Co. v. Bristol Corpn.* (1918), 87 L.J.Ch. 414; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A.C. 468. Applied: *Bourne v. Keene*, [1918-19] All E.R.Rep. 167. Considered: *Pelrak Petroleum Maatschappij v. Deen*, [1924] 1 K.B. 111; *The Croxteth Hall, The Celtic*, [1930] P. 197; *Birmingham Corpn. v. Barnes*, [1934] 1 K.B. 484; *Pugh v. Pugh*, [1951] 2 All E.R. 680; *H.R.H. Prince Ernest Augustus of Hanover v. A.-G.*, [1955] 3 All E.R. 647; *Coward v. Motor Insurers Bureau*, [1962] 1 All E.R. 531. Referred to: *Davis v. Lloyd* (1844), 1 Car. & Kir. 275; *Stapylton v. Clough* (1853), 2 E. & B. 933; *Papendick v. Bridgwater* (1855), 5 E. & B. 166; *Fenton v. Livingstone, Livingstone v. Livingstone* (1859), 5 Jur.N.S. 1183; *Bright v. Legerton* (No. 1) (1860), 29 Beav. 60; *Brook v. Brook* (1861), 9 H.L.Cas. 193; *Smith v. Blakey* (1867), L.R. 2 Q.B. 326; *Whaley v. Carlisle* (1867), 15 W.R. 1183; *Re Lambert* (1886), 56 L.J.Ch. 122; *R. v. Dibden*, [1910] P. 57; *Tucker v. Oldbury U.D.C.*, [1912] 2 K.B. 317; *Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K.B. 130; *R. v. Moscovitch* (1927), 138 L.T. 183; *Buerger v. New York Life Assurance Co.* (1927), 96 L.J.K.B. 930; *Swami (Pakala Narayane) v. King-Emperor*, [1939] 1 All E.R. 396; *Alexander v. Tredegar Iron and Coal Co.*, [1944] 1 All E.R. 451.

F

G

H

I

As to the admissibility in evidence of declarations and the proof of foreign law, see 15 HALSBURY'S LAWS (3rd Edn.) 294-314, 328; as to the construction and operation of statutes, see 36 HALSBURY'S LAWS (3rd Edn.) 382 et seq., 428-430; as to royal marriages, see 7 HALSBURY'S LAWS (3rd Edn.) 211, 212. For cases see 22

A DIGEST (Repl.) 91 et seq., 619-623; 42 DIGEST 609 et seq., 687-689; 11 DIGEST (Repl.) 566. For the Royal Marriages Act, 1772, see 4 HALSBURY'S STATUTES (2nd Edn.) 188.

Cases referred to:

- (1) *Stowel v. Lord Zouch* (1569), 1 Plowd. 353; 75 E.R. 536; 42 Digest 635, 378.
 (2) *Banbury Peerage Case*, 2 Selwyn's N.P. (10th Edn.) 756.
 (3) *Heseltine v. Lady Augusta Murray* (1794), 2 Add. 400, n.; 162 E.R. 341; 27 Digest (Repl.) 551, 5015.
 (4) *Berkeley Peerage Case* (1811), 4 Camp. 401, H.L.; 22 Digest (Repl.) 71, 463.
 (5) *Higham v. Ridgway* (1808), 10 East, 109; 103 E.R. 717; 22 Digest (Repl.) 93, 709.
 (6) *Standen v. Standen* (1791), Peake, 45, N.P.; 27 Digest (Repl.) 47, 241.
 (7) *Doe d. Patteshall v. Turford* (1832), 3 B. & Ad. 890; 1 L.J.K.B. 262; 110 E.R. 327; 22 Digest (Repl.) 109, 899.
 (8) *Dalrymple v. Dalrymple* (1811), 2 Hag. Con. 54; 161 E.R. 665; on appeal (1814), 2 Hag. Con. 137, n.; 22 Digest (Repl.) 618, 7112.
 (9) *Compton v. Bearcroft* (1769), Bull.N.P. 113; 2 Hag. Con. 444, n.; 161 E.R. 799; 11 Digest (Repl.) 463, 967.
 (10) *Ilderton v. Ilderton* (1793), 2 Hy. Bl. 145; 126 E.R. 476; 11 Digest (Repl.) 498, 1182.

Petition presented to Her Majesty by Augustus Frederick D'Este, who claimed the honours, dignities, and privileges of Duke of Sussex, Earl of Inverness, and Baron of Arklow, and referred by Her Majesty to the House of Lords and by the House to the Committee for Privileges.

Prince Augustus Frederick was the sixth son of his late Majesty George III; in 1793 he went to Rome, and on April 4 in that year intermarried with Lady Augusta Murray, the second daughter of the Earl and Countess of Dunmore; that marriage was celebrated by a clergyman of the Church of England, in a form as nearly as could be according to the rites of the Church of England, an English prayer-book being used upon the occasion; and it was contracted and attested by two papers signed by his Royal Highness and by Lady Augusta, which papers were in the following terms:

"As this paper is to contain the mutual promise of marriage between Augustus Frederick and Augusta Murray, our mutual names must be put here by us both, and kept in my possession; it is a promise neither of us can break, and is made before God our Creator and all-merciful Father.

"On my knees before God our Creator, I Augustus Frederick promise thee Augusta Murray, and swear upon the Bible, as I hope for salvation in the world to come, that I will take thee Augusta Murray for my wife; for better for worse; for richer for poorer; in sickness and in health; to love and to cherish till death us do part; to love but thee only, and none other; and may God forget me if I ever forget thee. The Lord's name be praised! So bless me! So bless us, O God! And with my handwriting do I Augustus Frederick this sign, Mar. 21, 1793, at Rome; and put my seal to it, and my name.

"Augustus Frederick."

"(Completed at Rome, April 4, 1793.)"

"On my knees before God my Creator, I Augusta Murray promise and swear upon the Bible, as I hope for salvation in the world to come, to take thee Augustus Frederick for my husband; for better for worse; for richer for poorer; in sickness and in health; to love and to cherish till death us do part. So bless my God, and sign this.

"Augusta Murray."

There were duplicates of these papers; and in the first of them, the words "Married, April 4, 1793, Rome, 7 o'clock at night," were introduced in the place of the words

"Completed at Rome, April 4, 1793." The latter words were added on the day A
thus mentioned, in the handwriting of his Royal Highness.

The petitioner's Case further stated that the parties were again regularly married in England, that the petitioner was born in the parish of St. Marylebone, London, on Jan. 13, 1794, and that he was the only male issue of the marriage; that by letters patent, dated on Nov. 27, 1801, Prince Augustus Frederick, was created a peer of the realm, by the titles of Baron Arklow, Earl of Inverness, and Duke of Sussex, with limitation to the heirs male of his body, that he afterwards sat and voted in Parliament, and that he died on April 21, 1843, leaving the petitioner his only son and heir male him surviving. B

On Aug. 21, 1843, the Attorney-General made a report to Her Majesty, in which he said :

"It appears to me, on the testimony laid before me, that it is established that the contracts of marriage above set forth were entered into by his late Royal Highness the Duke of Sussex and the Lady Augusta Murray, at Rome, on Mar. 21, 1793; and I think it may be inferred that the Duke of Sussex and the Lady Augusta Murray considered that they stood in the relation of husband and wife." C

He then expressed his doubts of the fact of any marriage, valid by the laws of England, having been contracted, even independently of the Royal Marriages Act, 1772, and declared that he was not satisfied with the correctness of certain opinions which had been laid before him stating that Act to have no binding force on parties living out of England. He, therefore, recommended Her Majesty to refer the petition to the House of Lords. Accordingly, on Aug. 22 the petition was referred to the House of Lords, and by the House to the Committee for Privileges. E

At the first sitting of the Committee for Privileges, on June 7, 1844, TINDAL, C.J., POLLOCK, C.B., and PATTESON, WILLIAMS, COLTMAN and CRESSWELL, JJ., and PARKE, B., attended.

Sir Thomas Wilde (*Erle and James Wilde* with him) for the petitioner.

The Attorney-General (*Sir W. W. Follett*), *the Solicitor-General* (*Sir Frederick Thesiger*), and *Waddington* for the Crown. F

In the course of the evidence of the marriage put forward on behalf of the petitioner, a prayer-book, produced from the papers and documents of Lady Augusta, and containing an entry proved to be in her handwriting, was tendered in evidence. The entry was as follows : G

"The prayer-book by which I was married at Rome to Prince Augustus Frederick, on the 4th day of April, 1793, by the Rev. Mr. —"

The entry itself was without date.

Waddington objected that this entry was not admissible for the purpose of proving the fact to which it related. H

LORD LYNTHURST, L.C.—It is admissible as a declaration by one of the parties that there was a marriage, though not admissible to prove the marriage.

The prayer-book was received, and the entry read.

A will, dated Berlin, Sept. 15, 1799, and proved to be in the handwriting of the prince, and sealed with the royal arms, was tendered in evidence as a declaration I made by him at the time of the fact of his marriage.

Waddington.—This paper cannot be received in evidence, even as a declaration by the party, for it appears by the date to have been made after a suit to annul the prince's marriage. It contains a statement of that suit, and, therefore, by the decision in the *Banbury Peerage Case* (2), it is inadmissible.

Sir Thomas Wilde.—There never was any lis as to the fact of the marriage; and this declaration, which only states that fact, is, therefore, evidence. The lis only related to the legality of the marriage.

A *Waddington*.—The paper says: "Notwithstanding a decree has passed Doctors' Commons to declare my marriage unlawful and void, yet I still feel myself bound . . ." It goes on to state that the writer makes the declaration contained in it for the purpose of establishing the legitimacy of his son, which had been called in question by these proceedings. This clearly falls within the ordinary rule of law against admitting declarations *post litem motam*.

B *Sir Thomas Wilde*.—This paper is offered in proof only as a declaration of the fact of the marriage. That fact never has been questioned; the passage now read from the paper proves that. The decree never could have been passed to declare a marriage unlawful and void, if no marriage had in fact taken place. The dispute there was on the legal consequences of the marriage, which is quite a collateral matter.

C *Waddington*.—The suit in which this decree was made was a suit for nullity of marriage, instituted at the instance of the King.

LORD BROUGHAM.—The document shows that there has been a *lis*; and my opinion is that that makes it impossible for us to receive this document till we see what that *lis* really was. The argument that the decree only related to the lawfulness of the marriage, and not to the fact of a marriage, cannot be sustained, for the alleged marriage might have been only a pretended marriage.

LORD DENMAN, C.J.—I have got the report of *Heseltine v. Lady Augusta Murray* (3), in 2 *ADDAMS*, 400, n. The libel states that on April 4

E "A marriage, or rather a show or effigy of marriage, between his said Royal Highness Prince Augustus Frederick and the said Lady Augusta Murray, was in fact had and solemnised, or pretended to have been had and solemnised, at the house of the Right Honourable Charlotte, Countess of Dunmore, at the city of Rome, on the 4th day of April, 1793."

F **LORD LYNDHURST, L.C.**—A declaration of a marriage is only admissible in evidence as a declaration of a legal marriage. The legality of it had been in controversy here. The declaration of a marriage in fact is nothing.

LORD BROUGHAM.—The judgment is to this effect (2 *Add.* at p. 401, n.):

G "In respect to the fact of marriage, or rather show or effigy of a marriage, pleaded in the said libel to have been had and solemnised, or pretended to have been had and solemnised, at the house of the Right Honourable Charlotte, Countess of Dunmore, in the city of Rome, on the 4th day of April, 1793, there is not sufficient proof by witnesses that any such fact of marriage, or rather show or effigy of a marriage, was in any manner had or solemnised at the said city of Rome, between his said Royal Highness Prince Augustus Frederick and the Right Honourable Lady Augusta Murray, spinster, the parties cited in this cause; but that if any such marriage, or rather show or effigy of a marriage, was in fact had or solemnised at the said city of Rome between the said parties, the said pretended marriage was and is absolutely null and void to all intents and purposes in law whatsoever."

H This judgment distinctly declares, that there is not sufficient to prove the fact of the marriage, but that if it existed in fact, it was null and void. This surely shows

I that the Roman marriage was in issue.

LORD CAMPBELL.—So that the declaration in the will would be in contradiction to the judgment of a court. It cannot be received.

The declarations of Mr. Gunn, made to his son with respect to the marriage, were proposed to be proved in evidence by the son on the ground that they were the declarations of an individual who knew the facts, who was not interested in misrepresenting them, who had an interest in being silent respecting them, and whose statements, he being dead, were, therefore, admissible in evidence.

Sir Thomas Wilde and *Erle* in support of the evidence tendered.—Mr. Gunn has been proved to have been at Rome at the period in question. By the letters of the prince and of Lady Augusta it is proved that they proposed to be married, and were married by a Mr. Gunn. He had a perfect knowledge of the facts, and was not interested in misrepresenting them, but the contrary. The question to which these declarations relate rests partly on the Royal Marriages Act, 1772, s. 3, which contains a penal [provision rendering liable to penalties any person solemnising a marriage declared null and void by the Act]. There have been proceedings in Chancery. Mr. Gunn was called as a witness, and interrogatories were put to him. He demurred to them on the ground that, if he answered them, he might subject himself to penalties under the Act of 1772. This shows that he not only was not interested in misrepresenting facts to support the marriage, but believed himself to have an interest the other way.

LORD LYNDHURST, L.C.—This question has been put upon two grounds. It is contended in the first place, that as Mr. Gunn might have stood indifferent on this occasion as he had no interest, and as he knew the facts, he being dead, his declarations are receivable in evidence. That is a position which cannot be maintained in this House; for in the *Berkeley Peerage Case* (4) that point was expressly decided the other way, on reference to the judges. So far as this House is concerned, we cannot again open that question, but must consider that decision of it as final.

The next ground of argument is that in all the cases where the party has known the facts and is dead, and has made declarations, and these declarations are against his interest, and would if he had been living subject him to a prosecution, such declarations are receivable in evidence. That is the broad and general proposition. That proposition cannot be sustained: let us try it by instances ordinarily occurring. A. is indicted for murder. B., who is dead, made while living a declaration that he was present at the murder. That declaration is against his own interest, and would, had he lived, have subjected him to a prosecution. It is in principle the very case supposed in the argument, and it is not possible to say that such a declaration would have been receivable in evidence. Again, suppose the Duke of Sussex had been put upon his trial under the Royal Marriages Act, for contracting this marriage, is it possible to maintain that Mr. Gunn's declarations would have been receivable in evidence against him? It is sufficient to state these instances, to show that the proposition of the learned counsel cannot be maintained. It is not true that the declarations of deceased persons are in all circumstances receivable in evidence when in some way or other they might injuriously affect the interest of the party making them. Nor is it true that because, while living, a party would be excused from answering as to certain facts, his declarations as to those facts become evidence after his death. These are not correlative nor corresponding purposes. Besides, this case is not what for the purposes of this argument it is represented to be. First, Mr. Gunn is said not to have been liable to prosecution. Then these declarations were made to his own son, and in so making them it cannot be presumed that he would have exposed himself to prosecution, or that he made them under any belief that he should do so. These two circumstances take away the main grounds on which the argument for the admission of these declarations has been rested. On no ground, therefore, can these declarations be, in my opinion, received in evidence.

LORD BROUGHAM.—I so entirely agree with my noble and learned friend that I need scarcely trouble your Lordships further than to express my concurrence in what has been expressed in so luminous and convincing a manner. *Higham v. Ridgway* (5) declares the law on the point at issue. The more we look at that case, the more clearly must we come to two conclusions. In the first place we must see that the evidence there was admitted, not because the subject-matter of the declaration was within the peculiar knowledge of the party

- A** making the declaration, but that it was a declaration made against an interest of a very specific nature, viz., a pecuniary interest. I may further say, that one of the learned judges who is now present to assist your Lordships, WILLIAMS, J., was a counsel in that very case, and argued it with MR. SERJEANT MANLEY in 1808 against the admission of the evidence, and he remembers perfectly well that the evidence was received on the express and specific ground that it was an entry against the
- B** pecuniary interest of the party. Another conclusion to which we must come is that, considering the nature and tendencies of such evidence unless properly restricted, we ought to be careful and cautious of extending the rule as laid down in *Higham v. Ridgway* (5), beyond the limits settled by that case. To say, if a man should confess a felony for which he would be liable to prosecution, that, therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every
- C** action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced. LORD KENYON never could have entertained the opinion or held the doctrine imputed to him in *Standen v. Standen* (6). The law in *Higham v. Ridgway* (5) has been carried far enough, although not too far. The rule, as understood now is that the only declarations of deceased persons receivable in evidence are those made against the proprietary or pecuniary
- D** interest of the party making them when the subject-matter of such declarations is within the peculiar knowledge of the party so making them.

- LORD DENMAN, C.J.**—I entirely agree with what has fallen from my noble and learned friends. I take the rule in *Higham v. Ridgway* (5) to be as my noble and learned friend has just stated it. With regard to declarations made by persons
- E** in extremis, supposing all necessary matters concurred such as actual danger, death following it, and a full apprehension, at the time, of the danger and of death, such declarations can be received in evidence, but all these things must concur to render such declarations admissible. Such evidence, however, ought to be received with caution, because it is subject to no cross-examination. As to *Standen v. Standen* (6), I agree with my noble and learned friend, that it is doubtful whether
- F** LORD KENYON ever could have admitted the evidence in the way there described, but, even if he did, it must be recollected that that was an issue from the Court of Chancery in the trial of which the rules of evidence are sometimes relaxed as the whole proceeding is one simply for the information of that court. The witness there came to bastardise his own issue; he was discredited, and the verdict was against him. It never, therefore, became necessary to discuss the propriety of what had
- G** been done, but that case has never since been acted on, and to me it seems to involve a very dangerous principle of law.

LORD COTTENHAM.—I beg simply to express my concurrence in what has already been said by the noble and learned Lords who have preceded me.

- H** **LORD CAMPBELL.**—By the law of England the declarations of deceased persons are not generally admissible unless they are against the pecuniary interest of the party making them. There are two exceptions: first, where a declaration by word of mouth or by writing is made in the course of the business of the individual making it; there it may be received in evidence, though it is not against his interest: *Doe d. Patteshall v. Turford* (7). The service of a notice may thus be
- I** proved, and, in like manner, an entry by a notary's clerk that he had presented a bill, for that is in the ordinary discharge of his duty. But as to the point of interest, I have always understood the rule to be that the declaration, to be admissible, must have been one which was contrary to the interests of the party making it, in a pecuniary point of view, and, with the exception of *Standen v. Standen* (6), I do not know any case which appears to break in upon that principle. I think it would lead to most inconvenient consequences, both to individuals and to the public, if we were to say that the apprehension of a criminal prosecution was an interest which ought to let in such declarations in evidence. But even if such a

rule did exist, it would not permit the learned counsel here to bring in the statements of Mr. Gunn, for how are your Lordships to know what state Mr. Gunn's mind was in when he made the declarations? He might have believed that the marriage having been celebrated abroad, the provisions of the Royal Marriages Act did not extend to it, and that he was in no danger whatever from what he had done. A

LORD LANGDALE, M.R.—Lest it should be supposed that there is any difference of opinion on this point, I beg to say that I fully concur with the noble and learned Lords who have preceded me. B

The declarations tendered were rejected.

The Right Rev. Nicholas Wiseman, D.D., having been called, and having begun to give his evidence on the law at Rome on the subject of marriage, referred, while doing so, to a work which was lying by him. This was noticed. C

LORD BROUGHAM (to counsel).—You had better state to the witness that he may refresh his recollection by referring to authorities on the matter of law to which his evidence is addressed.

LORD LYNTHURST, L.C.—Do so. The witness may thus correct and confirm his recollection of the law, though he is the person to tell us what it is. D

LORD CAMPBELL.—The most authoritative form of getting at foreign law is to have the book which lays down the law. Thus we have had the CODE NAPOLEON in our courts. It is better than to examine a witness, whose memory may be defective, and who may have a bias influencing his mind upon the law. E

LORD BROUGHAM.—My opinion entirely concurs with that of the Lord Chancellor. The witness may refer to the sources of his knowledge, but it is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law, for the House has not organs to know and to deal with the text of that law, and, therefore, requires the assistance of a lawyer who knows how to interpret it. If the CODE NAPOLEON was before a French court, that court would know how to deal with and construe its provisions; but in England we have no such knowledge, and the English judges must, therefore, have the assistance of foreign lawyers. This was fully considered in *Dalrymple v. Dalrymple* (8), in which the opinion of the Scottish lawyers was taken as a matter of fact, they being examined upon oath. In those opinions they referred to Scottish statutes and Scottish law-books. It was agreed on all hands, that that which was there in evidence were not the mere statements of foreign text-writers, but the opinions of skilful and scientific men who were examined on oath. F

LORD DENMAN, C.J.—There does not appear to be, in fact, any real difference of opinion upon this point. There is no question raised here as to any exclusive mode of getting at this evidence, for we have both the materials of knowledge offered to us. We have the witness, and he states the law, which he says is correctly laid down in these books. The books are produced, but the witness describes them as authoritative, and explains them by his knowledge of the actual practice of the law. A skilful and scientific man must state what the law is, but may refer to books and statutes to assist him in doing so. G H

LORD CAMPBELL.—I entirely concur with the law as laid down by the noble and learned Lord who has just spoken. Foreign law is a matter of fact to be proved by evidence. You call witnesses to prove that fact; you ask the witness what the law is. He may from his recollection, or on producing and referring to books, say what it is, or that it is found correctly stated in such a book. So likewise he may take the book to refresh his memory. I

LORD LANGDALE, M.R.—The question here is how a witness as to what is foreign law is to be examined; in what form and manner he is to give his testimony.

A Foreign law is, in the courts of this country, a matter of fact. A witness more or less skilled in it, is called in to depose to it. He may state what it is from his own knowledge, or assist his knowledge by reference to books and authorities that are within his reach. He may refer to textbooks, or to books of decisions, and so render his knowledge more accurate than before.

B The witness went on to state what was the law of Rome, and what the practice of the Roman courts, on the subjects of marriage generally, and of marriages between Protestants in particular.

The following question was put to the judges on the construction of the Royal Marriages Act:

C "Evidence being offered of a marriage solemnised at Rome in the year 1793 by an English priest, according to the rites of the church of England, between A.B., a son of his Majesty King George III, and C.D., a British subject, without the previous consent of his said Majesty, assuming such evidence to have been sufficient to establish a valid marriage between A.B. and C.D. independently of the provisions of the Royal Marriages Act, 1772, would it be sufficient, having regard to that statute, to establish a valid marriage in a suit, in which the eldest son of A.B. claims lands in England, as heir of A.B., by virtue of such alleged marriage?"

D The judges requested time to consider the question, which was granted.

July 9, 1844. **TINDAL, C.J.**, read the following opinion of the judges.—
I am requested by my brethren to inform your Lordships, that it is the unanimous
E opinion of all the judges who have heard the argument in this case that, assuming the evidence given to have been sufficient to establish a valid marriage between A.B. and C.D. independently of the provisions of the Royal Marriages Act, 1772, it is not sufficient, having regard to that statute, to establish a valid marriage in a suit, in which the eldest son of A.B. claims lands in England, as heir of A.B., by virtue of such alleged marriage.

F The question turns entirely upon the legal construction of that statute, and is shortly this—whether, to bring a marriage within the prohibition of that statute, it is necessary that it should have been contracted within the realm of England, or whether the statute extends to prohibit and to annul marriages, wherever the same be contracted or solemnised, either within the realm of England or without?

G It is scarcely necessary to observe, that as A.B. was a son of his late Majesty King George III, and the statute applies to a descendant of the body of his late Majesty King George II, not being the issue of any princess married into a foreign family, A.B. falls precisely within the class or description of persons with respect to whose marriage the statute intends to legislate, and that, as he falls within that description or class, the statute may be considered as if it had been passed with respect to him personally and individually—as if it had enacted in express
H terms "that A.B. shall not be capable of contracting matrimony without the previous consent of the reigning Sovereign, signified under the Great Seal, and declared in Council," and again, "that the marriage of A.B., without such consent first had and obtained, shall be null and void to all intents and purposes."

I The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to **DYER, C.J.**, [in *Stowel v. Lord Zouch* (1)] is "a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress."

Looking to all these grounds of interpretation, we think they concur, in the

present instance, in demanding that construction of the statute at which we have arrived. For, in the first place, the words of the statute itself appear to us to be free from ambiguity. The prohibitory words of it are general—that no one of the persons therein described “shall be capable of contracting matrimony without the previous consent of His Majesty.” And again: A

“... every marriage or matrimonial contract of any such descendant without such consent first had and obtained shall be null and void to all intents and purposes whatsoever.” B

The statute does not enact an incapacity to contract matrimony within one particular country and district or another; it enacts an incapacity to contract matrimony generally, and in the abstract. It is an incapacity attaching itself to the person of A.B., which he carries with him wherever he goes. But as a marriage once duly contracted in any country will be a valid marriage all the world over, the incapacity to contract a marriage at Rome is as clearly within the prohibitory words of the statute as the incapacity to contract in England. So again, as to the second or annulling branch of the enactment, that “every marriage without such consent shall be null and void,” the words employed are general, or, more properly, universal, and cannot be satisfied in their plain, literal, ordinary meaning, unless they are held to extend to all marriages in whatever part of the world they may have been contracted or celebrated. C

The words of s. 2 throw light upon and confirm the interpretation to be given to s. 1. By s. 2 the descendants of the body of George II, being above the age of 25 years, who shall persist in their resolution to contract a marriage disapproved of or dissented from by the King, upon giving notice to the Privy Council, are enabled, at any time from the expiration of twelve calendar months after such notice, to contract such marriage, and such marriage may be duly solemnised, without the previous consent of his Majesty, his heirs or successors. Such a marriage is declared to be good, as if the Act had never been made, unless both Houses of Parliament shall, before the expiration of the twelve months, expressly declare their disapprobation of the intended marriage. The words employed in this section are the same as in the first, “to contract a marriage,” and “marriage” generally, without any reference to the country wherein the marriage is contracted or solemnised. As no doubt could be entertained by any one but that a marriage, taking place with the due observance of the requisites of s. 2, would be held equally valid whether contracted and celebrated at Rome or in England; so we think it would be contrary to all established rules of construction if the very same words in s. 1 were to receive a different sense from those in s. 2, if it should be held that a marriage at Rome, contracted with reference to s. 2, is made valid, and at the same time a marriage at Rome is not prohibited under s. 1. It is scarcely supposable that the legislature should have provided the minute and laborious machinery of the second section, that it should have interposed such checks against a marriage without consent, and at the same time have rendered such a marriage ultimately valid in one given state of circumstances—if the party who is the subject of such legislation, by an easy journey, or a voyage of a few hours, could render all these provisions useless and set the statute at defiance by contracting a marriage abroad with whomever he thought proper. It is not unworthy of remark, while we are looking to the body of this Act in order to discover its interpretation, that the very exception from the prohibitory clause, of the issue of those princesses who have married or may marry into foreign families, affords some proof that marriages abroad could not have been out of the view or contemplation of the legislature at the time of passing the Act, as such marriages in all probability might not infrequently be celebrated out of England. D

It was contended in the course of the argument at your Lordships' Bar, that an Act of the English legislature can have no binding force beyond, or out of, the realm of England. If by this is meant only that it can have no obligatory force upon the subjects of another State, the position is no doubt correct in its full extent, E

A but it is equally certain that an Act of the legislature will bind the subjects of this realm, both within the kingdom and without, if such was its intention. Indeed it was admitted by the learned counsel for the claimant that, if there had been found in this statute the words "marriages within the realm of England or without," or any other words equipollent thereto, under such an enactment the capacity to contract a marriage at Rome would have been taken away, and the marriage there
B solemnised would have been made null and void. But if the words actually found in the Statute are comprehensive enough to include all marriages, as well those within the realm as without, as we think they are, and if, at the same time, the restraining the sense of those words to marriages within England must necessarily defeat the object and purpose of the Act, as we think it would, it seems to follow that the construction of the Act must be the same, whether those words are found within
C the statute or not. Surely, if the marriage of a descendant of George II, contracted or celebrated in Scotland or Ireland, or on the continent is to be held a marriage not prohibited by this Act, the statute itself may be considered as virtually and substantially a dead letter from the first day it was passed.

The object and purpose for which the Act was passed, and the mischief intended to be prevented thereby, are clear, and leave no doubt as to the proper construction
D of the Act. It was founded upon the policy and expediency which requires that no marriage of any branch of the Royal Family should be contracted, which might be detrimental to the interests of the State, either at home or abroad. The object declared by the preamble is "more effectually to guard the descendants of his late Majesty King George II . . . from marrying without the approbation of the reigning Sovereign"; and it also declares that

E "marriages in the Royal Family are of the highest importance to the State, and that, therefore, the kings of this realm have ever been entrusted with the care and approbation thereof."

But this object is frustrated, the mischief is remediless, and the power of the Sovereign nugatory, if a marriage, which in England would have been confessedly
F void, is to be held good and valid when celebrated out of the country.

It was argued on the part of the claimant, that, as it is directed in s. 1 of the Act that the consent under the Great Seal shall be set out in the licence and register of the marriage, and as this direction can only be applicable to the case of a marriage celebrated in this country, so the prohibition must be construed as confined to a marriage in this country only, and as not extending to a foreign
G marriage. But to this objection it appears to us to be a sufficient answer that the only words in that section that are essential to make the marriage a valid marriage are those which require "the previous consent of his Majesty . . . signified under the Great Seal, and declared in Council," and that the words which follow, directing such consent to be set out in the licence and register of the marriage, are, as the very words import, directory only, not essential, and are applicable to those cases
H alone where they can be applied, namely, to the case of a marriage celebrated in England by licence. For it would be impossible to contend, if the marriage of A.B. had been celebrated at Rome, with the previous consent of his Majesty King George III, signified under the Great Seal, and declared in Council, that such marriage would not have been good and valid to all intents and purposes although the observance of the direction that such consent should be inserted in the licence
I and register of the marriage had become, in that case, impracticable.

It was further contended in argument, that inasmuch as by s. 3 of the Act all persons who wilfully and knowingly presume to solemnise, or assist or be present at the celebration of any marriage, or at the making of any matrimonial contract, without such consent, shall incur the penalties of a *praemunire* [the penalty of *praemunire* has long been obsolete: see 10 HALSBURY'S LAWS (3rd Edn.) 568, note (o)], and as there is no provision made in this section for the trial and consequently the punishment of the offender where the offence shall be committed out of England, the necessary inference must be, that the statute itself does not extend to prohibit

a marriage out of England, but we think the inference that the penal clause is itself defective in not making provision for the trial of British subjects when they violate the statute out of the realm is the more just and reasonable inference—not that we should refuse, on that account, to give the plain words of the statute their necessary force, and hold the enactment itself to be substantially useless and inoperative. We, therefore, think, for the reasons humbly submitted to your Lordships, that the eldest son of A.B., under the circumstances stated in your Lordships' question, and regard being had to the Royal Marriages Act, 1772, could not make out a good title, as heir to A.B., to the lands sought to be recovered.

LORD LYNTHURST, L.C.—I do not entertain the slightest doubt of the sufficiency of the evidence to establish the marriage as a marriage in fact. By a "marriage in fact," I mean that I think the evidence is sufficient to show that these parties were married at Rome by a clergyman of the Church of England, in conformity with the rites and ceremonies of the English church. With regard to the evidence, as referred to by my noble and learned friend, that evidence is sufficient, as it at present stands, to show that this marriage would be a valid marriage of Protestants at Rome, according to the law of Rome. Whether such a marriage would be a valid marriage in this country for any purpose independently of the Royal Marriages Act, is a point upon which I give no opinion. I propose to resolve that it is the opinion of the committee that the claimant has not made out his claim.

LORD BROUGHAM.—In agreeing to the motion of my noble and learned friend, and in expressing my entire concurrence with the opinion of the learned judges, I do so upon the ground not only that the object of the Act is clear, but that the words of the Act are sufficient (for that is necessary also) to accomplish the manifest purpose of the Act. I say this because it is not a sufficient ground to hold that the purpose is clear, unless the words are sufficient to accomplish that purpose, though otherwise the Act might have been nugatory. It was so in the case of the Marriage Act, 1823. It was quite clear that that Act was intended to prevent minors from marrying without consent, unless with the publication of banns, and yet notwithstanding that, by going to Scotland, a very short journey, the parties intended to be affected by the Act, namely, wealthy persons, could easily accomplish the purpose, and defeat the Act. My opinion is that if that Act had used the same phraseology as this, and had rendered the parties incapable of contracting matrimony, we should never have heard of *Compton v. Bearcroft* (9), and *Ilderton v. Ilderton* (10). At all events, there is sufficient, to my mind, to stamp with perfect accuracy the opinions delivered by the learned judges. Parties are rendered incapable of contracting matrimony, and not merely, as in the case of Lord Hardwicke's Act [26 Geo. 2, c. 33: repealed by Marriage Act, 1823, itself repealed with savings by Marriage Act, 1949], the marriage rendered null and void. It, therefore, follows that a prince going abroad and contracting matrimony is, for all British purposes, with a view to the Crown and the rights of peerage, incapable of contracting matrimony, and any marriage so contracted is null and void.

LORD DENMAN, C.J.—After the observations of my noble and learned friends, there does not appear to me to be any sufficient reason for postponing the decision on this claim. I am happy and much satisfied in being enabled to say that my opinion entirely agrees with that of your Lordships. I think the operative words of the Royal Marriages Act, taken alone, are perfectly clear to show that this is no marriage by the law of England.

LORD CAMPBELL.—I agree with my noble and learned friend, the Lord Chancellor, that, as the evidence now stands, there would be a marriage in fact, because the evidence that has been given to us of the Roman law, uncontradicted as it is, would prove that a marriage at Rome of English Protestants, contracted according to the rites of their own church, would be recognised as a marriage by the Roman law, and, therefore, would be a marriage all over the world. I own that that evidence rather surprised me. I had imagined that it was impossible there could be

A a valid marriage at Rome, between Protestants, by a Protestant clergyman, such as the Roman law would recognise. As the evidence stands at your Lordships' Bar, it would appear, however, that the Roman law would recognise such a marriage without the religious ceremonies required by the Romish church before the Council of Trent, namely, without the intervention of a priest, and would treat it as a marriage valid by the universal law of the church before the date of the decree of B that council, and it would appear that the decree of the Council of Trent respecting marriages was not meant to apply to the marriage of Protestants, who could not conform to it.

That, my Lords, I think is the universally prevailing opinion. But when we come to the Royal Marriages Act, it seems to me that there is an insuperable bar to the validity of this marriage. The elaborate opinion that has been delivered by C the Lord Chief Justice of the Common Pleas (TINDAL, C.J.) appears to me to have exhausted entirely this part of the subject. It accords with the opinion I had originally formed. I kept my mind, however, entirely open till I had heard the arguments on both sides, and I now am confirmed in my previous opinion by the legal reasoning laid before us in the most admirable opinion we have this day D heard delivered by the Lord Chief Justice. I entirely concur with that opinion. I have no doubt that it is competent to the British legislature to pass a law making invalid the marriage of particular British subjects all over the world. I have no doubt that it was the object of that Act of Parliament to invalidate marriages of the descendants of George II (with the exception of the issue of princesses married or marrying into foreign royal families), without the consent of the Crown, wherever those marriages might be celebrated, and I am clearly of opinion that the intention E is sufficiently testified by the language which has been employed.

LORD COTTENHAM.—After the discussion which has taken place, I think it right to say that my opinion is formed entirely and exclusively upon the Royal Marriages Act. I entirely agree in the opinion which has been expressed by the learned judges, inasmuch as by the construction of the Royal Marriages Act, whether F the marriage would be valid by the law of Rome or not, it would not be valid by the law of this country. My opinion, therefore, is against the claim.

Resolved that the claimant had not made out his claim to be Duke of Sussex, Earl of Inverness, and Baron of Arklow.

SIMONIN v. MALLAC

[COURT FOR DIVORCE AND MATRIMONIAL CAUSES (Cresswell, J.O., Channell, B., and Keating, J.), January 18, April 26, 1860]

[Reported 2 Sw. & Tr. 67; 29 L.J.P.M. & A. 97; 2 L.T. 327;
6 Jur.N.S. 561; 164 E.R. 917]

Conflict of Laws—Marriage—Validity—Solemnisation in England—Both parties domiciled abroad—Formalities needed for valid marriage in foreign country not complied with—Recourse to English ceremony to evade foreign law.

A marriage duly solemnised in England in the manner prescribed by the law of England between parties of full age and capable of contracting according to English law is valid although the parties to the marriage, being foreigners, contracted it in England in order to evade the laws of the country to which they belonged and in which they were domiciled. An English court has jurisdiction to adjudicate on the validity or otherwise of such a marriage.

Notes. Considered: *Brook v. Brook* (1861), 9 H.L.Cas. 193. Distinguished: *Sottomayer v. De Barros* (No. 1), [1874-80] All E.R.Rep. 94. Applied: *Sottomayer v. De Barros* (*Queen's Proctor Intervening*), [1874-80] All E.R.Rep. 97. Followed: *Hay v. Northcote*, [1900] 2 Ch. 262; *Ogden v. Ogden*, [1904-7] All E.R.Rep. 86. Considered: *Salveson (or Von Lorang) v. Austrian Property Administrator*, [1927] All E.R.Rep. 78. Explained: *Inverclyde v. Inverclyde*, [1931] P. 29. Considered: *Casey v. Casey*, [1949] 2 All E.R. 110; *Hill (otherwise Petchey) v. Hill*, [1958] 3 All E.R. 754. Explained and Distinguished: *Ross Smith v. Ross Smith (otherwise Radford)*, [1962] 1 All E.R. 344. Referred to: *Le Sueur v. Le Sueur* (1876), 1 P.D. 139; *Niboyet v. Niboyet* (1878), 4 P.D. 1; *Re Cooke's Trusts* (1887), 56 L.J.Ch. 637; *Linke (otherwise Van Aerde) v. Van Aerde* (1894), 10 T.L.R. 426; *Chetti v. Chetti*, [1908-10] All E.R.Rep. 49; *De Gasquet James v. Mecklenburg Schwerin*, [1914] P. 53; *Hutter v. Hutter (otherwise Perry)*, [1944] 2 All E.R. 368; *Merker v. Merker*, [1962] 3 All E.R. 928.

As to the validity of marriages between persons domiciled abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 88 et seq.; and for cases see 11 DIGEST (Repl.) 455 et seq.

Cases referred to:

- (1) *Dalrymple v. Dalrymple* (1811), 2 Hag. Con. 54; 161 E.R. 665; on appeal (1814), 2 Hag. Con. 137, n.; 22 Digest (Repl.) 621, 7141.
- (2) *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395; 161 E.R. 782; 11 Digest (Repl.) 462, 955.
- (3) *Middleton v. Janverin* (1802), 2 Hag. Con. 437; 161 E.R. 797; 11 Digest (Repl.) 462, 957.
- (4) *Gordon v. Pye*, Ferg. 361.
- (5) *Compton v. Bearcroft* (1769), Bull.N.P. 113; 2 Hag. Con. 444, n.; 161 E.R. 799; 11 Digest (Repl.) 463, 967.

Also referred to in argument:

- Butler v. Dolben* (1756), 2 Lee, 312.
Lindo v. Belisario (1795), 1 Hag. Con. 216; 161 E.R. 531; on appeal (1796), 1 Hag. Con. App. 7; 27 Digest (Repl.) 35, 125.
Collett v. Collett (1843), 3 Curt. 726; 2 Notes of Cases, 504; 7 Jur. 1164; 163 E.R. 881; 27 Digest (Repl.) 468, 4031.
Dasent v. Dasent (1850), 1 Rob. Eccl. 800; 7 Notes of Cases, 126; 14 L.T.O.S. 48; 13 Jur. 832; 163 E.R. 1218; 27 Digest (Repl.) 467, 4026.
Vansittart v. Vansittart (1858), 4 K. & J. 62; 27 L.J.Ch. 222; 30 L.T.O.S. 331; 4 Jur.N.S. 276; 6 W.R. 239; affirmed, 2 De G. & J. 249; 27 L.J.Ch. 289; 31 L.T.O.S. 4; 22 J.P. 704; 4 Jur.N.S. 519; 6 W.R. 386; 44 E.R. 984, L.C. & L.J.J.; 27 Digest (Repl.) 213, 1691.

A *Brook v. Brook* (1858), 3 Sm. & G. 481; 27 L.J.Ch. 401; 30 L.T.O.S. 183; 4 Jur.N.S. 317; 6 W.R. 110; affirmed [1861-73] All E.R.Rep. 493; 9 H.L.Cas. 193; 4 L.T. 93; 25 J.P. 259; 7 Jur.N.S. 422; 9 W.R. 461; 11 E.R. 703; 11 Digest (Repl.) 457, 915.

B **Petition** for a decree of nullity of marriage brought by Valérie Josephine Wilhelmine Simonin (falsely called Mallac), of Kingston, who, on or about June 21, 1854, went through a form or ceremony of marriage with Leon Mallac, of Paris, at the parish church of St. Martin-in-the-Fields, London.

C The petitioner alleged that about two days after the ceremony of marriage, she and Mallac returned to Paris, but she did not cohabit with him, nor was the marriage ever consummated. The ceremony of marriage was had in contravention and evasion of the law of France regulating the marriage of domiciled French subjects contracted in foreign countries, and particularly in contravention and evasion of the provisions of arts. 170, 63, 148, 151 and 152 of the CODE CIVIL or CODE NAPOLÉON. The petitioner and Leon Mallac were native subjects of France, and were at the date of the ceremony of marriage domiciled in Paris, the petitioner then being about the age of twenty-two years, and Leon Mallac was about twenty-nine.

D On or about Dec. 1, 1854, the Civil Tribunal of the First Instance of the department of the Seine, sitting at Paris, at a public session of the first chamber of the tribunal, at the suit of the petitioner, Leon Mallac having been first duly summoned but not appearing, declared null and of no effect the pretended marriage of June 21, 1854, between Leon Mallac and the petitioner, and condemned Leon Mallac in the costs of the suit.

E The citation and copy petition were served personally on Leon Mallac at Naples. He put in no answer.

Dr. Phillimore, Q.C., and Dr. Swabey for the petitioner.

Cur. adv. vult.

April 26, 1860. **CRESSWELL, J.O.**, read the following judgment of the court.—

F This was a petition for a decree of nullity of marriage. The case came on for hearing before my brothers CHANNELL and KEATING and myself, on Jan. 18, 1860, when the petitioner proved that she was of French origin, and in 1853 was residing in Paris with her mother, her father being then dead. In that year she became acquainted with Leon Mallac, also of French origin, who made an offer of marriage, which she accepted. In June, 1854, he proposed that they should come to England

G and be married in this country, assigning as a reason that if that were done his father would afterwards consent, and he would then marry her in France. The parties came to London, and were married in due form by licence on June 21, 1854, in the parish church of St. Martins-in-the-Fields. The marriage was not consummated, and the parties returned to Paris the next day, and went to the residence of the petitioner's mother, Leon Mallac occupying another part of the same building.

H The petitioner asked him to marry her in France; he did not do so, but said he would go to his own country and ask the consent of his father, who lived on the banks of the Garonne. He afterwards wrote to her a letter, refusing to marry in France, and admitting that he had broken his word. The petitioner then instituted a suit before the Civil Tribunal of the First Instance of the Seine to procure a decree of nullity of the pretended marriage; and on Dec. 1, 1854, a decree was made.

I of which the original and a translation were put in evidence.

The grounds on which that decree was made are stated in the following words in the translation :

"The court decides by default against Leon Mallac, who did not appear, nor anyone for him, although duly called, as follows: Considering in law that, by the words of art. 170 of the CODE NAPOLÉON, when a marriage between French subjects has been celebrated in foreign countries, it must have been preceded by publication in France prescribed by the law, and that there must not have been any contravention of the provisions of arts. 144 and following of the

CODE NAPOLÉON; considering that the nullity provided for by art. 170 is not absolute, but ought to be pronounced when an omission of formalities has taken place with the formal intention to elude the law, it being in the province of the tribunal to appreciate the circumstances thereof; considering in fact that Leon Mallac and Valérie Simonin, artist of the Théâtre Français, both being French subjects, and domiciled in Paris, have contracted marriage in London, on June 22, 1854, before a minister of the Protestant Church, in the presence of witnesses; considering that this marriage was celebrated without the parties having obtained or sought the consent of their parents, and without having been preceded in France by the publications prescribed by art. 63 of the CODE NAPOLÉON; considering that the married couple having resided in Paris, only went momentarily to England for the purpose of contracting marriage there, and returned to France directly after the celebration; considering that from this it is evident that they acted in this manner with the formal intention of evading the prescriptions of the French law; considering that Valérie Simonin states distinctly that this marriage was not followed by any consummation or cohabitation between the parties, and that that assertion is not contradicted by Leon Mallac; considering that under these circumstances the marriage contracted in London, on June 22, 1854, between Leon Mallac and Valérie Simonin, cannot be recognised as valid and regular; on these grounds it declares the pretended marriage of June 22, 1854, between Leon Mallac and Valérie Simonin null and void . . ."

In May, 1857, the petitioner and her mother came to England, and they have resided here from that time, and the petitioner stated that she had no intention to return to France, and had no property there.

A witness, Auguste Noël, called to prove the law of France as applicable to the case, stated that he had acted as a notary public in Paris, and in order to do so it was necessary that he should be acquainted with the law of marriage in France. He deposed that art. 63 of the CODE NAPOLÉON as to publication of banns of marriage is part of the existing law of France, and was so in 1854; that art. 170 and arts. 151-154 are part of the law of France, and were so in 1854; that those articles do not prohibit the marriage, but only postpone it, and if the form prescribed is followed, and the time prescribed has elapsed, the parties may marry without consent; that a marriage in a foreign land as mentioned in art. 170, without attention to arts. 144 and 164 therein referred to, is good or bad according as the French tribunal before whom the question is raised may think the parties went abroad to marry in fraud of the law of France or not; that if a Frenchman was married here in England without consent, and consent afterwards given in France, that would render the marriage valid, whatever were the formalities omitted; that art. 184 of the CODE is part of the law of France, and was so in 1854; that the prescription therein mentioned would run in the case of a daughter from the age of twenty-one, and of a son from the age of twenty-five; that if a daughter between the ages of twenty-one and twenty-five allows a year to elapse without impeaching the marriage, this is a statute of limitations, and she cannot impeach it afterwards.

This state of facts presented two very important questions for our consideration: first, whether the court has any jurisdiction over Leon Mallac, the party cited; and, secondly, assuming that such jurisdiction exists, whether, according to the law of this country, the marriage solemnised is to be held null and void. We had the advantage of a learned argument on the part of the petitioner, and feel that the responsibility cast upon the court is greatly increased by the want of any such assistance on the other side. The argument in favour of the jurisdiction was rested on the ground, (i) that the contract was made in England and that the court is called upon for its decision with regard to the effect of a civil and religious English contract, celebrated under an English statute, the Marriage Act, 1823 [repealed with Savings by Marriage Act, 1949], and that the tribunals loci contractus have, generally speaking, consueance of the contract; (ii) that England is now the domicil

A of the petitioner, but that objection begs the main question in dispute, for, if the marriage be valid, it is not her domicile; (iii) that the respondent was personally served with the citation and petition, and has not appeared to contest the jurisdiction of the court. Section 42 of the Matrimonial Causes Act, 1857 [see now 12 HALSBURY'S LAWS (3rd Edn.) 332], removes all objection on the ground of the citation having been served without Her Majesty's dominions, but, in our opinion, B would not of itself suffice to give to the court authority to decide upon the rights of a party not otherwise subject to its jurisdiction.

This question, therefore, depends upon the first proposition, that the parties, by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal. HUBER, 65, tit. 1, De Foro Competente, s. 5, says :

C "Sequitur causa fori tertia quam rem gestam esse diximus eamque vel e contractu vel e delicto admissio."

In another place he adds, "Si reus illic haberi posse," etc. The same doctrine is to be found in JOHN VOET, BOULENOIS, DONELLUS and STORY. The Common Law Procedure Act, 1852 [repealed by Statute Law Revision and Civil Procedure Act, D 1883], s. 19, which allows a writ of summons to be issued against a person residing out of the jurisdiction and not being a British subject, and proceedings to be had thereon, notice of such writ having been served on the party, appears to have been founded on this principle; and s. 42 of the Act of 1857 already adverted to, removes all difficulty as to service of process, although the party cited is a foreigner by origin and domicile. There is nothing contrary to natural justice in calling upon E

him to have the validity or invalidity of a supposed contract ascertained and determined by the tribunal of the country where it was entered into by him, for, according to LORD STOWELL, in *Dalrymple v. Dalrymple* (1) (2 Hag. Con. at p. 61), it is an indisputable rule of law, as exercised in all civilised countries, that a man who contracts in a country engages for a competent knowledge of the law of contract in that country. If he rashly presumes to contract without such knowledge, he F must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party. We think, therefore, that this court is competent to entertain the present suit, and to adjudicate upon the petition presented by the party calling herself Valérie Simonin, which prays the court to decree that the pretended form or ceremony of marriage had between her and Leon Mallac was and is void, and of no effect in law whatsoever.

G This, which is the second question to be determined, is no doubt of the gravest importance, and, as far as this court has been able to ascertain, *primae impressionis*. No decision on the point was cited to us by the learned advocate for the petitioner, and we have not had the benefit of any other diligence save our own in the attempt to discover precedents for our guidance. The question is this—whether a marriage duly solemnised in England in the manner prescribed by the law of England between H parties of full age and capable of contracting according to that law is to be held null and void because the parties to that marriage, being foreigners, contracted it in England in order to evade the laws of the country to which they belonged and in which they were domiciled. It may, indeed, be doubted whether the evidence of the petitioner established the intention to evade the law of France, and whether that which the witness Auguste Noel called a statute of limitation, viz., art. 183 of the I CODE NAPOLÉON, did or did not operate to bar the right of the petitioner to institute this proceeding four years after the marriage was solemnised, but we pass over those points in order to deal with the broad and important question that has been raised.

It was contended that, the parties being French, the law of that country affixed to them an incapacity to contract marriage without attending to the formalities prescribed, and that such incapacity was a personal status which travelled with them everywhere and rendered them incapable of making a valid contract in any other country. But, according to the evidence, such incapacity to contract was,

not absolute, but conditional only, and a contract made by them would be good unless they came here with the intention to evade the law of France. So a contract made here would be unimpeachable if ratified by the subsequent assent of the parents, and a contract made here would be perfectly valid unless impeached within a certain time, and, therefore, a marriage contracted between a man and woman of the respective ages of twenty-five and twenty-one, without attending to the formalities prescribed by the CODE NAPOLÉON, arts. 151, 152, 153 and 154, may receive a different consideration from one absolutely prohibited by art. 148, by parties respectively under those ages. A B

Taking the decree of the French court in the suit there instituted as evidence that by the law of France this marriage was void, we again come to the broad question: Is it to be judged of here by the law of England or the law of France? In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made. It was and is contended, however, that that rule does not extend to contracts of marriage, but that parties are, with reference to them, bound by the law of their domicile. This question, of so much importance in all civilised communities, has been largely discussed by jurists of all nations, but they all apply their observations to controversies arising, not in the countries where the marriage was celebrated, but in other countries where it is brought in dispute and of which the parties were domiciled subjects. That a marriage, good by the law of the country where solemnised, should be held good in all other countries, and the converse, is strongly maintained as a general rule by nearly all writers on international law. But, according to the same authorities, it is subject to some few exceptions, viz., marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy, e.g., by our Royal Marriages Act, 1772. STORY, in his CONFLICT OF LAWS, s. 113 a, mentions a third exception: C D E

“Those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country.”

In several instances, learned judges presiding in our ecclesiastical courts have stated the general rule, without mentioning the exceptions, whence it has sometimes been contended that they meant to controvert their existence. But, inasmuch as none of the cases referred to fell within the exceptions above mentioned, it cannot justly be inferred that those learned persons intended their words to bear so extensive a meaning, for they would hardly have repudiated the doctrine of several learned writers, whose works are always received as worthy of great attention, without condescending to advert to it in terms, and assigning some reasons for dissenting from it. F G

In addition to the writings of jurists as to the existence of such a general rule by the law of all civilised nations, we find that in several cases it has been adopted by the courts of this country as the ground of their decisions. I believe the earliest of them was *Scrimshire v. Scrimshire* (2) decided by SIR EDWARD SIMPSON in 1752, for that learned judge then said it was a case *primae impressionis*. The judgment is of great value, from the full manner in which he dealt with the principles on which the court should proceed in adjudicating upon such cases. The parties were British subjects, domiciled in England; it was a suit for restitution of conjugal rights. The respondent pleaded that the marriage was celebrated in France, set forth circumstances under which that celebration took place, and averred that by the laws of France the marriage was null and void. SIR EDWARD SIMPSON, after disposing of one or two preliminary points, observed (2 Hag. Con. at pp. 398, 399): H I

“The general questions are two: first, whether there be full and legal proof that the parties did mutually, freely and voluntarily celebrate marriage in such manner as the laws of this country would deem to constitute marriage, if there was nothing else in the case but a question on the fact of the marriage; secondly, whether, if the fact of the marriage should be proved, this marriage can by the laws of this country be effectuated and pronounced to be good, being

A solemnised in France, where by law it is null and void, to all intents and purposes? For it seemed to be admitted in the argument that the law was so, but insisted that it ought not to be a rule of determination in this cause."

The first point he determined in the affirmative, and would have held the marriage valid had it been agreeable to the laws of France, where it was celebrated. He continues (*ibid.* at pp. 405 and 407):

B "But the great difficulty arises on the second question, from the marriage being celebrated in France, where such marriage is null by the laws of France . . . The only question before me is, whether this is a good or bad marriage by the laws of England; and I am inclined to think that it is not good. On this point I apprehend that it is the law of this country to take notice of the laws of France, or of any foreign country, in determining upon marriages of this kind.

C The question being in substance this—whether, by the law of this country, marriage contracts are not to be deemed good or bad according to the laws of the country in which they are formed, and whether they are not to be construed by that law."

D He then quotes several passages from SANCHEZ, J. VOET and others, showing that, if subjects of a country where clandestine marriages are prohibited go to another country where there is no such prohibition, and celebrate a clandestine marriage there, it is to be held good; and the converse is established by the same authorities. He sums up the effect of the books referred to in these words:

E "These authorities fully show that all contracts are to be considered according to the laws of the country where they are made, and the practice of civilised countries has been conformable to this doctrine, and by the common consent of nations has been so received."

F In many instances judges have used similar language with reference to cases where the form and ceremonial of the marriage were alone in question; and it can hardly, in such cases, be presumed that they intended their words to bear a more extensive sense than was necessary for the question then before them; but the sense ascribed by SIR EDWARD SIMPSON to these passages extends to the clandestine character of the marriage, and not merely to the form of the contract or ceremonial. He then explains, in the clearest manner, the principle on which courts have proceeded in holding that marriages are to be considered according to the law of the country in which they are celebrated (*ibid.* at p. 417):

G "All nations allow marriage contracts, they are *juris gentium*, and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion which must necessarily arise to the subjects of all nations with respect to legitimacy, successions and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not according to the laws of the country where they are made. It is of equal consequence to all that one rule in these cases should be observed by all countries, that is the law where the contract is made. By observing this law no inconvenience can arise, but infinite mischief will ensue if it is not."

H

I The same rule was recognised and made the ground of the judgment of SIR W. WYNNE, in *Middleton v. Janverin* (3); nor is their reasoning weakened by the fact that certain exceptions out of that rule have been generally recognised, viz., where marriages deemed contrary to the law of religion and morality, and contrary to the settled policy of a nation, have been contracted abroad and held void in the country of which the parties were domiciled subjects, and where such a marriage would not be allowed. It is very remarkable that neither in the writings of jurists nor in the arguments of counsel, nor in the judgments delivered in the courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of a country where a marriage has been solemnised in conformity with the

laws of that country should hold it void because the parties to the contract were the domiciled subjects of another country where such a marriage would not be allowed. No such argument has been advanced, even in the case of marriages deemed to be incestuous. There is a passage in HUBER *PRAELECTIONES JURIS CIVILIS*, lib. 1 tit. 3, "De Conflictu Legum," on this subject, which ought to be noticed. After discussing contracts made in foreign countries, in s. 8, he proceeds:

"Matrimonium pertinet etiam ad has regulas, si licitum est eo loco ubi contractum et celebratum est ubique validum erit affectumque habebit sub eadem exceptione prejudicii aliis non creandi, cui licet addere si exempli nimis sit abominandi, ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu veniri possit."

He proceeds to say that, if parties go to a country where such a marriage is tolerated and celebrate it there and return to their own country, it will not be recognised:

"Quia sic jus nostrum pessimis exemplis eluderetur, eoque pertinet haec observatio; sæpe fit ut adolescentes sub curatoribus agentes, furtivos amores nuptiis conglutinare cupientes abeant in Trisiam Orientalem aliave loca in quibus curatorum consensus ad matrimonium non requiretur juxta leges Romanas, quæ apud nos hæc parte cessant. Celebrant ibi matrimonium et mox redeunt in patriam. Ego ita existimo hanc rem manifeste pertinere ad eversionem juris nostri ac ideo non esse magistratus hic obligatos e jure gentium ejusmodi nuptias agnoscere et ratas habere; multoque magis statuendum et eos contra jus gentium facere videri qui civibus alieni imperii suâ facilitate jus patriis legibus contrarium scientes volentes impertiuntur."

This passage is remarkable. HUBER discusses the two exceptions out of the general rule that marriages good where celebrated are by the law of nations to be acknowledged everywhere—incestuous marriages and marriages of minors without consent (curatorum) celebrated in countries whither they have gone for the purpose of evading the laws of the country of their domicile—and he does not suggest the slightest doubt as to either class being held good in the country where solemnised, but, with reference to the second class, he vindicates the country of the domicile against the charge of violating the laws of nations by refusing to recognise them. STORY is, I believe, the only writer who has expressed an opinion on this point, and he, after mentioning that France has ventured on the doctrine that the marriages of Frenchmen under such circumstances shall not be deemed valid, adds (*CONFLICT OF LAWS*, s. 90):

"There can be little doubt that foreign countries where such marriages are celebrated will follow their own law, and disregard that of France."

The question appears to have occurred to LORD MEADOWBANK, a judge of great eminence, for in the note of his opinion annexed to his interlocutor of remit in *Gordon v. Pye* (4), he puts this question (*Ferg.* at p. 361):

"Or would a marriage here be declared void because the parties were domiciled in England, and minors when they married here, and of course incapable by the law of the country of contracting marriage?"

plainly intimating his own opinion that it would not. In this country marriages have been solemnly recognised as valid, although celebrated in Scotland between English domiciled minors without the consent required by the Marriage Act, 1753, 26 Geo. 2, c. 33 [repealed by Marriage Act, 1823], to which country they had resorted for the purpose of evading the operation of that Act. I allude to *Compton v. Bearcroft* (5) in a note to the report of *Middleton v. Janverin* (3).

The libel in that case is set out, in which the minority of the lady, the want of consent, the English domicile, and the Marriage Act, 1753, were pleaded, and it was alleged that the parties were married in Dumfries merely to evade the laws of this country, and returned to England the same day. The prayer was "that the mar-

A riage might be declared null and void, pursuant to the said Act for clandestine marriages." The libel was rejected. The court, therefore, must have held that if all the matters alleged were proved, they would not supply a ground for declaring the marriage null. It has been said that the parties did not in that case evade the Marriage Act, 1753, for that it contains an express exception of marriages solemnised in Scotland. It is true that marriages of minors in Scotland without consent are not prohibited by the Act, and, therefore, they cannot be said to be contrary to the law of England, but there can be no doubt that the parties went to Scotland to evade the operation of the law which was established in England. *Compton v. Bearcroft* (5) is, therefore, an authority to this extent, that a marriage contracted by English domiciled subjects abroad, where it is not prohibited by English law, will not be held bad because the parties have gone thither to evade the necessity of complying with certain conditions that would have been imposed upon them in England.

The French tribunal in the present case appears to have held the marriage null and void, not because it was absolutely prohibited by the law of France, but because the parties contracted it in England with the formal intention of evading the prescriptions of the French law. Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories, and if its subjects sustain hardships in consequence of those restrictions, their own nation only must bear the blame; but what right has one independent nation to call upon any other nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions? If there be any such right it must be found in the law of nations, that law

E "to which all nations have consented, or to which they must be presumed to consent, for the common benefit and advantage."

Which would be for the common benefit and advantage in such cases as the present, the observance of the law of the country where the marriage is celebrated, or of a foreign country? Parties contracting in any country are to be assumed to know, or to take the responsibility of not knowing, the law of that country. The law of France is equally stringent whether both parties are French, or one only. Assume, then, that a French subject comes to England and there marries without consent a subject of another foreign country by the laws of which such a marriage would be valid. Which law is to prevail? To which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not then be more just, and, therefore, more for the interest of all, that the law of that country should prevail which both are presumed to know and to agree to be bound by? Again, assume that one of the parties is English, would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law?

H But it may be said that in the case now before the court both parties are French, and, therefore, no such difficulty can arise. That is true; but if once the principle of surrendering our own law to that of a foreign country is recognised, it must be followed out to all its consequences. The cases put are, therefore, a fair test as to the possibility of maintaining that by any *comitas* or *jus gentium* this court is bound to adopt the law of France as its guide. HUBER, indeed, in the passage cited, after vindicating the refusal to acknowledge a marriage solemnised abroad between parties who have gone there to evade the laws of their own country, proceeds:

"Multoque magis statuendum est eos contra jus gentium facere videri qui civibus alieni imperii suâ facilitate jus patriis legibus contrarium scientes volentes impertiuntur."

It is somewhat difficult to ascertain what HUBER would require to be done by foreigners in order that they may be exempted from his reproach. He assumes that they are scientes. Is it intended that they are to inquire and ascertain whether

the law of any foreign nation will be evaded if the proposed marriage is solemnised? A
Is the domicile of the parties and the law prevailing there to be investigated? Are
the parties to be called upon to prove their ages, consent of certain relations, or the
non-existence of certain relations? or that they have not come to this country to
evade the laws of their own? Are the clergy of this country to be deemed
scientes that a foreign law is about to be evaded unless they have proof
to the contrary? Unless that proposition can be established, the reproach of B
violating the law of nations cannot attach to this country if such marriages are here
celebrated.

The great importance of having some one certain rule applicable to all cases; the
difficulty, not to say impossibility, of having any rule applicable to all cases, save
that the law of the country where a marriage is solemnised shall in that country
at least decide whether it is valid or invalid; the absence of any judicial decision or C
dictum, or of even any opposite opinion of any writer of authority on the law of
nations, have led us to the conclusion that we ought not to found our judgment in
this case on any other rule than the law of England as prevailing among English
subjects. France may make laws for her own subjects, and impose on them all the
consequences, good or evil, that result from those laws; but England also may make D
laws for the regulation of all matters within her own territory. Either nation may
refuse to surrender its own laws to those of the other, and if either is guilty of any
breach of the comitas or jus gentium, that reproach should attach to the nation
whose laws are least calculated to ensure the common benefit and advantage of all.
For these reasons we feel bound to dismiss this petition. It may be unfortunate
for the petitioner that she should be held a wife in England and not so in France.
If she had remained in her own country, she might have enjoyed there the freedom E
conferred upon her by a French tribunal; having elected England as her residence,
she must be contented to take English law as she finds it, and to be treated as
bound by the contract which she there made. The novelty and importance of the
question has cast upon the court much anxiety, but from some portion of it we are
relieved by the consideration that, if our judgment is wrong, it may be corrected F
by the highest tribunal in this country.

Petition dismissed.

A

CHASEMORE v. RICHARDS

[HOUSE OF LORDS (Lord Chelmsford, Lord Brougham, Lord Cranworth, Lord Wensleydale and Lord Kingsdown), February 15, 16, June 11, July 27, 1859]

B

[Reported 7 H.L.Cas. 349; 29 L.J.Ex. 81; 33 L.T.O.S. 350;
23 J.P. 596; 5 Jur.N.S. 873; 7 W.R. 685; 11 E.R. 140]

Water Supply—Rights of undertakers—Underground percolating water—Diversion from neighbouring land.

C

The right to the enjoyment of a natural stream of water on the surface ex jure naturae belongs to the proprietor of the adjoining lands as a natural incident to the property through which it passes, and he is entitled to the benefit of it as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle as that on which he is entitled to the support of his neighbours' soil for his own in its natural state. His right in no way depends on prescription or the presumed grant of his neighbours.

D

These principles, however, are not applicable to water percolating through underground strata, which has no certain course and no defined limit, but oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of water in a running stream, but the right to percolating underground water is necessarily of a very uncertain description. The owner of land under which there is water which is not in a known and defined channel can appropriate that water even though in so doing he deprives an adjacent landowner of water which he has enjoyed for many years.

E

This is so whether the diversion of the water is caused by the action of a private person in, e.g., sinking a well for his domestic use, or by the action of a public authority in taking the water from a large area of land owned by them and applying it to the use of the residents of that area.

F

So held by LORD CHELMSFORD, LORD BROUGHAM, LORD CRANWORTH and LORD KINGSDOWN, LORD WENSLEYDALE dubitante.

G

Notes. Applied: *New River Co. v. Johnson* (1860), 2 E. & E. 435; *R. v. Metropolitan Board of Works* (1863), 3 B. & S. 710. Distinguished: *Hodgkinson v. Ennor* (1863), 4 B. & S. 229. Considered: *Grand Junction Canal Co. v. Shugar* (1871), 6 Ch. App. 483. Distinguished: *Ballacorkish Silver, Lead and Copper Mining Co. v. Harrison* (1873), L.R. 5 P.C. 49. Considered: *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662. Applied: *Angus v. Dalton* (1877), 3 Q.B.D. 85. Considered: *Angus v. Dalton* (1878), 4 Q.B.D. 162. Applied: *Bryant v. Lefever* (1879), 4 C.P.D. 172; *Brain v. Marfell* (1879), 4 L.T. 455. Explained and Distinguished: *Ballard v. Tomlinson*, [1881-5] All E.R.Rep. 688. Followed: *Bower v. Sandford* (1889), 5 T.L.R. 570; *Bradford Corp'n. v. Pickles*, [1895-9] All E.R.Rep. 984. Considered: *Jordeson v. Sutton Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217. Applied: *Bradford Corp'n. v. Ferrand*, [1902] 2 Ch. 655. Considered: *English v. Metropolitan Water Board*, [1907] 1 K.B. 588. Distinguished: *Schwann v. Cotton*, [1916] 2 Ch. 120. Referred to: *Ennor v. Barwell* (1860), 2 Giff. 410; *Hunt v. Peake* (1860), 25 J.P. 5; *Gaved v. Martyn* (1865), 19 C.B.N.S. 732; *Ibbotson v. Peat* (1865), 3 H. & C. 644; *Jegon v. Vivian* (1871), 40 L.J.Ch. 389; *Dumbell v. Ballacorkish Silver, Lead and Copper Mining Co.* (1873), 22 W.R. 377; *West Cumberland Iron and Steel Co. v. Kenyon* (1877), 6 Ch.D. 773; *Sturges v. Bridgman* (1879), 11 Ch.D. 852; *A.-G. v. Tomline*, [1874-80] All E.R.Rep. 981; *Public Works Comrs. v. Angus & Co.*, *Dalton v. Angus & Co.*, [1881-5] All E.R.Rep. 1; *Harris v. De Pinna* (1886), 33 Ch.D. 238; *North Shore Rail. Co. v. Pion* (1889), 14 App. Cas. 612; *Baso v. Gregory* (1890), 25 Q.B.D. 481; *Allen v. Flood*, [1898] A.C. 1; *Salt Union v. Brunner, Mond & Co.*, [1906] 2 K.B. 822; *Ware and De Freville, Ltd. v.*

I

Motor Trade Association, [1920] All E.R.Rep. 387; *Bleachers Association, Ltd. v. A Chapel-en-le-Frith R.D.C.*, [1932] All E.R.Rep. 605; *Paine & Co. v. St. Neots Gas and Coke Co.*, [1939] 3 All E.R. 812.

As to water flowing otherwise than in defined channel, see 39 HALSBURY'S LAWS (3rd Edn.) 526-528; and for cases see 44 DIGEST 34-37.

Cases referred to :

- (1) *Broadbent v. Ramsbotham* (1856), 11 Exch. 602; 25 L.J.Ex. 115; 26 L.T.O.S. 244; 20 J.P. 486; 4 W.R. 290; 156 E.R. 971; 44 Digest 14, 62. B
- (2) *Embrey v. Owen* (1851), 6 Exch. 353; 20 L.J.Ex. 212; 17 L.T.O.S. 79; 15 Jur. 633; 155 E.R. 579; 44 Digest 17, 95.
- (3) *Rawstron v. Taylor* (1855), 11 Exch. 369; 25 L.J.Ex. 33; 156 E.R. 873; 44 Digest 36, 263.
- (4) *Acton v. Blundell* (1843), 12 M. & W. 324; 13 L.J.Ex. 289; 1 L.T.O.S. 207; 152 E.R. 1223, Ex. Ch.; 44 Digest 34, 249. C
- (5) *Balston v. Bensted* (1808), 1 Camp. 463; 170 E.R. 462, N.P.; 44 Digest 35, 261.
- (6) *Dickinson v. Grand Junction Canal Co.* (1852), 7 Exch. 282; 21 L.J.Ex. 241; 18 L.T.O.S. 258; 16 Jur. 200; 155 E.R. 953; 44 Digest 11, 40.
- (7) *Mason v. Hill* (1833), 5 B. & Ad. 1; 2 Nev. & M.K.B. 747; 2 L.J.K.B. 118; 110 E.R. 692; 44 Digest 5, 1. D
- (8) *Shury v. Piggot* (1626), 3 Bulst. 339; 81 E.R. 280; sub nom. *Shewry v. Pigott*, W.Jo. 145; sub nom. *Sury v. Pigott*, Palm. 444; Poph. 166; sub nom. *Surrey v. Piggot*, Lat. 153; Noy, 84; 44 Digest 31, 230.
- (9) *Brown v. Best* (1747), 1 Wils. 174; 95 E.R. 557; 44 Digest 24, 160.
- (10) *Wood v. Waud* (1849), 3 Exch. 748; 18 L.J.Ex. 305; 13 L.T.O.S. 212; 13 Jur. 472; 154 E.R. 1047; 44 Digest 37, 268. E
- (11) *Wright v. Howard* (1823), 1 Sim. & St. 190; 1 L.J.O.S.Ch. 94; 57 E.R. 76; 44 Digest 28, 205.
- (12) *Tyler v. Wilkinson*, 4 Mason U.S.Rep. 397.
- (13) *Pastorius v. Fisher*, 1 Rawle, Pennsylvania Reports, 27.
- (14) *Williams v. Morland* (1824), 2 B. & C. 910; 4 Dow. & Ry.K.B. 583; 2 L.J.O.S.K.B. 191; 107 E.R. 620; 44 Digest 5, 3. F
- (15) *Liggins v. Inge* (1831), 7 Bing. 682; 5 Moo. & P. 712; 9 L.J.O.S.C.P. 202; 131 E.R. 263; 44 Digest 5, 4.
- (16) *Smith v. Kendrick* (1849), post p. 273; 7 C.B. 515; 18 L.J.C.P. 172; 12 L.T.O.S. 556; 13 Jur. 362; 137 E.R. 205; 33 Digest (Repl.) 866, 1150. G

Appeal from a decision of the Court of Exchequer Chamber, reported 2 H. & N. 168, in an action brought by the appellant, a mill owner, against the respondents, the clerk and members of the Local Board of Health, Croydon, Surrey, for damage alleged to have been done by the respondents under the authority of the board to an ancient stream and mill of the appellant by abstracting therefrom, by means of a well, the underground water which would otherwise have flowed into and supplied such stream. H

The appellant, Chasemore, was the occupier of an ancient mill on the river Wandle, called Wandle Mill, situated about a mile from Croydon. He and his predecessors had been accustomed for sixty years and upwards to use and enjoy the flow of the river for the purpose of working and using the mill. The river had always been fed and supplied above the mill by (among other sources) the rainfall of a district of many thousand acres in extent, comprising the town of Croydon and its vicinity. Large quantities of this water sank into the upper ground to various depths, and then flowed and percolated through the strata towards and into the river Wandle (if not interfered with), in some instances rising to the surface as springs, and then flowing as little surface streams into the river, and in other instances finding their whole way underground into the river. The precise lines and courses in which the underground runlets and particles of water so found their way underground into the river varied continually and infinitely with the shiftings I

A and variations in the soil which occurred from natural causes, but the general flow of large quantities of water to the river Wandle was as described, and if they were not interfered with or intercepted they formed considerable sources of supply to the river, as well above as below the mill. It was impossible to know beforehand the precise or complete effect which the sinking of a new well and pumping from it in any part of the district above described might have upon springs or streams

B in the vicinity; the effect might be instantly sensible and considerable, or for a long time no sensible effect might appear; but the natural effect of abstracting a large quantity of water at any spot of the district was to diminish the quantity at every other spot throughout the district, though the amount of diminution at particular spots might be infinitesimally small, and the natural effect to be reasonably expected from sinking a new well in such a district, and from continually, or almost

C continually, pumping thence large quantities of water for a long time, must be the sensible diminution of the water supply of springs and streams in the vicinity. This description applied to the district in question, not merely at the time of the action, but for sixty years and upwards before the works and acts of the local board of health.

The local board of health for the town of Croydon was constituted under the

D Public Health Acts. In 1851 the board, for the purpose of supplying the town of Croydon with water and for other sanitary purposes, sunk a large well to the depth of seventy-four feet in a piece of land belonging to them in the town of Croydon. They also erected pumps and steam-engines on their ground and pumped water from the well into a reservoir and pipes for the supply of the town. The amount of water pumped and taken by them from the well during the period of six calendar months

E from Aug. 16, 1853, to Feb. 16, 1854, was between 500,000 and 600,000 gallons daily. Part of this water, so pumped and taken by them from the well, was water then flowing and finding its way underground through the strata towards the river Wandle, and, if not intercepted by the operation of the well and pumping, would have found its way into the river Wandle, above the appellant's mill and would have been serviceable for the working of the mill, but, by the operation of the well

F and pumping, it was drawn away into the well and thence pumped up and taken by the board. The board throughout all their acts and works was actuated by no malice against the appellant or anyone else, and they did not intend in any way to diminish the quantity of water in the river Wandle, or to injure any person interested in the use of the river, but the board, at the time of their acts and works, had reasonable means of knowing the probable and natural effects thereof.

G The Court of Exchequer gave judgment in favour of the respondents, without argument, on the authority of a previous decision in that court of *Broadbent v. Ramsbotham* (1). On appeal to the Court of Exchequer Chamber the decision of the Exchequer was confirmed, COLERIDGE, J., differing from the rest of the court. The appellant appealed to the House of Lords.

H *Bovill, Q.C., Needham and Raymond* for the appellant.
Sir Fitzroy Kelly, Q.C., and Miller for the respondents.

At the conclusion of the arguments the House put the following question to the learned judges who attended, viz., WIGHTMAN, WILLIAMS, CROMPTON, JJ., and MARTIN, BRAMWELL and WATSON, BB.: Whether, under the circumstances stated, the Croydon Local Board of Health are legally liable to the action of the appellant

I for the abstraction of the water in the manner described? The learned judges later delivered their unanimous opinion by WIGHTMAN, J., answering the question submitted to them in the negative.

In the course of his judgment **WIGHTMAN, J.**, said: The law respecting the right to water flowing in definite visible channels may be considered as pretty well settled by several modern decisions, and is very clearly enunciated in the judgment of the Court of Exchequer in *Embrey v. Owen* (2). But the law as laid down in those cases is inapplicable to the case of subterranean water not flowing into any definite channel, nor indeed at all in the ordinary sense, but percolating or oozing

through the soil more or less according to the quantity of rain that may chance to fall. The inapplicability of the general law respecting rights to water to such a case has been recognised and observed upon by many judges whose opinions are of the greatest weight and authority. A

[He referred to *Rawstron v. Taylor* (3), *Broadbent v. Ramsbotham* (1), and *Acton v. Blundell* (4), and continued:] There is no case of authority, of which I am aware, that can be cited in support of the position contended for by the appellant, or in which the right to subterranean percolating water adverse to that of the owner of the soil came in question, except the *nisi prius* case of *Balston v. Bensted* (5), and *Dickinson v. Grand Junction Canal Co.* (6). B

In the first of these cases LORD ELLENBOROUGH is reported to have expressed his opinion that twenty years of the enjoyment of the use of water in any manner afforded an exclusive presumption of right. This opinion amounted only to the dictum of an eminent judge followed by no decision upon the point, for the case ended in the withdrawal of a juror and is directly at variance with the judgment of the Court of Exchequer in the other case, upon which the appellant relies, of *Dickinson v. Grand Junction Canal Co.* (6), in which the court held that C

"the right to have a stream running in its natural course is not by a presumed grant from a long acquiescence on the part of the riparian proprietors above and below, but is *ex jure naturæ*, and an incident of property as much as the right to have the soil itself in its natural state unaltered by the acts of a neighbouring proprietor who cannot dig so as to deprive it of the support of his land. D

In *Dickinson v. Grand Junction Canal Co.* (6) the very question now before your Lordships' House arose, and that case is relied upon by the appellant as a decisive authority in his favour. The Court of Exchequer was of opinion that the company, by digging a well and pumping out the water, and so intercepting and diverting underground and percolating water which would otherwise have gone into a stream which flowed to the appellant's mill, and was applied to the working of it, had rendered themselves liable to an action for the infringement of a right at common law. In the same judgment, however, the court refers to *Acton v. Blundell* (4), apparently with approbation, and observes (7 Exch. at p. 300) that E

"the existence and state of underground water is generally unknown before the well is made, and after it is made there is a difficulty in knowing certainly how much, if any, of the water of the well when the ground was in its natural state belonged to the owner in right of his property in the soil, and how much belonged to his neighbour." G

He then observes that

"these practical uncertainties make it very reasonable not to apply the rules which regulate the enjoyment of streams and waters above ground to subterranean waters." H

But the court, without at all adverting to this distinction which it has adopted, treats the case of underground percolating water as governed by the same rules as would obtain in the case of visible streams and watercourses above ground, and no remark or comment is made or reason assigned by the court for arriving at a conclusion which not only does not seem warranted by the premises previously adopted, but is in effect hardly consistent with them. The plaintiff in that case was held to have a cause of action independently of any infringement of a right at common law, by reason of the breach of an agreement between the parties and of an Act of Parliament; and a decision upon the right at common law seems not to have been necessary for determining the suit between the parties. These considerations greatly weaken the effect of *Dickinson v. Grand Junction Canal Co.* (6), as an authority against the respondents upon the point now in question, but it is an authority in their favour to show that a right to water is not by a presumed grant from long acquiescence, but, if it exists at all, it is *jure nature*, and that the rules I

A of law that regulate the rights of parties to the use of water are not at all applicable to the case of waters percolating underground.

Their Lordships took time for consideration.

July 27, 1859. The following opinions were delivered.

B **LORD CHELMSFORD.**—The question in this case is whether the appellant is entitled to claim against the respondents the right to have the benefit of the rain-water which falls upon a district of many thousand acres in extent, and percolates through the strata to the river Wandle, increasing the supply of water in the river and being of sensible value in and towards the working of an ancient mill belonging to the appellant. The acts of the respondents by which this underground water
 C was interrupted and prevented from finding its way into the river were done upon their own land. It was conceded by the appellant in argument that a landowner had a limited and qualified right to appropriate water, the course of which is invisible and undefined, exactly to the same extent and for the same purposes as he would be entitled to use water flowing in a defined and visible channel. This, it was contended, must be confined to a reasonable use of the water for domestic and
 D agricultural purposes, and perhaps (it was said), according to the opinion of CHANCELLOR KENT, for the purposes of manufacture also. It must further be admitted (and appeared to be so in argument) that, in addition to these direct uses to which the water may be diverted, if in the regular course of mining operations the percolation of underground water is arrested in its progress and prevented reaching a point where it would have increased a supply which had previously been
 E usefully employed by an adjoining landowner, he can maintain no action for the loss of the water thus cut off from him. A distinction was suggested between such a use as the one last mentioned, where the interception of the water was merely the consequence of operations upon a party's own land, and the present, where the very end and object of the act done was to collect and appropriate the water.

On the state of things existing in this case, a further distinction was insisted upon
 F between a party sinking a well in his own land, either for domestic or agricultural or manufacturing purposes, and a public board or a water company doing the same thing for sanitary purposes, or for supplying the inhabitants of the neighbourhood with water. Before, however, the appellant can question the act of the respondents, or discuss with them the reasonableness of their claim to appropriate this underground water for their own purposes (whatever they may be), he must first
 G establish his own right to have it pass freely to his mill, subject only to the qualified and restricted use of it to which each owner may be entitled, through whose land it may make its way. It seems to me that both principle and authority are opposed to such a right. The law as to water flowing in a certain and definite channel has been conclusively settled by a series of decisions, in which the whole subject has been very fully and satisfactorily gone into and considered, and the relative rights
 H and duties of riparian proprietors have been carefully adjusted and established.

The principle of these decisions seems to me to be applicable to all water flowing in a certain and defined course, whether in an open visible stream or in a subterranean channel. I agree with the observation of POLLOCK, C.B., in *Dickinson v. Grand Junction Canal* (6) (7 Exch. at pp. 300, 301) that

I "if the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterranean course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground."

But it appears to me that the principles which apply to flowing water in streams or rivers, the right to the flow of which in the natural state is incident to the property through which it passes, are wholly inapplicable to water percolating

through underground strata, which has no certain course and no defined limit, but oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream—whether it has been increased by floods or diminished by drought it flows on in the same ascertained course, and the use which every owner may claim is only of the water which has entered into and become a part of the stream. But the right to percolating underground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain had found its way to the ground? If the owner of land through which the water filters cannot intercept it in its progress, can he prevent its descending to the earth at all by catching it in tanks or cisterns? And how far will the right to this water supply extend?

In the present case the water which ultimately finds its way to the river Wandle is strained through the soil of several thousand acres. Are the most distant land-owners, as well as the adjacent ones, to be bound at their peril to take care to use their lands so as not to interrupt the oozing of the water through the soil to a greater extent than shall be necessary for their own actual wants? For, with COLERIDGE, J., I do not see

“how the ignorance which the landowner has of the course of the springs below the surface, of the changes they undergo, and of the date of their commencement, is material in respect of a right which does not grow out of the assent or acquiescence of the landowner, as in the case of a servitude, but out of the nature of the thing itself.”

This distinction between water flowing in a definite channel, and water, whether above or under ground, not flowing in a stream at all, but either draining off the surface of the land or oozing through the underground soil in varying quantities and in uncertain directions depending upon the variations of the atmosphere, appears to be well settled by the cases cited in argument.

In *Rawstron v. Taylor* (3), it was held that in the case of common surface water rising out of spongy or boggy ground, and flowing in no definite channel, the landowner was entitled to get rid of it in any way he pleased, although it contributed to the supply of the plaintiff's mill. My noble and learned friend LORD WENSLEYDALE, then PARKE, B., in his judgment observed (11 Exch. at p. 382):

“This water having no defined course, and its supply being merely casual, the defendant is entitled to get rid of it in any way he pleases.”

In *Broadbent v. Ramsbotham* (1), it was decided that a landowner has a right to appropriate surface water which flows over his land in no definite channel although the water is thereby prevented from reaching a brook, the stream of which had for more than fifty years worked the plaintiff's mill. ALDERSON, B., in delivering the judgment of the court in that case, says (11 Exch. at p. 615):

“No doubt all the water falling from heaven and shed upon the surface of the earth at the foot of which the brook runs must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which the water falls from dealing with it as he pleases and appropriating it. He cannot, it is true, do so if the water has arrived at, and is flowing in some natural channel already formed, but he has a perfect right to appropriate it before it arrives at such channel.”

These cases apply to the right to surface water not flowing in any defined natural watercourse. But, of course, the principles they establish are equally, if not more strongly, applicable to subterranean water of the same casual, undefined and varying description. This appears clearly to have been the opinion of TINDAL, C.J., and the Court of Exchequer Chamber in *Acton v. Blundell* (4), for, although the court abstained from intimating any opinion as to what might have been the rule of law if there had been an uninterrupted user for twenty years of the well of the plaintiff

A which had been laid dry by the mining operations of the defendant, yet the Chief Justice, having prefaced his judgment by stating (12 M. & W. at p. 348) that

“The question argued before us had been in substance this : whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applied to this and regulates a watercourse flowing on the surface,”

B concludes with these words (*ibid.* at pp. 353, 354) :

“We think the present case . . . is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or veinous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is therein to be found to his own purposes, at his free will and pleasure; that if, in the exercise of such rights, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuria*, which cannot become the ground of an action.”

The Court of Exchequer in the present case gave judgment for the respondents without argument, on the authority of the decision in *Broadbent v. Ramsbotham* (1). The Court of Exchequer Chamber affirmed that judgment, there having been only one dissentient opinion, which, however, pronounced (as it was) by a most learned and able judge (COLERIDGE, J.), is certainly entitled to the highest respect. The judges, of whose assistance your Lordships have had the advantage, have been unanimous in their agreement with the judgment of the Court of Exchequer Chamber. Against this concurrence of authority, what is there to be opposed in favour of the appellant but the *nisi prius* case of *Balston v. Bensted* (5) and *Dickinson v. Grand Junction Canal Co.* (6)? With respect to *Balston v. Bensted* (5), it does not appear that the question of the right to water percolating through the strata, as distinguished from water flowing in a visible stream, was ever presented to LORD ELLENBOROUGH's mind, but he observed early in the trial that there could be no doubt but that twenty years' exclusive enjoyment of water in any particular manner affords a presumption of right in the party so enjoying it. Whether by the words “in any particular manner” his Lordship meant to point to the right claimed in that case, or intended to state a proposition applicable to all water of which there had been a twenty years' enjoyment, from whatever source it might be derived, it is impossible to gather from the report, but the question was never argued, and as, upon proof that the decrease of the water in the plaintiff's bath had been occasioned by the operations in the defendant's quarry, the case was at once referred, it can hardly be urged as any authority at all upon a point of such importance, which requires so much consideration, as that which it is supposed to have decided. With respect to *Dickinson v. Grand Junction Canal Co.* (6), upon which the appellant also relied, after the observations made upon it by CRESSWELL, J., in the Exchequer Chamber and by WIGHTMAN, J., delivering the opinions of the judges to this House, it is unnecessary for me to say more than that I entirely agree with them, and think that it can hardly be regarded as a satisfactory decision upon the point now under consideration.

It appears to me that reason and principle, as well as authority, are opposed to the claim of the appellant to maintain an action for the interception of the underground water which would otherwise have ultimately found its way to the river Wandle, and that, therefore, the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD CRANWORTH.—I shall not trouble your Lordships by adding more than a very few words to what has fallen from my noble and learned friend, concurring,

as I do, in the unanimous opinion delivered by the learned judges who assisted your Lordships at the hearing of the argument, and in the view taken by my noble and learned friend. The right to running water has always been properly described as a natural right, just like the right to the air we breathe; they are the gifts of nature, and no one has a right to appropriate them. There is no difficulty in enforcing that right, because running water is something visible, and no one can intercept it without knowing whether he does or does not do injury to those who are above or below him. But if the doctrine were applied to water merely percolating, as it is said, through the soil, and eventually reaching some stream, it would always be a matter that would require the evidence of scientific men to state whether or not there had been interruption, and whether or not there had been injury. It is a process of nature not apparent, and, therefore, such percolating water has not received the protection which water running in a natural channel on the surface has always received. If the arguments of the appellant were adopted, the consequence would be that every well that ever was sunk would have given rise, or might give rise, to an action. It is said that, in this case, this is not a well sunk by a particular individual for his own purposes, but a great well which has been sunk, and by which water is raised to a very enormous extent, for supplying the whole town of Croydon. That argument does not affect my mind at all; because, if it be conceded—as I think it must be conceded—that each and every one of the individuals residing upon this area might have sunk a well of his own to supply himself, it seems to me to be exactly the same thing whether the water is abstracted by one large well which supplies the whole community, or by a thousand small wells, by which each individual of the community supplies himself. In truth, I should think that, in all probability, the loss of water would be much greater by each individual sinking a well than by one great well being sunk for the supply of the whole community. On these grounds I entirely concur with my noble and learned friend, and I think the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD WENSLEYDALE.—This case is of the greatest importance, and requires the most full and attentive consideration. No question that has occurred in my time has been so worthy of the most careful examination; and though we have had a very able argument at the Bar from the learned counsel, and we also have been favoured with the unanimous opinion of six of the judges in an able judgment pronounced by WIGHTMAN, J., I must own, speaking for myself, I should still desire further discussion, as I have felt very great difficulty in coming to a conclusion satisfactory to my mind, so many difficulties presenting themselves on both sides. As, however, my noble and learned friends who heard the case argued at the Bar have not had the same difficulty in deciding that I have, I concur, though not without very serious doubts in the propriety of the conclusion at which they have arrived.

Your Lordships have for the first time to decide the question of the rights to underground water. There are two conflicting authorities—the case under appeal, and *Dickinson v. Grand Junction Canal Co.* (6). Your Lordships have to decide between them. It is supposed in the judgment in the Exchequer Chamber in this case, delivered by CRESSWELL, J., that the Court of Exchequer had in two subsequent cases, *Rawstron v. Taylor* (3) and *Broadbent v. Ramsbotham* (1), decided differently. Those cases are said to be inconsistent with the decision in *Dickinson v. Grand Junction Canal Co.* (6), and virtually to overrule it. This is certainly a mistake, for having been a party to the judgments in each of those cases, I am sure that I, at least, had no notion of impugning the doctrine which I had joined in laying down before in *Dickinson v. Grand Junction Canal Co.* (6), which was not decided without great consideration. In *Broadbent v. Ramsbotham* (1) it did not appear that any water which percolated the strata would have reached the brook, and I well recollect that on the argument I so considered, and, therefore, that the plaintiff could not recover on the ground on which *Dickinson v. Grand Junction Canal Co.* (6) was decided. The argument of Mr. Cowling, as reported in 25 L.J.Ex.

A 122, which is fuller than that in 11 Exch. 602, was directed to the point. I may add that the report is more correct than that in 11 Exch., which attributes to me too limited a view of the decision in *Dickinson v. Grand Junction Canal Co.* (6).

The subject of rights to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory ground. It has been now settled that the right to the enjoyment of a natural stream of water on the surface *ex jure naturæ* belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle as that on which he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription or the presumed grant of his neighbours.

The elaborate judgment of LORD DENMAN, in *Mason v. Hill* (7) in 1833, reviewed most prior judgments and authorities of importance up to that date, and fully established that proposition. But former authorities, and of a very early date, when carefully considered, really left no room for doubt on the subject. In *Shury v. Piggot* (8) decided in 1626, WHITLOCK, J., laid it down that a watercourse differs from a way or common; that it doth not begin by prescription, nor yet by assent, but the same doth begin *ex jure naturæ*, having taken this course naturally, and cannot be arrested; and he observed that the course of a spring is a natural course and current, and to stop this may be a nuisance to the commonwealth and a private wrong. In *Brown v. Best* (9), LEE, C.J., is reported to have said that a watercourse is *jure naturæ* and, therefore, a declaration stating merely the possession of the place through which the water used to run is good. DENISON, J., said that in natural watercourses that was the most proper mode of declaring. The decision in *Mason v. Hill* (7) has been followed by many others, laying down the same propositions: *Wood v. Waud* (10) (3 Exch. at pp. 774, 775). *Mason v. Hill* (7), had been preceded by *Wright v. Howard* (11), before SIR JOHN LEACH, V.-C.; and it was followed by *Embrey v. Owen* (2), and by *Dickinson v. Grand Junction Canal Co.* (6).

This position is also established in the American courts: *Tyler v. Wilkinson* (12); and sanctioned by the best writers of the highest authority: 3 KENT'S COMMENTARIES, Lect. 52, pp. 439, 455. It is laid down as the first proposition in the very able treatise on WATERCOURSES by MR. ANGELL, an American authority, pp. 1 and 21, 22, and it has been held in America that the law implied damage from the violation of the right (vide ANGELL ON WATERCOURSES, 98; *Pastorius v. Fisher* (13))—a matter which has been sometimes doubted, though probably without sufficient room.

We may consider, therefore, that this proposition is indisputable—that the right of the proprietor to the enjoyment of a watercourse on the surface is a natural right, and not acquired by occupation of the stream itself, or presumed grant. The expressions used by BAYLEY, J., in *Williams v. Morland* (14), and by TINDAL, C.J., in *Liggins v. Inge* (15), that water flowing in a stream is *publici juris*, and the property of the first occupier, are founded on a mistake between the property in the water itself, and the right to have its continual flow. The observation also of TINDAL, C.J., in *Acton v. Blundell* (4), and of MAULE, J., in *Smith v. Kendrick* (16), as to the origin of the right to the continued flow of a superficial stream, being the presumed acquiescence of the proprietors above and below, which is the foundation of the distinction made by the Lord Chief Justice between those streams and subterranean watercourses, cannot be supported. The right to a natural stream flowing in a definite channel is not confined to streams on the surface, but the right to an underground stream flowing in a known and definite channel is equally a right *ex natura*, and an incident to the land itself, as a beneficial adjunct to it, as was determined in *Wood v. Waud* (10).

If the river Wandle in this case had been supplied by natural streams flowing into the river above ground or in known definite channels below ground, the cutting off

those streams to which the person entitled to the use of the river was entitled *ex natura* as feeders of the river would be an injury to him and give him a right of action. And if this be true with regard to underground streams finding their way into the river, then comes the difficulty how to distinguish the smaller rivulets and particles of water which flow and percolate into and supply the river. They are all equally the gift of nature for the benefit of the proprietors of the soil, through and into which they flow. They are all flowing water the property in which is not vested in the owner of the soil any more than the property in the water of a river which flows through it on the surface. In *Acton v. Blundell* (4) it is said by TINDAL, C.J., that the case

“rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it be solid rock or porous ground, or veinous earth, or part soil, part water; that the person who owns the surface may dig therein and apply all that he finds to his own purposes at his free will and pleasure.”

If this applies to water underground naturally in a course of transit—and it must do so to be applicable—and not to mere stagnant water, I agree with COLERIDGE, J., in his remark that the reason why it is more the subject of property than the water flowing above ground is not explained. Surely the use of the flowing water in each case, and not the property in it, belongs to the proprietor of the surface. As to that part of COLERIDGE, J.'s opinion in which he relies on the possession of the mill for thirty or sixty years, I think he is wrong. I do not think that the principle on which prescription rests can be applied. It has not been with the permission of the proprietor of the land that the streams have flowed into the river for twenty years or upwards: *qui non prohibet quod prohibere potest, assentire videtur*. But how here could he prevent it? He could not bring an action against the adjoining proprietor; he could not be bound to dig a deep trench in his own land to cut off the supplies of water, in order to indicate his dissent. It is going very far to say that a man must be at the expense of putting up a screen to window lights to prevent a title being gained by twenty years' enjoyment of light passing through a window. But this case would go very far beyond that. I think that the enjoyment of the right to these natural streams cannot be supported by any length of enjoyment, if it does not belong of natural right to the plaintiff. For the same reason I dispute the correctness of LORD ELLENBOROUGH's opinion in the case of the spring in *Balston v. Bensted* (5), where there had been twenty years' enjoyment of it in a particular mode.

The true foundation of the right is that it is incident to the land *ex jure naturæ*. What, then, is the distinction between superficial streams and subterranean water? With respect to underground water percolating the strata, two considerations arise which make a material difference between it and the right to superficial streams. In the first place, these subterranean waters cannot be actually enjoyed (and all things are given to be enjoyed) without artificial means. The water must be reduced into possession before it can be used, and some mode of reducing into possession must be permitted by law. If there be no such right, underground water is comparatively useless. A man may, therefore, dig for his own supply or make a well for his own use, and that of his family, and in so doing he may deprive his neighbour's land of moisture, and even tap a copious spring and prevent it from flowing to his neighbour's close. It can rarely happen that, in excavating in order to obtain the use of the water, some injury will not be caused to the subterranean supplies of a neighbour, especially as the precise course and direction of such water can seldom be known accurately beforehand. In the second place, as the great interests of society require that the cultivation of every man's land should be encouraged and its natural advantages made fully available, the owner must be permitted to dig in his own soil, and in so doing he can very rarely avoid interfering with the subterranean water flowing or percolating in his neighbour's land. In the civil law are to be found many instances in which it is allowed to cut off subterranean

A supplies, if it is done in the cultivation of the soil. In the *DIGEST*, lib. 39, tit. 3, art. 1, s. iii (POTHIER's edition, vol. 3, p. 578), it is said

“Denique Marcellus scribit; cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem non debet habere, si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit.”

B A very extensive sense is given to these words, authorising the improvement of the proprietor's own land, in the civil law. In the *DIGEST*, lib. 39, tit. 3, art. 1, s. ix, “*DE AQUA*,” it is said that the making a work “*agri colendi causa et frugum querendarum causa*” and thereby altering the course of the *aquae pluviae*, is not actionable. The term “*fruges*” is said to be the same as *rent*: s. ix, see POTHIER's *DIGEST*, 379.

C It would seem, therefore, that, if the sources of a fountain or spring in an adjoining piece of land were cut off by excavating in order to get the minerals in any place, it would be deemed by the Roman law to fall within the principle of the improvement of the land, and not be actionable. *Acton v. Blundell* (4) would be rightly decided upon this ground, because the injury to the plaintiff's well was caused by the lawful exercise of the defendant's right to get the minerals in his

D land, and, unless he had that right, the public would have lost the benefit of a valuable gift of Providence. We came to the conclusion that every man has a right to the natural advantages of his soil—the plaintiff to the benefit of the flow of water in the river and its natural supplies; the defendant to the enjoyment of his land, and to the underground waters in it; and he may, in order to obtain that water, sink a well. But, according to the rule of reason and law—*sic utere tuo ut*

E *non alienum laedas*—it seems right to hold that he ought to exercise his right in a reasonable manner, with as little injury to his neighbour's rights as may be. The civil law deems an act, otherwise lawful in itself, illegal, if done with a malicious intent of injuring a neighbour: *animo vicini nocendi*. The same principle is adopted in the laws of Scotland, where an otherwise lawful act is forbidden if done *aemulatione vicini*: *BELL'S PRINCIPLES*, s. 966.

F The question in this case, therefore, as it seems to me, resolves itself into an inquiry whether the respondents exercised their right of enjoying the subterranean waters in a reasonable manner. Had they made the well and used their steam-engines for the supply of water for the use of their own property and those living on it, there could have been no question, if the number of houses upon it had increased to any extent, and the quantity of water for the families dwelling on the

G property had been proportionately augmented, that there could have been no just ground of complaint, but I doubt very greatly the legality of the respondents' acts in abstracting water for the use of a large district in the neighbourhood unconnected with their estate, who would have no right to take it directly themselves, to the injury of those neighbouring proprietors who have an equal right with themselves. It does not follow that each person who was supplied with water by the respondents

H could have dug a well himself on his own land and taken the like quantity of water; the respondents may have taken much more than would have been abstracted if each had exercised his own right. The same objection would not apply to the abstraction of water for the use of the dwellers on the respondents' land, even though they carried on trades requiring more water (brewers for example) than would be used for mere domestic purposes. It would still be for their purposes

I only, but in this case there has been an abstraction of water for purposes wholly unconnected with the enjoyment of the respondents' land. On the whole, I should certainly have wished to give this important case further consideration; but as my noble and learned friends have formed their opinions upon it, I acquiesce, and do not give my advice to your Lordships to reverse the judgment.

LORD KINGSDOWN.—I confess that I am unable to share in the doubts that have been expressed by LORD WENSLEYDALE in the able and elaborate opinion which he has just delivered. I entirely concur in the opinion which has been given by the

judges unanimously in this case, and for the reasons by which that judgment has been supported. A

LORD CHELMSFORD.—I ought to have mentioned that my noble and learned friend **LORD BROUGHAM**, who is compelled to leave the House today, but who was present during the whole of the argument, entirely concurs in the opinion which I have expressed. B

Appeal dismissed.

CLARK v. TAYLOR

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), July 7, 1853]

[Reported 1 Drew. 642; 1 Eq. Rep. 435; 21 L.T.O.S. 287;
1 W.R. 476; 61 E.R. 596] D

Charity—Cy-près doctrine—General charitable intent—Need to prove—Gift to institution defunct at testator's death.

A testator bequeathed a legacy "... to the treasurer for the time being of the Female Orphan Asylum at Greenwich ... patronised by Mrs. E. ..." At the death of the testator the institution had ceased to exist. E

Held: the testator had no intention other than to benefit one particular institution which was defunct, and, there being no general charitable intention, the doctrine of cy-près could not be applied and the legacy lapsed.

Notes. Considered: *Coldwell v. Holme* (1854), 2 Sm. & G. 31; *Fisk v. A.-G.* (1867), L.R. 4 Eq. 521; *Re Ovey, Broadbent v. Barrow* (1885), 29 Ch.D. 560. Distinguished: *Re Slevin, Slevin v. Hepburn*, [1891-4] All E.R.Rep. 200. Applied: *Re Rymer, Rymer v. Stanfield*, [1891-4] All E.R.Rep. 328. Considered: *Gibson v. South American Stores (Gath & Chaves), Ltd.*, [1949] 2 All E.R. 985. Referred to: *Marsh v. Means* (1857), 30 L.T.O.S. 89; *Re Maguire* (1870), L.R. 9 Eq. 632; *Re Davis, Hannen v. Hillyer*, [1900-3] All E.R.Rep. 336; *Re Cunningham, Dulcken v. Cunningham*, [1914] 1 Ch. 427; *Re Withall, Withall v. Cobb*, [1932] 2 Ch. 236; *Re Leverhulme, Cooper v. Leverhulme*, [1943] 2 All E.R. 143; *Re Leverhulme, Cooper v. Leverhulme (No. 2)* (1943), 169 L.T. 294. F

As to the existence or not of a general charitable intent, see 4 HALSBURY'S LAWS (3rd Edn.) 276 and 325; and for cases see 8 DIGEST (Repl.) 468. As to gifts for specified charitable objects which have ceased to exist, see 4 HALSBURY'S LAWS (3rd Edn.) 285; and for cases see 8 DIGEST (Repl.) 418 et seq. G

Case referred to in argument: H

Loscombe v. Wintringham (1850), 13 Beav. 87; 51 E.R. 34; 8 Digest (Repl.) 417, 1084.

Motion for a decree.

By his will made in 1839, the testator, James Baylis, gave the rent of a leasehold house at Blackheath, and certain dividends, to the plaintiff for life, with remainder, as to one moiety, to her children, and as to the dividends of the other moiety the testator stated: I

"I give to the treasurer for the time being of the Female Orphan Asylum at Greenwich aforesaid, patronised by Mrs. Enderby, the sum of £50 for the benefit of that charity."

The testator died in 1846, at which time the institution in question was also defunct. The plaintiff claimed that the legacy of £50 had lapsed, and that she

A was entitled to it, being residuary legatee under the will. The defendant had for six years refused to pay it to her, and alleged that, by the doctrine of *cy-près*, the Court of Chancery might direct him to pay it to some other charitable institution for the benefit of female orphans.

Bazalgette for the plaintiff.

J. H. Palmer for one of the defendants.

B *Busk* for the executors.

Wickens for the Attorney-General.

KINDERSLEY, V.-C.—What appears from the evidence in this case is this: Mrs. Enderby had once kept a school for female orphans, and received assistance by sermons and otherwise; and the bill in all probability contemplated an endowed charity when it stated that there was no such charity as that mentioned in the testator's will. There are cases in which this court has said, "This is a gift to a charity generally, indicating a general charitable purpose, and pointing out the mode in which the testator designed it should be applied." If the testator's particular design cannot be effected, still, in such a case as this, the court will carry out his general charitable intention. Then, again, there are cases in which it is clear the testator does not contemplate general charity, but only some particular benefit to one institution. In such a case as this, if that one institution does not exist to receive the benefit at his death, the legacy does not go to charity generally. The doctrine of *cy-près* does not apply, nor does the Crown attempt to dispose of it.

There are cases which it is very difficult to place under either of these two classes; though there can be very little doubt that this case belongs to the second. **E** A charity or school clearly did exist; and it is just possible that, from friendship to Mrs. Enderby, the testator meant specifically to benefit that establishment patronised by her, and that alone; for, it may be observed, he does not say, "I give this sum to the school of Mrs. Enderby because I mean to support female orphan institutions generally"; but he gave this sum of £50 to the

F "treasurer for the time being of the Female Orphan Institution of Greenwich patronised by Mrs. Enderby; for the benefit of that charity,"

clearly showing an intention to benefit only that charity. Without, therefore, trenching upon the doctrine laid down in the cases cited, or on that of the *cy-près*, this case is, in my opinion, one where it cannot be said the testator had any other than a particular intention to benefit one charity; and as that was defunct at the time of his decease, the legacy of £50 must be held to have lapsed; and there must be a declaration to that effect; and that the plaintiff is entitled to it as residuary legatee.

Order accordingly.

BURGESS v. BURGESS

[COURT OF APPEAL IN CHANCERY (Knight-Bruce and Turner, L.JJ.), March 18, 1853]

[Reported 3 De G.M. & G. 896; 22 L.J.Ch. 675; 21 L.T.O.S. 53;
17 Jur. 292; 43 E.R. 351]

Trade-Name—Right to sell goods under own name—Name same as that of other trader.

The defendant manufactured and sold under his own name a fish sauce described as "Essence of Anchovies." The plaintiff, his father, had for many years sold a similar sauce under the same name and description, which had become very well known. The plaintiff sought an injunction to restrain the defendant from selling his sauce under that name.

Held: the celebrity of the plaintiff's product did not give him any right to prevent a person of the same name selling everything he manufactured under that name, and, in the absence of fraud or passing-off by the defendant, the plaintiff could not prevent him from selling his goods under his own name.

Notes. Distinguished: *Edelsten v. Vick* (1853), 18 Jur. 7. Considered: *Taylor v. Taylor* (1854), 23 L.J.Ch. 255. Distinguished: *Schweitzer v. Atkins* (1868), 37 L.J.Ch. 847. Considered: *Massam v. Thorley's Cattle Food Co.* (1880), 14 Ch.D. 748. Applied: *Nicholls v. Kimpton* (1887), 3 T.L.R. 674. Followed: *Warner v. Warner* (1889), 5 T.L.R. 327. Applied: *Turton v. Turton* (1889), 42 Ch.D. 128; *Tussaud v. Tussaud* (1890), 44 Ch.D. 678. Followed: *Otard, Dupuy & Co. v. Otard de Montebello Cognac Co.* (1893), 9 T.L.R. 295. Considered: *Saunders v. Sun Life Assurance of Canada*, [1894] 1 Ch. 537. Approved: *Reddaway & Co. v. Banham & Co.*, [1895-9] All E.R.Rep. 133; *Birmingham Vinegar Brewery Co. v. Powell*, [1897] A.C. 710. Followed: *Jamieson v. Jamieson* (1898), 14 T.L.R. 160. Approved: *Cellular Clothing Co. v. Maxton*, [1899] A.C. 326. Applied: *Dunlop Pneumatic Tyre Co. v. Dunlop Motor Co.* (1907), 51 Sol. Jo. 715; *Brinsmead v. Brinsmead and Waddington* (1913), 29 T.L.R. 237. Followed: *Teofani v. Teofani, Re Teofani's Trade Marks*, [1913] 2 Ch. 545. Considered: *Lyons & Co. v. Lyons* (1931), 49 R.P.C. 188; *Parker-Knoll v. Knoll International, Ltd.*, [1962] R.P.C. 265. Referred to: *Lawson v. Bank of London* (1856), 4 W.R. 481; *Free Fishers and Dredgers of Whitstable v. Elliott* (1888), 4 T.L.R. 273; *Starey v. Chilworth Gunpowder Co.* (1889), 24 Q.B.D. 90; *Valentine's Meat Juice Co. v. Valentine Extract Co.* (1899), 48 W.R. 127; *J. & J. Cash, Ltd. v. Cash* (1900), 82 L.T. 655; *Magnolia Metal Co. v. Tandem Smelting Syndicate* (1900), 17 R.P.C. 477; *Weingarten v. Bayer* (1903), 88 L.T. 168; *Warsop v. Warsop* (1904), 21 R.P.C. 481; *Electromobile Co. v. British Electromobile Co.* (1907), 98 L.T. 258; *Ouvah Ceylon Estates v. Ulva Ceylon Rubber Estates* (1910), 103 L.T. 16; *Ash v. Invicta Manufacturing Co.* (1911), 55 Sol. Jo. 348; *A. G. Spalding Bros. v. A. W. Gamage, Ltd.*, [1914-15] All E.R.Rep. 147; *Waring and Gillow v. Gillow and Gillow* (1916), 32 T.L.R. 389; *Goddard v. Watford Co-operative Society* (1924), 41 R.P.C. 218; *Draper v. Trist*, [1939] 3 All E.R. 513; *Jaques & Son, Ltd. v. Chess*, [1939] 3 All E.R. 227; *Wright, Layman and Umney, Ltd. v. Wright* (1948), 65 R.P.C. 185; *Baume & Co. v. A. H. Moore, Ltd.*, [1958] 2 All E.R. 113.

As to the right of a person to trade under his own name, see 38 HALSBURY'S LAWS (3rd Edn.) 618, 619; and for cases see 43 DIGEST 265, 286.

Cases referred to in argument:

Sykes v. Sykes (1824), 3 B. & C. 541; 5 Dow. & Ry. K.B. 292; 3 L.J.O.S.K.B. 46; 107 E.R. 834; 43 Digest 285, 1147.

Blofeld v. Payne (1833), 4 B. & Ad. 410; 1 Nev. & M.K.B. 353; 2 L.J.K.B. 68; 110 E.R. 509; 43 Digest 334, 1555.

Southern v. How (1617), Cro. Jac. 468; J.Bridg. 125; Poph. 143; 2 Roll. Rep. 26; 79 E.R. 400; 39 Digest (Repl.) 579, 1021.

- A** *Croft v. Day* (1843), 7 Beav. 84; 49 E.R. 994; 43 Digest 285, 1148.
Perry v. Truefitt (1842), 6 Beav. 66; 49 E.R. 749; 43 Digest 296, 1218.
Millington v. Fox (1838), 3 My. & Cr. 338; 40 E.R. 956, L.C.; 43 Digest 233, 778.
Lewis v. Langdon (1835), 7 Sim. 421; 4 L.J.Ch. 258; 58 E.R. 899; 36 Digest (Repl.) 603, 1643.
Knott v. Morgan (1836), 2 Keen, 213; 48 E.R. 610; 43 Digest 315, 1371.

B **Appeal** from a decision of KINDERSLEY, V.-C., in an action by the plaintiff, William Robert Burgess against the defendant, his son, William Harding Burgess, to restrain the defendant by injunction from having or continuing on his shop-front the words "late of 107, Strand," and from having or continuing on the sides of the door of his shop any plate containing the words "Burgess's Fish Sauce Warehouse, late of 107, Strand"; and also from selling or disposing of, or causing to be sold or disposed of, any sauce, essence, or composition, manufactured by or for him (the defendant) and described as, or purporting to be, or represented as being, "Burgess's Essence of Anchovies"; and from printing or using those words as descriptive of the article manufactured by himself, either upon labels or wrappers, and with the bottles in which the article was sold by the defendant, or in the advertisements, circulars, or catalogues published by the defendant.

D The evidence was that the father of the plaintiff, one John Burgess, had for forty years carried on business on his own account as an Italian warehouseman at a shop or warehouse at No. 17, Strand. The plaintiff in 1800 was taken into partnership with his father, and they continued to carry on the business together, under the style or firm of "John Burgess & Son,," until 1820, when the father died, and the plaintiff, who had succeeded to his father's business, continued it down to the present time on the same premises under the same style of "John Burgess & Son."

E Among other articles in which the original firm, and afterwards the plaintiff, had been in the habit of dealing, was a fish sauce sold under the name of "Burgess's Essence of Anchovies." The defendant, who had formerly been employed by his father, after a disagreement left him, and commenced trading on his own account as an Italian warehouseman, at No. 36, King William Street, in the city of London.

F The plaintiff alleged that the defendant, for the purpose of leading the public to believe that he was the same Burgess as the plaintiff, and that the business carried on by the defendant was the same business as that carried on by the plaintiff in the Strand, or an offset or continuation of such business, had caused to be placed over his shop-front, in King William Street, the words "W. H. Burgess, late of 107, Strand," and on each side of the door of such shop or warehouse, had caused to be fixed a metal plate with the words "Burgess's Fish Sauce Warehouse, late of 107, Strand"; and that the defendant was selling a fish sauce purporting to be "Burgess's Essence of Anchovies," but at a lower price than that of the article sold by the plaintiff under the same description or title, and that such sauce was offered for sale by the defendant in bottles similar in size and shape to the bottles used by the plaintiff, accompanied by labels, wrappers, and catalogues bearing a general resemblance to those used by the plaintiff in the sale of his essence of anchovies; and in particular, that upon such labels, wrappers, and catalogues, the essence of anchovies sold by the defendant was described as "Burgess's Essence of Anchovies," a title under which the article sold by the plaintiff was well known, and had long enjoyed a great celebrity in the market. The plaintiff alleged that the labels, wrappers, and catalogues so used by the defendant, and particularly the words "Burgess's Essence of Anchovies" printed thereon, had been adopted and used by the defendant with the fraudulent object of deceiving the public, and leading persons purchasing the sauce manufactured and sold by the defendant to believe that they were purchasing the essence of anchovies manufactured and sold by the plaintiff, and which was commonly known as "Burgess's Essence of Anchovies."

I When the motion came before KINDERSLEY, V.-C., on Oct. 5, 1852; he granted an injunction to restrain the defendant from continuing over his shop-front the words "late of 107, Strand," and from continuing on the sides of his shop-door the plate

with the words "Burgess's Fish Sauce Warehouse, late of 107, Strand"; but refused A
the rest of the motion. The plaintiff considering himself entitled to the whole of
the relief sought by his bill, appealed from that order.

Sir Frederick Thesiger, Campbell and W. R. Moore for the plaintiff.

Bacon and May for the defendant were not called on to argue.

KNIGHT-BRUCE, L.J. All the Queen's subjects have a right to sell pickles and B
other articles; and not the less so if their fathers have done so before them. All
the Queen's subjects have a right to call themselves by their own names; and not
the less so if they happen to have been their fathers' names. Nothing else has the
present defendant done in that which is in question before us in the present
case. He follows the trade that his father follows and has followed, namely, a C
manufacturer and seller of pickles, preserves, and sauces, and among them a sauce
called "Essence of Anchovies." He carries on his business under his own name,
and sells his essence as "Burgess's Essence of Anchovies," which truly it is. If
any circumstances of fraud of a material character had appeared, the case would
stand very differently; but it has been very correctly stated that the whole case
is founded upon the great celebrity which during many years has been possessed
by the elder Mr. Burgess's essence of anchovies. It does not appear to me that D
there is such an exclusive privilege as to prevent a person of the name of Burgess
selling everything that he manufactures under his own name.

Without questioning any of the authorities, all of which I assume to be correctly
cited, there is no case for an injunction here. Even if I had a doubt upon the
subject, it would be impossible to accede to the present motion simply upon an
interlocutory motion by way of appeal, notice having been given in March from an E
order made in the preceding October complaining of that order. I am of opinion
that this motion ought to be refused with costs, with liberty to take such proceed-
ings in a court of law as the plaintiff may be advised.

TURNER, L.J.—I am of opinion that this motion must be refused. I take it to
be clear that no man has a right to represent his own goods to be the goods of F
another. The case must be made that the defendant is selling his own goods as the
goods of another. When a person is selling goods in a name which is his own,
and another, not having that name, uses that name, he is representing that which is
not the case. But here two persons have the same name. It does not at all follow
that because one man, the defendant, sells goods in his own name, and the plaintiff
happens to have the same name, that, therefore, the defendant is selling his goods G
as the goods of others. Here the question is whether there is a representation
that the goods so sold are the goods of the other. Looking at the evidence in this
case, it seems to me to be clear that since the order of *KINDERSLEY, V.-C.*, there has
been no representation on the part of the defendant that the goods he is selling are
the goods manufactured by the plaintiff. It is, therefore, clear that the motion
must be refused with costs, with liberty for the plaintiff to apply to a court of law, H
as he may be advised.

Appeal dismissed.

A

MITCHELL v. HENDER

[BAIL COURT (Coleridge, J.), April 27, 1854]

[Reported 1 Saund. & M. 22; 23 L.J.Q.B. 273; 23 L.T.O.S. 83;
18 J.P. 728; 18 Jur. 430; 2 W.R. 411; 2 C.L.R. 460]

B

County Court—Jurisdiction—Court for commencement of action—"Carrying on business."

The defendant, a surgeon, apothecary and accoucheur, resided and carried on his business within the jurisdiction of county court A., but he also attended daily patients residing within the jurisdiction of county court B.

C

Held: the defendant carried on business within the jurisdiction of county court B. within the meaning of s. 128 of the County Courts Act, 1846 [see now County Court Rules, 1936, Ord. 2, r. 1].

Considered: *Davis v. British Geon, Ltd.*, [1956] 2 All E.R. 404.

As to venue of an action in the county court, see 9 HALSBURY'S LAWS (3rd Edn.) 166 et seq.; and for cases see 13 DIGEST (Repl.) 415 et seq.

D

Cases referred to:

(1) *Rolfe v. Learmonth* (1849), 14 Q.B. 196; Cox, M. & H. 267; Rob. L. & W. 143; 19 L.J.Q.B. 10; 14 L.T.O.S. 128; 13 Jur. 986; 117 E.R. 79; 13 Digest (Repl.) 417, 433.

(2) *Buckley v. Hann* (1850), 5 Exch. 43; Cox, M. & H. 269; Rob. L. & W. 307; 19 L.J.Ex. 151; 14 L.T.O.S. 444; 14 J.P. 467; 14 Jur. 226; 13 Digest (Repl.) 416, 432.

E

(3) *Stephens v. Derry* (1812), 16 East, 147.

(4) *Gray v. Cook* (1807), 8 East, 336.

Application by the plaintiff for the costs of the action under s. 4 of the County Courts Act, 1852 [repealed]. The action was brought in this court to recover from the defendant £10 16s. 8d. due to the plaintiff for work done in a mine in the Launceston County Court District of which the defendant was a shareholder. The cause was tried under a writ of trial before the under-sheriff of Cornwall, when a verdict was returned for the plaintiff. The plaintiff's affidavit showed that the cause of action arose within the jurisdiction of the Launceston County Court, and that the defendant resided and carried on his business as a surgeon and apothecary at Callington, within the jurisdiction of the Liskeard County Court. It appeared from the defendant's affidavit that, although he resided at Callington, he carried on his business of a surgeon and accoucheur at Launceston, by attending daily patients within several parishes within the jurisdiction of the Launceston County Court and that he was the surgeon of the Launceston union.

G

Maynard for the plaintiff.

H

Collier for the defendant.

COLERIDGE, J.—I am of opinion that this rule ought to be refused on the ground that the defendant carries on his business within the jurisdiction of the Launceston County Court. In looking at the language of the affidavits, care should be taken that they are framed with such strictness that it should appear that there has been no evasion of the County Courts Act, 1846, and that it has been substantially complied with. The defendant says that, at the time the action was brought, he was carrying on the business of a surgeon and accoucheur at Launceston, and was attending, and now attends, at Launceston, several patients, being resident within the several parishes named within the jurisdiction. That is an averment that he is in the daily habit of attending patients being resident within that place, and we should be trifling with language if any other construction were put on it. As to the construction of s. 128 of the County Courts Act, 1846, that section says that actions may be brought in the superior court

I

"where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought." A

The limit given for dwelling is, "within the jurisdiction of the court"; and it is the same as his carrying on his business—if it is within the jurisdiction, that is sufficient. There must undoubtedly be something personal, and not merely by an agent; the dwelling must be personal, and so must the carrying on of the business. B Suppose, however, the nature of the business to be moving about within a particular district; that is carrying on business within that district. What does the defendant say here? He says that he is in daily attendance on his patients within the Launceston district, which is sufficient to show that he was carrying on his business there.

That being so, let us see the cases that have already been decided. The first is that of *Rolfe v. Learmonth* (1), which was the case of an officer of the Lord Chancellor, namely, the Deputy Sealer of the Writs, whose duty it was to attend on the Lord Chancellor wherever he might be; and it was there held that his was not a business carried on at any fixed place—it was an office which had no reference whatever to locality. The next case is that of *Buckley v. Hann* (2), which was decided on the authority of *Rolfe v. Learmonth* (1), and in which it was held that a clerk in the Admiralty, who as such attends daily at an office within the city of London, is not a person who carries on his business there within the London Small Debts Act, 1847 (10 & 11 Vict., c. lxxi). In *Stephens v. Derry* (3), which was under the London Court of Requests Act, 1800, the actual residence of the defendant was in Middlesex, where his wife carried on business, though he himself was employed as a clerk in the office of a solicitor in London; and all the judges were of opinion that he was seeking his livelihood where he was residing, and where his wife was carrying on the business. In *Gray v. Cook* (4), which was under the same Act, a market gardener rented at an annual rent a stand with a shed over it in Fleet Market which he occupied three times a week, on market-days, till ten o'clock in the morning; after which, and on all other days, it was occupied by others. It was held that he did not keep a stand within the meaning of the Act; but that case has little bearing on the present one. E F

On the whole, I think that this rule ought to be refused.

Rule refused.

A

LADD v. GOULD

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., and Crompton, J.),
January 21, 1860]

[Reported 1 L.T. 325; 24 J.P. 357]

B

Medical Practitioner—Unregistered person—Description of "surgeon and mechanical dentist"—Falsely pretending to be registered person—Question of fact for justices.

The respondent kept a chemist's and druggist's shop on the door of which were the words "surgeon and mechanical dentist." He examined a woman's arm and gave her a liniment for which she paid. The justices dismissed an information against the respondent for falsely pretending to be a surgeon, contrary to s. 40 of the Medical Act, 1858.

C

Held: it being a question of fact for the justices, their finding must be upheld.

Notes. The Medical Act, 1858, s. 40, has been replaced by s. 31 of the Medical Act, 1956.

D

Considered: *Whitwell v. Shakesby* (1932), 147 L.T. 157; *Jutson v. Barrow*, [1935] All E.R.Rep. 644. Referred to: *Ellis v. Kelly* (1860), 6 H. & N. 222; *Carpenter v. Hamilton* (1877), 41 J.P. 615; *Royal College of Veterinary Surgeons v. Robinson*, [1892] 1 Q.B. 557; *Brown v. Whitlock* (1903), 67 J.P. 451; *Wilson v. Inyang*, [1951] 2 All E.R. 237.

E

As to unlawful use of medical title, see 26 HALSBURY'S LAWS (3rd Edn.) 13, 14; and for cases see 33 DIGEST (Repl.) 541 et seq. For the Medical Act, 1956, s. 31, see 36 HALSBURY'S STATUTES (2nd Edn.) 596.

Case Stated by Kingston-upon-Thames magistrates.

The London Medical Registration Society preferred an information against the respondent Frederick Gould, under s. 40 of the Medical Act, 1858, charging that, at his residence in Eden Street, Kingston, he took and used the title of surgeon without legal qualification, he not being registered under the Medical Act, 1858; and that in that capacity he treated one Charlotte Tenniswood for a surgical complaint, and supplied her with medicine for the same, contrary to the form of the statute, for which medicine he was paid, and for which offence he had forfeited a sum not exceeding £20.

G

The prosecution was conducted by the appellant, the secretary of the London Medical Registration Society. It was proved that, on Aug. 5, 1859, Charlotte Tenniswood went to the respondent's shop, and told him that she had knocked her elbow and that it caused a great numbness in her arm and fingers. The respondent examined her arm, said that she had undoubtedly jarred the marrow of the bone, and gave her a liniment, for which she paid him 1s. She said that she noticed that he had "surgeon" on the side of his door, and she believed him to be a surgeon, or she would not have gone to him, but she afterwards said that the word "surgeon" was followed by the words "and mechanical dentist." It was also proved that the respondent's name, with the words "chemist and druggist," was on his shop front, and that the woman went to his shop, which was also a chemist's and druggist's, because, she said, she thought that he would supply her with something cheaper than by going to a doctor's. She also stated that she had made no complaint to the registration society, but that, on the day after she had got the liniment, she consulted a surgeon and he gave her a lotion and told her not to use the liniment. The surgeon afterwards called on her with a gentleman, asked her name, and said that they should want her as a witness.

H

I

The magistrates were of opinion that the respondent had used the word "surgeon" simply to show what branches of the business of a dentist he carried on, and not to represent himself as a surgeon within the meaning of the Act; and, at all events, there was not sufficient evidence that he wilfully (as well as falsely) pretended to,

or took, or used the name of a surgeon or other title implying that he was recognised by law as a surgeon. They dismissed the information, and the appellant now appealed. A

Lush, Q.C., for the appellant, said that the magistrates meant to leave to the court the question whether the evidence brought the respondent within the meaning of s. 40 of the Act of 1858. B

SIR ALEXANDER COCKBURN, C.J.—I do not think that it does, but this is a question of fact. It is like the case of persons who call themselves "surgeon-dentists," who are known generally not to be surgeons, though some of them are. B

CROMPTON, J.—It is like the case of the "surgeon-chiroprpodists." But it is a matter of fact for the magistrates. The Act of 1858 gives power to put questions of law only to this court, not questions of fact. C

SIR ALEXANDER COCKBURN, C.J.—I do not think that there was any falsehood, or any intention to deceive, which was necessary in order to bring the case within the Medical Act, 1858, s. 40. That was also the opinion of the magistrates, though they might have come to a different opinion. D

CROMPTON, J.—I think that there was evidence upon which the magistrates might have come to either conclusion, but I cannot say that they were bound to convict. D

Appeal dismissed.

HOPKINS v. TANQUERAY

[COURT OF COMMON PLEAS (Jervis, C.J., Maule, Cresswell and Crowder, JJ.), May 26, 1854] E

[Reported 15 C.B. 130; 23 L.J.C.P. 162; 23 L.T.O.S. 144; 18 Jur. 608; 2 W.R. 475; 2 C.L.R. 842; 139 E.R. 369]

Sale of Goods—Warranty—Untrue statement believed to be true—Horse sold by auction without guarantee—Prior representation by seller that horse sound—Horse not sound—Liability. F

The defendant sent a horse to Tattersall's for sale by auction. The day before the sale, seeing the plaintiff examining the horse's legs, the defendant said that he did not need to do that, the horse was all right, he was perfectly sound. The plaintiff replied that, if the defendant said so, he was satisfied. The plaintiff bought the horse at the auction without a warranty. Subsequently, the horse was found to be unsound. No fraud was imputed to the defendant, who did not know that the horse was unsound. G

Held: the defendant had merely represented what he believed to be the fact, and, therefore, there was no evidence of a warranty. H

Notes. Applied: *Stuckey v. Bailey* (1862), 1 H. & C. 405. Distinguished: *Harling v. Eddy*, [1951] 2 All E.R. 212. Referred to: *Sayers v. London and Birmingham Flint Glass and Alkali Co.* (1858), 27 L.J.Ex. 294; *Carter v. Crick* (1859), 28 L.J.Ex. 238. I

As to warranty on sale of an animal, see 1 HALSBURY'S LAWS (3rd Edn.) 683 et seq.; and for cases see 2 DIGEST (Repl.) 347 et seq.

Case referred to:

- (1) *Bartlett v. Purnell* (1836), 4 Ad. & El. 792; 6 Nev. & M.K.B. 299; 2 Har. & W. 16; 5 L.J.K.B. 169; 111 E.R. 981; 3 Digest (Repl.) 7, 54.

A Also referred to in argument:

Cave v. Coleman (1820), 3 Man. & Ry.K.B. 2; 7 L.J.O.S.K.B. 25; 2 Digest (Repl.), 348, 327.

Wood v. Smith (1829), 4 C. & P. 45; 5 Man. & Ry.K.B. 124; Mood. & M. 539; 8 L.J.O.S.K.B. 50; 2 Digest (Repl.) 357, 401.

Salmon v. Ward (1825), 2 C. & P. 211; 2 Digest (Repl.) 348, 324.

B *Risney v. Selby* (1704), 1 Salk. 211; 91 E.R. 189; sub nom. *Lysney v. Selby*, 2 Ld. Raym. 1118; 35 Digest (Repl.) 13, 67.

Pasley v. Freeman (1789), 3 Term Rep. 51; 100 E.R. 450; 35 Digest (Repl.) 25, 165.

Fishmongers' Co. v. Robertson (1843), 5 Man. & G. 131; 12 L.J.C.P. 185; 134 E.R. 510; sub nom. *Fishmongers' Co. v. Robertson*, *Fishmongers' Co. v. Booth*, *Fishmongers' Co. v. Staines*, 6 Scott, N.R. 56; 21 Digest (Repl.) 252, 341.

Syers v. Jonas (1848), 2 Exch. 111; 154 E.R. 426; 39 Digest (Repl.) 557, 863.

Rule Nisi obtained by the defendant to set aside the verdict for the plaintiff and enter a nonsuit in an action for breach of warranty on the sale of a horse.

D In 1853, the defendant sent his horse "California" to Tattersall's for sale. The plaintiff and the defendant were known to each other, and the defendant, on the Sunday before the sale, which always took place on a Monday, saw the plaintiff kneeling down and feeling the horse's legs. He said to him, "You need not do that—he is all right, he is perfectly sound," or words to that effect. The plaintiff at the sale bought the horse for £150, the horse being sold by Tattersall's without a warranty. The horse was subsequently sent by the plaintiff to a trainer, who, perceiving a swelling on one of his legs, stated that he was unsound and not fit for training. This being mentioned to the defendant, it was referred to some friends of the parties to say whether the horse was sold with a warranty, and whether he was sound at the time. Before them, the defendant admitted that what he had said to the plaintiff amounted to a warranty.

E At the trial before TALFOURD, J., a verdict was found for the plaintiff, damages £150. It was proved that the defendant did not know that the horse was unsound, and no fraud was imputed to him.

The defendant obtained a rule nisi calling on the plaintiff to show cause why the verdict should not be set aside and a nonsuit entered, on the ground that there was no warranty.

G *Serjeant Byles* and *Finlason* showed cause against the rule. *Lush* was not called on to support the rule.

JERVIS, C.J.—This rule must be made absolute. The arguments raised are on points well established, but not determining this case. It is not necessary to define a warranty, or to have the word "promise" mentioned in a bargain. A statement may amount to a warranty, as has been well decided; and it is not necessary **H** that it should be made simultaneously with the bargain. Counsel for the defendant says that you may, by an agreement before a sale by public auction, alter the nature of the contract as to the article itself, and he cites *Bartlett v. Purnell* (1). But that case does not establish his proposition. The bargain there did not alter the character of the article sold, it being only an agreement that payment should be made in a certain way. The words used by the defendant are clearly a representation, and a representation only. **I** The plaintiff is examining the horse. The defendant says that he is all right, and perfectly sound. The plaintiff says, "I am satisfied"; and, being satisfied with the honourable representation of the party, he does no more. He does not have him examined by a veterinary surgeon. Then Tattersall's sells the horse without any warranty at all. I think, therefore, that the defendant represented what he believed to be the fact; that the plaintiff took it as such, and that there was no warranty. I think that what took place at the arbitration, and what was said by the defendant, makes no difference. It only shows that he did not know what a legal warranty was.

MAULE, J.—I am of the same opinion. There was no warranty at the sale, and the horse was dealt with by the auctioneer as not warranted. It is said that you can import what took place before on the Sunday, and that it amounted to a warranty. But I think that there is not the smallest ground for inferring that that was a warranty. That other unprofessional persons should think so makes no difference. It amounts only to this, that the defendant was believed by the plaintiff to be a person of veracity and skill about horses; and, the plaintiff being about to examine the horse, the defendant says, "You need not do this—I have examined him and found him sound." That is said without any fraud, and is merely a representation by the defendant that the horse is, in his opinion, perfectly sound, and was not intended to subject him to the liability of paying for the loss, if the horse should, without his having known it, turn out unsound. That is much strengthened by the fact that both parties knew that the horse was to be sold unwarranted. There was, therefore, no evidence to go to the jury of a warranty.

CRESSWELL and **CROWDER, JJ.**, concurred.

Rule absolute.

OCKENDEN v. HENLY

[COURT OF QUEEN'S BENCH (Lord Campbell, L.C., Coleridge, Erle and Crompton, JJ.), May 22, 31, 1858]

[Reported E.B. & E. 485; 27 L.J.Q.B. 361; 31 L.T.O.S. 179;
4 Jur.N.S. 999; 120 E.R. 590]

Sale of Land—Failure by purchaser to complete—Forfeiture of deposit—Re-sale of property—Right of vendor to recover deposit in addition to expenses of re-sale.

The plaintiff put up for sale by auction a cottage and garden on conditions of sale one of which provided that, if the purchaser failed to comply with the conditions, the deposit money "shall be actually forfeited to the vendor, who shall be at full liberty to re-sell," that any deficiency that might arise on a re-sale, together with all expenses attending the same, should be made good by the defaulter, and that on non-payment thereof the amount should be recoverable by the vendor as and for liquidated damages. The defendant purchased the property at the auction for £120, but he did not pay the deposit nor complete the purchase, and the plaintiff re-sold the property for £105.

Held: the plaintiff having obtained a right to the deposit (which had been forfeited) he was now entitled to recover the difference between the £120 less the deposit and the £105.

Notes. Considered: *Hinton v. Sparkes* (1868), L.R. 3 C.P. 161. Distinguished: *Essex v. Daniell*, *Daniell v. Essex* (1875), L.R. 10 C.P. 538. Considered: *Howe v. Smith*, [1881-5] All E.R.Rep. 201. Referred to: *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122.

As to remedies under an uncompleted contract for sale of land, see 34 HALSBURY'S LAWS (3rd Edn.) 320 et seq.; and for cases see 40 DIGEST (Repl.) 279 et seq.

Case referred to:

(1) *Palmer v. Temple* (1839), 9 Ad. & El. 508; 1 Per. & Dav. 379; 8 L.J.Q.B. 179; 112 E.R. 1304; 40 Digest (Repl.) 244, 2053.

Also referred to in argument:

Icely v. Grew (1836), 6 Nev. & M.K.B. 467; 40 Digest (Repl.) 141, 1080.

A Rule Nisi to reduce damages in an action for breach of contract.

The plaintiff put up for sale by auction a cottage and garden, and it was knocked down to the defendant for £120 under the usual conditions. The defendant signed an agreement, but did not pay the deposit, and ultimately refused to complete his purchase. The plaintiff re-sold the premises by auction for £105, and sued the defendant for the deposit £24, the deficiency £15, and the costs of re-sale, etc., £9 5s. At the trial before ERLE, J., a verdict was directed for the amount of those sums. A rule nisi was obtained by the defendant to reduce the amount to £24 5s., the deficiency in price and expenses.

The seventh condition of sale provided :

"That if the purchaser . . . shall fail to comply with these conditions, the deposit money shall be actually forfeited to the vendor, who shall be at full liberty to re-sell the lot by public auction or private contract; and any deficiency that may arise upon such re-sale, together with all expenses attending the same, shall immediately after such second sale be made good by such defaulter; and, on non-payment thereof, such amount shall be recoverable by the vendor as and for liquidated damages, without the necessity of previously tendering an assignment or other assurance to the defaulter; but any increase of price that may be produced at such second sale shall belong to the vendor."

Hannen showed cause against the rule.

J. O. Griffiths supported the rule.

Cur. adv. vult.

May 31, 1858. **LORD CAMPBELL, C.J.**, read the following judgment of the court.—There being a direct forfeiture of the deposit by the express words of the seventh condition, if the deposit had been paid, it could not in any event have been recovered back by the purchaser, and the seller would have been entitled to any addition or benefit from the re-sale. The seller having obtained a right to the forfeited deposit, and making a further demand of damages sustained on the re-sale, it becomes necessary to consider what was the nature of the deposit. It is well settled by our law, following the rule of the civil law, that a pecuniary deposit on a purchase is to be considered as a payment in part of the purchase-money, and not as a mere pledge for the performance of the contract; and the authorities are collected in *SUGDEN'S VENDORS AND PURCHASERS* (13th edn.), ch. 1, s. III, art. 18. Therefore, in this case, if the deposit had been paid, the balance only of the purchase-money would have remained payable. What then, according to the seventh condition, is the deficiency arising on the re-sale which the seller is entitled to recover? We think that it is the difference between the balance of the purchase-money on the first sale and the amount of the purchase-money obtained on the second sale; or, in other words, the deposit, although forfeited so far as to prevent the purchaser from ever recovering it back, according to *Palmer v. Temple* (1), still is to be brought by the seller into account if he seeks to recover as for a deficiency on the re-sale. The rule, therefore, to reduce the damages to £24 5s. will be made absolute.

I may mention that we have consulted **LORD ST. LEONARDS** on this point, having such profound respect for his knowledge on every branch of the law, particularly on this, and he most obligingly gave us his opinion, which is in exact conformity to the judgment which I have read.

Rule absolute.

DRUMMOND v. PARISH

[PREROGATIVE COURT (Sir Herbert Jenner Fust), February 22, May 19, 1843]

[Reported 3 Curt. 522; 2 Notes of Cases, 318; 1 L.T.O.S. 207;
7 Jur. 538; 163 E.R. 812]

Will—Soldier's will—"Actual military service"—Need for testator to be on an expedition—Staff officer stationed in England—Wills Act, 1837 (7 Will. 4 and 1 Vict., c. 26), s. 11.

By s. 11 of the Wills Act, 1837: "Any soldier being in actual military service . . . may dispose of his personal estate as he might have done before the making of this Act."

The effect of the words "in actual military service" is to confine the privilege conferred by the section to soldiers, of all ranks, who are on an expedition. Accordingly, where a major-general, who held the office of director-general of the Royal Artillery and was stationed at Woolwich, wrote out a testamentary paper which he signed and sealed, but which was not attested by witnesses as required by s. 9 of the Wills Act, 1837,

Held: the testator was not "in actual military service" within s. 11 when he executed the document, and, therefore, it was not a valid will.

Statute—Construction—Foreign law—Reference to foreign code whence principle of statute borrowed.

In construing a statute very little assistance can be derived from ancient or modern codes of other countries, but cases occur where in interpreting an Act the assistance of foreign codes from which the principle of the particular statute has been borrowed has been resorted to in order to give the true interpretation of the Act.

Notes. Section 11 of the Act of 1837 was explained and extended by the Wills (Soldiers and Sailors) Act, 1918 (26 HALSBURY'S STATUTES (2nd Edn.) 1361).

Applied: *Whyte v. Repton* (1844), 3 Notes of Cases, 97. Followed: *In the Goods of Hill* (1845), 1 Rob. Eccl. 276. Distinguished: *Herbert v. Herbert* (1855), Dea. & Sw. 10. Applied: *In the Goods of Thorne* (1865), 4 Sw. & Tr. 36. Considered: *In the Goods of Hiscock*, [1900-3] All E.R.Rep. 63; *Re Wernher, Wernher v. Beit*, [1918] 1 Ch. 339. Followed: *In the Estate of Grey*, [1922] All E.R.Rep. 124. Considered: *Re Booth, Booth v. Booth*, [1926] All E.R.Rep. 594; *Re Wingham, Andrews v. Wingham*, [1948] 2 All E.R. 908. Referred to: *Bowles v. Jackson* (1854), 1 Ecc. & Ad. 294; *In the Estate of Donner* (1917), 34 T.L.R. 138; *In the Estate of Gossage, Wood v. Gossage*, [1921] P. 194; *In the Estate of Rippon*, [1943] 1 All E.R. 676; *In the Estate of Anderson*, [1943] 2 All E.R. 609.

As to privileged wills, see 39 HALSBURY'S LAWS (3rd Edn.) 883-885; and for cases see 39 DIGEST (Repl.) 399. For the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326.

Cases referred to:

- (1) *Earl of Euston v. Lord Seymour* (1802), cited 2 Curt. 339; 163 E.R. 432; 39 Digest (Repl.) 399, 197.
- (2) *Shearman v. Pyke* (1724), cited 3 Curt. at p. 539.
- (3) *Key v. Jordan* (1712), cited 3 Curt. at p. 541; 163 E.R. 818; 39 Digest (Repl.) 399, 196.

Also referred to in argument:

- In the Goods of Phipps* (1840), 2 Curt. 368; 163 E.R. 442; 39 Digest (Repl.) 401, 210.
In the Goods of Hayes (1839), 2 Curt. 388; 163 E.R. 481; 39 Digest (Repl.) 400, 207.
Morrell v. Morrell (1827), 1 Hag. Ecc. 51; 162 E.R. 503; 44 Digest 304, 1354.

- A** *In the Goods of Jay* (1840), 2 Curt. 375; 163 E.R. 444; 39 Digest (Repl.) 400, 205.
In the Goods of Donaldson (1840), 2 Curt. 386; 163 E.R. 448; 39 Digest (Repl.) 404, 246.
Bowler v. Owen (1732), Barnes, 432; Cooke, Pr. Cas. 77; 94 E.R. 990; 41 Digest 106, 621.
- B** *Bradley v. Arthur* (1825), 4 B. & C. 292; 2 State Tr.N.S. 171; 6 Dow. & Ry.K.B. 413; 107 E.R. 1068; 22 Digest (Repl.) 136, 1202.

Allegation propounding a holograph will of Major-General Drummond, who died at Woolwich on Jan. 1, 1843.

A testamentary paper was found locked up in a private repository of the deceased. It was dated June 26, 1842, it was signed by the deceased, and it had a seal opposite to the signature but, it was not attested by witnesses. This paper was propounded as the last will and testament of the deceased on the ground that it was a valid will in view of the provisions of s. 11 of the Wills Act, 1837, which enacted :

"Any soldier, being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act."

- D** Article 5 of the allegation propounding set forth that the deceased, at the date of his will and at the time of his death, was a major-general in Her Majesty's army, on full-pay; he held the appointment of Director-General of the Royal Artillery; and he received the full-pay and allowances of that appointment. The duties of his office extended to the troops of the Royal Artillery, abroad, as well as in
- E** England. He was liable to be tried by court-martial. He was subject in all respects to military law, and, accordingly, was liable to be sent abroad upon foreign service whenever it might be required. He was as completely, to all intents and purposes, in the actual service of Her Majesty as if he had been in the command of, or serving with, a British regiment on foreign service. The admission of this allegation was opposed by

- F** *The Queen's Advocate* (Sir J. Dodson) and *Twiss* for the next-of-kin of the deceased.

Haggard and *Pratt* supported the allegation on behalf of beneficiaries under the will.

Cur. adv. vult.

- G** May 19, 1843. **SIR HERBERT JENNER FUST** delivered the following judgment.—This question relates to a paper which is propounded as the last will and testament of Major-General Drummond, who died in January in the present year. The paper is all in the handwriting of the deceased. It is dated June 26, 1842, and is signed by him, and sealed, but it is not attested by witnesses, so that, under the general provisions of the Wills Act, 1837, it is not entitled to probate—I say
- H** the general provisions of the Act, because the paper is propounded as a good and valid disposition of property, as coming under the exception in s. 11 of the Act. It was contended, when the admissibility of this allegation was debated, that this privilege extended to soldiers of all degrees and under any circumstances, with this exception, that there might be a distinction between soldiers on full-pay and those on half-pay, but that otherwise all persons belonging to the British army are
- I** to be considered as being on "actual military service." Assuming this to be the construction of the Act of Parliament, the effect would be to give to every soldier on full pay, from the recruit of today to the oldest general in the service, a disposition over personal property, not only by a writing unattested by witnesses, but by a will made by word of mouth. The exceptive clause in the Wills Act is the same as that in the Statute of Frauds, by which last statute it became, for the first time, necessary that all wills of personal property should be in writing. Therefore, as I have said, it would give to all soldiers on full-pay, taking that to be the interpretation of the words, "actual military service," the power of disposing of

property in any manner, as they might have done previously to the Act passing, and, consequently, as before the Statute of Frauds a will, made by word of mouth, would have been as operative as a will executed in the most formal manner, the effect of this clause would be to give at the present day validity to the most informal will. A

This is, indeed, a most startling proposition. It seems hardly possible that it should be the intention of the legislature to except out of the Wills Act so large a body of persons as the British Army now consists of or indeed as in the time of Charles II it was composed of. It is to be remembered that the exception was first made when the Statute of Frauds was passed (in 1676); it must, therefore, be considered with reference to the circumstances of that time, for s. 11 of the present Act is only a continuation of the privilege granted to soldiers and mariners in the time of Charles II. Prior to the Statute of Frauds a will might not only be made by word of mouth, but the most solemn will might be revoked by word of mouth; a will executed in the presence of witnesses might be revoked by parol. What would be the effect, what would be the state in which the whole of the British army would be placed, if this clause were now to have universal operation among that large body? In the present case the will is one which undoubtedly the court would be most anxious to support, if it can; it is a holograph, and, therefore, is not liable to the suspicion of being a forgery as might be the case in respect to a will in which the signature only was in the handwriting of the deceased; it is a will written with great care; it was kept by the testator in his private repository; there is no question that it is the act of the deceased; the only question is: Is it a will which can be carried into effect? It also unfortunately happens, that if this holograph paper can be supported, the court must include in such a determination papers less formal than this, wills by parol, for it is only by showing that the exception extends to all classes of the army, and to all descriptions of testamentary disposition, that this paper can be supported. I much doubt whether if this privilege could be maintained it would be for the benefit of the army at large. The effect of such a decision would be to open on the British soldier all the mischief which the Statute of Frauds and the Wills Act, 1837, intended to guard against; such must be the case if the court holds that every soldier on full or half-pay may make a will by parol, or a will in writing without witnesses. B C D E F

The court must look to the principle intended to be adopted into this Act, as also into the Statute of Frauds. The words are "no soldier being in actual military service." These words must have some meaning; it cannot be that they would be added to the word "soldier" unless it were intended to impose some limitation as to the particular class of soldier to whom they were intended to apply. If it were intended to comprise in the exceptive clause all classes and grades of persons in the service, there could be no necessity for the insertion of the words "actual military service." The court must endeavour to see whether it cannot find some meaning for these words, and some reason for their insertion in the two Acts of Parliament. G H

In the very elaborate arguments addressed to the court by the learned counsel on both sides, the court has not been referred to any case where a judicial decision has been come to on this point, and, with the exception of a case to which the court itself had referred, and to which it will presently advert, the court is not aware of any case which has occurred with respect to the will of a soldier. The only decisions of which the court is aware are with respect to the corresponding part of the clause as to the wills of mariners or seamen, as to which some few cases have occurred, and I allude in particular to *Earl of Euston v. Lord Seymour* (1). That was a case in which the testator was commander-in-chief of the naval force at Jamaica, but lived on shore at the official residence; his family and establishment were on shore. In that case it was held that the testator did not come within the exceptive clause relating to mariners at sea, and, consequently, a nuncupative will made by him on shore was pronounced to be invalid, and the allegation propounding it was rejected. One or two other cases have occurred, in which that case I

A has been referred to, but, with these exceptions, I am not aware that the discussion on this section of the Act has gone further than a question on motion. The court has in some few cases, where the point admitted of no doubt, acted on the certificate of the War Office.

It has now become a matter of importance that this question should be solemnly determined as to the description of persons coming within the exception of s. 11 of the Wills Act. It certainly would have been a matter of some surprise that so few cases should have occurred in which it has been necessary to consider the effect of this clause, if the fact were not accounted for by the reflection of how unsafe a thing it is to trust to wills made by word of mouth when the mode of disposing of personal property, according to the law of England, is so simple, and requires so few solemnities, and when, as is quite manifest, a will by word of mouth may lead to fraud, or misapprehension. Consequently, most persons, even military testers, would prefer making their wills in writing instead of trusting to so unsafe a mode of disposing of their property. This consideration may, I think, fairly account for the paucity of cases of this description.

With regard to the construction to be put on the words of s. 11, how is the meaning of them to be ascertained? It was observed in argument—and as a general proposition it is undoubtedly true—that in construing a British Act of Parliament very little assistance can be derived from ancient or modern codes of other countries, but yet cases have occurred, and do occur in courts of law, where in interpreting an Act of Parliament, the context of which does not furnish the necessary information or precise meaning, the assistance of foreign codes from which the principle of that particular statute has been borrowed has been resorted to, in order to give the true interpretation of the Act. It cannot be denied that the principle of s. 11 was borrowed from the civil law—indeed that is not denied, it is admitted on all hands. It appears, from the preface to the life of SIR LEOLINE JENKINS [by WILLIAM WYNNE] that he claimed to himself some merit for having, during the preparation of the Statute of Frauds, obtained for the soldiers of the English army the full benefit of the testamentary privileges of the Roman army. Therefore, I think it quite clear that the principle of the exception was borrowed from the civil law, and that in order to ascertain the extent and meaning of the exception, the civil law may be fairly resorted to. It has become necessary to recur to this because the court was referred to a variety of writers on the text law and to many passages from the learned commentators on the text law; and it is well known that very subtle distinctions are to be found in the writings of the commentators.

I will not enter into a long discussion on the different points on which the commentators have treated, or on the conflict of laws in this respect. I have, however, thought it necessary to look into the commentators, to see to what extent, in respect to the "*testamentum militare*," they consider (at least to the extent of the text law), the strict testamentary law was dispensed with. As far as I can collect, the only distinction upon which they differ is whether the privilege extended to soldiers in quarters or in garrison "*in stativis aut in hybernis*." They all agree in this one particular, namely, that it was not every soldier, under every circumstance, who was entitled to this privilege, but that it was confined to those who were "*expeditionibus occupati*"; the only difference seeming to be what constituted expedition, whether a soldier profectus was to be considered in expeditione until he actually returned home, or whether the expedition was at an end when he went into garrison or winter quarters. It is true that in its origin the testamentary privilege extended to all soldiers. We have it so expressed in book 29 of the DIGEST, entitled "*De testamento militis*," which begins by stating that full and free power of making a will was first granted by Julius Cæsar: "*Militibus liberam testamenti factionem primus quidem Julius Cæsar concessit*." This, according to all the commentators, was the origin of the privilege of soldiers making wills without having a certain number of witnesses to attest them, and without the observance of other solemnities, and that the privilege had no existence before the time of Julius Cæsar. It goes on:

"sed ea concessio temporalis erat. Postea vero primus Titus dedit, post hoc Domitianus, postea Nerva plenissimam indulgentiam in milites contulit, eamque et Trajanus secutus est, et exinde mandatis inseri cœpit caput tale: caput ex mandatis." A

Having set forth with this in order to show how far general the privilege was in its origin, the passage proceeds :

"Cum in notitiam meam prolatum est subinde testamenta a commilitonibus relicta proferri, quæ possint in controversiam deduci, si ad diligentiam legum revocentur et observantiam: secutus animi mei integritudinem erga optimos fidelissimosque commilitones simplicitati eorum consulendum existimaui, ut quoquo modo testati fuissent, rata esset eorum voluntas. Faciant igitur testamenta quo modo volent, quo modo poterint, sufficiatque ad bonorum suorum divisionem faciendam nuda voluntas testatoris." B C

Nothing can be clearer than that this privilege in its origin extended to all ranks, and to the whole of the vast body of the Roman army. The interpretation in the glosses on the word "simplicitas" is want of skill in legal forms, and the term made use of by JUSTINIAN in the INSTITUTES (Lib. II, tit. xi) is "imperitia." In the gloss of GOTHOFRED (CORP. JUR. CIV.) this is inserted: "nisi domi sint tunc enim jure communi testari debent." D

So stood the law at the time of the DIGEST. Various limitations were afterwards imposed. In book 6 of the CODE (tit. 21, law 3) "De testamento Militis" is this passage :

"Quamquam militum testamenta juris vinculis non subjiciantur cum propter simplicitatem militarem." E

One observation in the gloss is: "Simplicitas militaris ut hic armatæ militiæ," another is: "arma magis quam leges scire miles præsumitur." The text goes on :

"quomodo velint et quomodo possint ea facere his concedatur; tamen in Valeriani quondam centurionis testamento institutio etiam jure communi concessit auctoritatem." F

In law 17 of the same title headed "Quando miles testatur quomodo vult," this is to be found :

"Ne quidam putarent in omni tempore licere militibus testamenta quomodo voluerint componere Sancimus his solis qui in expeditionibus occupati sunt." G

In the gloss (GOTHOFRED), is this passage :

"Idque sive sint in castris, sive in fossato, sive in hybernis, sive in præidiis, sive in stativis seu sedibus sedetis ac ædibus." H

Another gloss upon the word "expeditio" is, "sufficit ergo ut fiat in expeditione licet non in procinctu." Reference has been made to Cujacius (49th cap.), who says :

"cum autem quæritur an non aliter valeat testamentum jure militari quam si fiat in procinctu Respondeo etiam si non fiat in procinctu testamentum valere jure militari modo fiat in expeditione in castris in stativis." I

So that it was not, according to this commentator, absolutely necessary that the soldier should be in procinctu, that is, called out in preparation for battle, but the privilege existed when he was in castris aut in stativis, and the reason he assigns for this is :

"alioquin nihil distaret paganus a milite, nam et a pagano in procinctu in acie in hostico quoquo modo factum testamentum valet ratione pari."

According to Cujacius, soldiers, in quarters or in camp, might make wills, without observing the solemnities of law, but he says, "modo fiat in expeditione." Whether the privilege extended to all cases when a soldier was in castris aut in stativis might be a matter of some doubt, but it is not necessary to consider that question.

- A** It cannot be said that General Drummond was either in *castris*, or in *stativis*; then, was he in *expeditione*?

CUJACIUS continues :

- B** “Ergo qui in *expeditione* testatur miles in *castris* in fossato ut loquuntur, imo et qui in *hybernis*, ut meum iudicium est, in *stativis*, in *præsiidiis* jure militari testamentum facere potest; ac proinde non est necesse ut adhibeat legitimum numerum testium ut est in principio tituli de militari testamento ubi et unum testem sufficere Theophilus noster scripsit. Et quidem nullum testem necessario requiro, ac satis esse opinor si aliis probationibus legitimus constare possit de voluntate militis.”

- C** Here again CUJACIUS repeats the use of the word “*expeditio*.” He seems to think that a soldier in *castris*, or in *stativis*, is not required to observe the solemnities of the testamentary law, but still he is of opinion, that he must be in *expeditione*. Then arises the question : What is the meaning of the word “*expeditio*?” According to CALVIN, in his *LEXICON JURIDICUM*, it is this :

- D** “*Expeditio* proprie profectio cum expeditis militibus.” “*Expediti* milites vel in *expeditionibus* degentes dicuntur quicumque sint in ipso exercitu aut *castris*, id est eo loco quo reipublicæ causa est belli apparatus, seu in statione illi sint, seu in *hybernis* seu alicubi pro finibus imperii tuendis, imo quocunque loco sint militiæ causa, ut si Romæ sint ad defensionem urbis collocati et dispositi.”

Then it is argued from this :

- E** “*Falsum* ergo est stationarios et limenarchas non recte testaturos jure militari quia non sint in *expeditionibus*.”

Then the authority of ULPIAN is referred to, who says, (lib. 1, s. ult. de bon. poss. ex test.) :

“Miles est etiamsi in nostro non est, et Nauarchi ac trierarchi classium jure militari testari possunt, et in classibus omnes remiges ac nautæ milites sunt.”

- F** So far, then, as CALVIN is an authority, here is a definition of the word “*expeditio*.” So far, then, as I have gone, it is quite clear, from these passages from the DIGEST, the CODE, and the commentators generally that the privilege did not extend to soldiers of every description. They must be soldiers *expeditionibus* occupati, or called out to defend the city; this last case was of itself an exception, for it could not strictly be said to be “*expeditio*.” I find the words of the CODE thus
- G** limited in book 2 of the INSTITUTES (tit. 11) :

- H** “Supradicta diligens observatio in ordinandis testamentis, militibus propter nimiam imperitiam eorum constitutionibus principalibus remissa est. Nam quævis ii neque legitimum numerum testium adhibuerint neque aliam testamentorum solemnitatem observaverint recte nihilominus testantur, videlicet cum in *expeditionibus* occupati sunt : quod merito nostra constitutio introduxit.”

(The law referred to will be found in the CODE, c. 6, tit. 21) :

- I** “Quoquo enim modo voluntas ejus suprema inveniatur, sive scripta, sive sine scriptura, valet testamentum ex voluntate ejus. Illis autem temporibus per quæ citra *expeditionem* necessitatem in aliis locis vel suis ædibus degunt, minime ad vindicandum tale privilegium adjuvantur.”

It is quite clear from this that the privilege of deviating from the general law was confined to those soldiers who were “*expeditionibus* occupati,” and that, if soldiers made wills at other times, they must comply with the requisites prescribed by the general Roman law to give operation to a will.

The same expressions are found in the same title and book of the Institutes (s. 3) :

“Sed hætenus hoc illis a principalibus constitutionibus conceditur quatenus militant et in *castris* degunt. Post missionem vero veterani vel extra castra

alii si faciant adhuc militantes testamentum, communi omnium civium Romanorum jure id facere debent."

The veterani here spoken of were not, as has been surmised, analogous to the generals of the English army, but soldiers who had served their time, and been discharged propter honestam causam, but the important bearing of the passage is that it shows that the privilege was confined simply and entirely to soldiers expeditionibus occupati. There is a passage from VULTEIUS (Lib. 2, c. 10), which sums up the whole of the law on this subject. The title is, "De testamentis ordinandis." He says:

"Olim ante Justinianum hoc privilegium commune erat militibus omnibus sive in expeditione sive extra eam essent, sed Justinianus restrinxisse illud videtur ad milites eos qui in expeditione degerent. Non igitur existimandum est si testamentum est militis testamentum illud esse militare; nam sive jus quod ante Justinianum fuit, sive jus quod Justinianus postea introduxit spectes, multi sunt milites qui tamen non militant aut in expeditione degunt."

Nothing can be more clear than that, according to the Roman text law, this was not a privilege extending to all soldiers, but to those only who were circumstanced as I have mentioned.

I now come to consider the case with reference to the passages cited from SWINBURNE [ON TESTAMENTS AND LAST WILLS], whom undoubtedly the court will consider a very high authority. He speaks (Part 1, s. 13) of three sorts of privileged testaments, and first "Testamentum militis." Of this he says (p. 95):

"After we have viewed what privileges do belong to soldiers, it shall be expedient to show what manner of soldiers they be to whom these privileges are granted; 1st, Milites armati—2nd, Milites literarii—3rd, Milites cælestes."

He says:

"Concerning the first, they be such as lie safely in some castle, or place of defence, or besieged by the enemy, only in readiness to be employed in case of invasion or rebellion, and then they do not enjoy these military privileges, or else they be such as are in expedition or actual service of wars, and such are privileged, at least during the time of their expedition, whether they be employed by land or by water, and whether they be horsemen or footmen."

The words used in both Acts of Parliaments are as nearly as possible the same as those used by SWINBURNE in explaining the word "expedition." The probability is that the words of s. 23 of the Statute of Frauds, from which s. 11 of the present Act was taken, were borrowed from SWINBURNE. MR. BURGE, in his work, COMMENTARIES ON COLONIAL AND FOREIGN LAWS, vol. 4, p. 394, defines actual military service by the words "Qui in expeditionibus sunt." It has also been shown in argument that the codes of all countries in Europe seem to have limited the privilege in the same way. The following writers and laws have been cited, DONATUS, DONELLUS, PAUL and JOHN VOET, HUBER, HOSTIENSIS, GAIL, VIGLIUS, PUFFENDORF, the THEODOSIAN CODE, the FRENCH CODE. POTHIER—who, in his sixth book (tit. 16), says: "Soldiers in forts or garrisons cannot avail themselves of this law"—the SARDINIAN CODE, the law of Spain, where the expression is "en guerra actual," the ordinance of the Emperor Maximilian in 1512; the law of Bavaria, of Mecklenburgh, of Westphalia—in short it appears that in all countries the privilege is accompanied with limitations. In most it would seem that a military will was only good when made on the field of battle or marching against the enemy, and when made under these circumstances, it only remained good for three months after the soldier returned home, or arrived at a place where there was a consul or some person before whom a will might be made.

These are the authorities to which the court has thought it necessary to refer in order to show what was the principle of exempting the wills of soldiers from the stricter forms of testamentary law, and to show that the privilege was borrowed

A from the Roman law, and engrafted into our laws, and that it is confined to soldiers placed in the particular situations I have described. The court has also searched to find, if possible, any case in which a court of law has put a construction on the words "actual military service." The court has found none, and, therefore, must resort to principle to put an interpretation on words to which some meaning must be given. The court, at the commencement of this judgment, stated that there is

B one case in which the question has received, in this court, a certain degree of interpretation; it is *Shearman v. Pyke* (2). The following is the extract from DR. ANDREW'S note:

C "James Wakeford was enlisted as a soldier in the service of the East India Co., and went with Governor Pyke to St. Helena. He was employed in his service as cook, and he gave him wages besides his pay. In 1719 the governor left St. Helena to proceed to Bencoolen, but at Batavia they were informed that the factory at Bencoolen was cut off by the natives. They sailed from Batavia to Moco Moro, and thence to Madras, thence he proceeded to Bencoolen to re-establish the factory. About October, 1720, they returned to Moco Moro. In January, 1721, James Wakeford being ill of an ague, and fever, and flux, whereof he died in the hospital at Moco Moro, being asked by J. Potter and M. Sams to make his will, replied: 'I give all I have to my master, and I will give nothing from him, and I'll make no other will; he may dispose of it as he pleases.' On Jan. 22, two days after his death, the witnesses signed a schedule of the contents of the will, and made oath thereof at Moco Moro. Potter died on the passage. This will is propounded by Governor Pyke as a nuncupative will, and opposed by Shearman, one of the next-of-kin."

E The arguments are given shortly.

"The [Statute of Frauds] s. 23, does not extend to every soldier in actual military service, or to every mariner or seaman being at sea; the exception is not restrained to an engagement, it is not from the imminence of the danger, but from their state and condition, being supposed to be ignorant and destitute of assistance. By the civil law, a will made jure militari continued good a year; if the danger were the only reason, that ceasing the will would become void. INSTIT. Bk. 2, tit. 2, s. 3.—Quatenus militans et in castris degunt."

F In point of fact the arguments were the same as on the present occasion. CALVIN'S definition of the word *expeditio*, was referred to, as was also the passage in CUJACIUS. On the other hand, the argument for the next-of-kin was this: "The

G court, upon the plea, directed they should set forth the expedition."

It seems from this that the allegation propounding the nuncupative will had been objected to, as not setting forth the expedition, and the court had directed it to be set forth:

H "It must be under actual engagement, attended with danger, otherwise mounting guard at Whitehall, would be sufficient; the expedition was over before he was in the hospital; refer to *Key v. Jordan* (3), 1712. A mariner made a nuncupative will at land; he was going on board next day, not allowed the privilege."

The words of the court, in pronouncing sentence, are these:

I "It is agreed, the will cannot be good unless within the privilege. A mariner on shore is not within the statute. Those who are enlisted in the service of the company have the same privilege as those in the service of the Crown, and though he acted as cook, it does not take away the privilege of the soldier. He was not only a soldier, but was upon an expedition. The proof is not clear whether the expedition was over or not, one witness swears he died on the passage, he was certainly engaged in the service."

The will was pronounced for. It appears doubtful on what particular grounds the decision turned, whether on the ground that the privilege extended to all persons

in the service, or whether that the expedition was not over, but was returning, A
when he fell ill, and died in the hospital. The court puts it thus :

"One witness swears he died on the passage; he was certainly engaged in the service."

This decision, so far as it goes, would have been an authority precisely in point B
if the will had been pronounced for on the ground that the testator was a soldier, on an expedition, and died on the passage. Unquestionably, in such case, the will was privileged, but, unfortunately, the language of the judgment renders it doubtful on what the judgment really turned. The judge was DR. BETTESWORTH. He evidently considered that the question had never received a decision. It also appears that, in the first instance, he had directed the allegation to be reformed, by setting forth the expedition on which the deceased was engaged.

Being of opinion from the result of the investigation of the authorities that the C
principle of the exemption contained in s. 11 of the Wills Act, 1837, was adopted from the Roman law, I think it was adopted with the limitations to which I have adverted, and that by the insertion of the words "actual military service," the privilege, as respects the British soldier, is confined to those who are on an expedition. The question, then, comes to be considered: What was the situation D
of Major-General Drummond at the time when he made his will? That is to be found in art. 5 of the allegation propounding the will. It is there stated that the general was "liable to be sent abroad"—so is every soldier in the service; and that he was "subject to be tried by a court-martial,"—so is every officer and soldier in the service. On these grounds I think this will not entitled to probate. It is not attested in manner and form prescribed as to all wills which bear date after E
Jan. 1, 1838, and it is not within the exception of s. 11 of the statute, that is, it is not made by a soldier "in actual military service." Therefore, I am of opinion that this allegation cannot be admitted to proof, and, accordingly, I reject it.

Allegation rejected.

CALEDONIAN RAIL. CO. v. SPROT

[HOUSE OF LORDS (Lord Cranworth, L.C., Lord Brougham and other Lords),
March 4, 6, 7, 8, 10, June 16, 1856]

[Reported 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659;
2 Macq. 449]

Land—Right to support—Railway—Conveyance of surface reserving mines and right to work them—Implied obligation to give surface subjacent and adjacent support.

A conveyance of the surface of land for a particular purpose, such as the construction of a railway, gives to the grantee an implied right to all reasonable subjacent and adjacent support. A person who has granted part of his land, reserving, for instance, his mines under the land conveyed, with liberty to win and work the minerals, must not so deal with the land which he retains, either subjacent or adjacent to the works of the person or body acquiring the land, as to cause that which he has granted to sink or fall. In reserving mines and the right to work them he must be understood to have reserved them only so far as he could work the mines consistently with the grant he has made. How far adjacent support must extend is a question depending on the circumstances of each case, but all that a grantor can reasonably be considered to grant or warrant is such measure of support, subjacent and adjacent, as is necessary for the land in its condition at the time of the grant or in the state for the purpose of putting it into which the grant is made.

Notes. Followed: *Caledonian Rail. Co. v. Belhaven* (1857), 29 L.T.O.S. 286. Considered: *Rowbotham v. Wilson* (1857), 8 E. & B. 123. Distinguished: *Great Western Rail. Co. v. Fletcher* (1860), 5 H. & N. 689. Considered: *Elliot v. North Eastern Rail. Co.* (1863), 10 H.L.Cas. 334. Explained: *Great Western Rail. Co. v. Bennett* (1867), L.R. 2 H.L. 27. Distinguished: *Aspden v. Seddon* (1875), 10 Ch. App. 394. Considered: *Rigby v. Bennett* (1882), 21 Ch.D. 559; *Birmingham, Dudley and District Banking Co. v. Ross* (1888), 38 Ch.D. 295. Applied: *Great Western Rail. Co. v. Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157. Considered: *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L.T. 53. Referred to: *Roberts v. Haines* (1856), 2 Jur.N.S. 999; *Dugdale v. Robertson* (1857), 3 K. & J. 695; *Bonomi v. Backhouse* (1859), 28 L.J.Q.B. 378; *Stourbridge Canal Co. v. Dudley* (1860), 30 L.J.Q.B. 108; *Shafte v. Johnson* (1863), 8 B. & S. 252, n.; *Midland Rail. Co. v. Checkley* (1867), L.R. 4 Eq. 19; *Wakefield v. Buccleuch* (1867), L.R. 4 Eq. 613; *Metropolitan Board of Works v. Metropolitan Rail. Co.* (1868), L.R. 3 C.P. 612; *Richards v. Jenkins* (1868), 18 L.T. 437; *Robinson v. Grave* (1873), 29 L.T. 7; *Colebeck v. Girdlers' Co.* (1876), 45 L.J.Q.B. 225; *Dalton v. Angus & Co.*, [1881–5] All E.R.Rep. 1; *Pountney v. Clayton* (1883), 11 Q.B.D. 820; *Russell v. Watts* (1885), 10 App. Cas. 590; *London and North Western Rail. Co. v. Evans*, [1893] 1 Ch. 16; *Aldin v. Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437; *Grosvenor Hotel Co. v. Hamilton*, [1891–4] All E.R.Rep. 1188; *Manchester Corpn. v. New Moss Colliery*, [1906] 1 Ch. 278; *London and North Western Rail. Co. v. Howley Park Coal and Canal Co.*, [1911] 2 Ch. 97; *Hargreaves, Ltd., Executors of v. Burnley Corpn.*, [1936] 3 All E.R. 959; *London and North Eastern Rail. Co. v. B.A. Collieries, Ltd.*, [1945] 1 All E.R. 51.

As to the right of support of the surface above a mine, see 26 HALSBURY'S LAWS (3rd Edn.) 339 et seq.; and for cases see 33 DIGEST (Repl.) 840 et seq.

Cases referred to:

- (1) *Harris v. Ryding* (1839), 5 M. & W. 60; 8 L.J.Ex. 181; 151 E.R. 27; 33 Digest (Repl.) 848, 1024.
- (2) *Humphries v. Brogden* (1850), 12 Q.B. 739; 20 L.J.Q.B. 10; 16 L.T.O.S. 457; 116 E.R. 1048; sub nom. *Humfries v. Brogden*, 15 Jur. 124; 33 Digest (Repl.) 732, 94.

Also referred to in argument :

R. v. Leeds and Selby Rail. Co. (1835), 3 Ad. & El. 683; 5 Nev. & M.K.B. 246; 111 E.R. 573; 11 Digest (Repl.) 175, 433.

Hilton v. Lord Granville (1844), 5 Q.B. 701; 1 Dav. & Mer. 614; 13 L.J.Q.B. 193; 2 L.T.O.S. 419; 8 Jur. 311; 114 E.R. 1414; 33 Digest (Repl.) 844, 1001.

Jeffries v. Williams (1850), 5 Exch. 792; 20 L.J.Ex. 14; 16 L.T.O.S. 196; 155 E.R. 347; 33 Digest (Repl.) 841, 983.

Appeal by the defendants from a decision of the Court of Session in an action brought by the respondent for a declaration that he was entitled to damages for loss sustained by him owing to the appellants preventing him from working a mine under their railway and refusing to pay him any compensation.

Sir Fitzroy Kelly, Q.C., Rolt, Q.C., and Anderson, Q.C., for the appellants.

Sir Richard Bethell, Q.C., R. Palmer, Q.C., and A. Brown for the respondent.

Their Lordships took time for consideration.

June 16, 1856. **LORD CRANWORTH, L.C.,** read the following opinion.—This appeal arose out of an action which had been brought by the respondent against the appellants, the object of which was to compel them to purchase certain minerals belonging to him, situate under and near the line of their railway. Several Acts of Parliament came in question in this case; first, the original Act, 7 Geo. 4, c. ciii, which is an Act for making a railway from the Monkland and Kirkintilloch Railway by Garnkirk to Glasgow. Under that Act there were the usual powers enabling the company to be incorporated for the purchase of lands; and, pursuant to the powers given by that Act, on Dec. 12, 1834, between eight and nine years after the passing of the Act, the respondent sold to the company, in consideration of a sum of £620, some land of his over which the railway was to pass, reserving, however, the minerals. Then there passed some amending Acts. By an Act of 1844 the name of the company was changed, and it was called the Glasgow, Garnkirk and Coatbridge Rail. Co. There passed, on July 21, 1845, the Scottish General Railway Clauses Act. In the same year an Act was passed, by which the Caledonian Rail. Co. was incorporated; and then, in 1846, an Act enabling the Caledonian Rail. Co. to purchase the Glasgow, Garnkirk and Coatbridge Railway. In 1848 the respondent, having sold his land to the original company, but having reserved to himself the mines, was proceeding to work certain mines under and near the line of railway when, on Aug. 17, 1848, he received a notice from the company calling upon him to desist from what he was proceeding to do. Having set forth the rights of the company, the summons in the present action states this :

“Under these circumstances the plaintiff proceeded with a working of the fire-clay and other minerals in his said lands of Garnkirk in due and ordinary course, until he was interrupted by the Caledonian Rail. Co. On or about Aug. 17, 1848, the agents for the company addressed a letter to the manager at the Garnkirk works, intimating that they had received a report from their engineer that the works then in the course of being carried on in the fire-clay mines under the line of the Garnkirk Railway at the Garnkirk brick-works were of a nature to endanger the safety of the railway, and calling upon the proprietors of the minerals to find security to the company for all damage, interruption of traffic, and other injury which might result to the company, before any further workings were proceeded with.”

Eventually, the appellants persisting in forbidding the respondent to work the mines, and the respondent persisting that he had a right to work them, the respondent brought the action, out of which the present appeal arose, in which he concludes :

“Therefore, it ought and should be found and declared by decree of the Lords of our council and session, that the said Caledonian Rail. Co., or the said

- A** Glasgow, Garnkirk, and Coatbridge Rail. Co., or either of them, defenders, have no right of property in the minerals in the lands of Garnkirk, situated under and adjacent to the Glasgow, Garnkirk, and Coatbridge Railway, or any part thereof; but that the property of the said minerals is still vested in and belongs to the plaintiff, subject to any right of purchase, or right to prevent the working thereof on making compensation for the same, competent to the
- B** said defendants or either of them under the said Acts of Parliament. Further it ought and should be found and declared by decree aforesaid, that the defenders are not entitled to require or compel the plaintiff to desist from working the minerals, or any part thereof, without paying to the plaintiff and his tenants the value of the minerals which they so require to be left unwrought, or compensating the plaintiff and his tenants for the loss occasioned to him by leaving the same unwrought. And, further, it ought and should be found and declared
- C** by decree aforesaid, that the proviso or enactment in s. 11 of the Act 7 Geo. 4, c. ciii, whereby it is declared that it shall not be lawful to, or in the power of any proprietor to whom satisfaction has been made as therein mentioned, and who has reserved his right to the minerals in the lands for which such satisfaction has been made, to work, win, or away take the said minerals, without
- D** giving previous security to the Glasgow and Garnkirk Rail. Co. or their successors, for damage, interruption of traffic, and other injury resulting to the said company and their said undertaking, does not in any respect apply to the minerals in the lands adjacent to the railway belonging to the plaintiff, which were not conveyed or included in the conveyance granted by him to the railway company in 1834; and notwithstanding the proviso or enactment in the said statute, and the terms of the said conveyance, the plaintiff is entitled to obtain compensation from the defendants or either of them, for all minerals under or
- E** adjacent to the line of railway which were not purchased by the railway company or their successors, and which the plaintiff or his tenants are prevented from working by reason of the necessity of maintaining the railway in a state of security, or by reason of the restriction imposed upon him not to injure the
- F** railway; and further, it ought and should be found and declared by decree aforesaid that the plaintiff is entitled to obtain full compensation from the defendants, the Caledonian Rail. Co. and other companies or either of them, for the whole minerals in the lands of Garnkirk not purchased by the railway company or their successors, and which cannot be wrought without danger to the railway and works, and that within the limits specified in the report of Mr. Robson the engineer of the company, dated Aug. 3, 1848, or as the same may be ascer-
- G** tained in the course of the proceedings to follow hereon."

That being the summons, and there having been a statement in answer, eventually on March 8, 1851, the Lord Ordinary pronounced a decree dismissing the suit, having come to the conclusion that the respondent, by the sale to the appellants

H of his lands, although he reserved the minerals, had nevertheless precluded himself from working the minerals either under or adjacent to the railway, so as to prejudice the railway.

That decision of the Lord Ordinary was brought by way of an appeal to the Court of Session, and they took this course. Before answer and under express reservation of all pleas or questions competent to the parties under the record,

I they remitted the case to Mr. Leslie and Mr. Lonsdale, the one a civil engineer and the other a mining engineer

"to examine the subjects and to inquire and report, first, whether, having reference to the nature of the railway which was made under the powers of the original Acts,"

the minerals under the railway could have been worked with safety to the railway and with a reasonable prospect of advantage to the proprietor, subject to the obligation of fair security, in terms of the original Act: and, secondly, whether,

and in what respects, and to what extent, the alterations made in the uses and structure of the railway by or under authority of the Acts of 1844, 1845 and 1846, or any of them, materially affected the practicability of working the minerals. Those gentlemen made the following report:

"That having reference to the nature of the railway made under the powers of the original Acts, the minerals could not have been worked with safety to the railway as they were in the habit of being worked; but that fully one-third or nearly one-half of the fire-clay could have been taken out from or under, or for sixty feet on each side of the centre of the railway by single mines."

and so on, which is not the ordinary way of working; and secondly

"that the railway being thus secured, it is of no consequence to the stowed mines or cased pillars, how many or how frequent the trains are."

They added:

"The reporters do not think that the increased traffic or the alterations of the structure and uses of the railway have materially affected the practicability of working the minerals under and adjacent to the railway."

When that report was brought before the First Division of the Court of Session, they took a different view from that which had been taken by the Lord Ordinary. They found that the consideration paid to the respondent did not include compensation for the loss of the minerals, and that he was entitled to work the minerals unless the company thought fit to purchase them. From that decision the present appeal was brought.

The respondent by his conveyance, dated Dec. 12, 1834, conveyed to the original Garnkirk company the portion of his land required for the line of the company in consideration of a sum of money agreed on as a price, and then paid to him. The conveyance was expressly made for the purpose of the land conveyed being used as a railway. He, however, reserved all mines under the land so conveyed, with full liberty to win and work the minerals. Independently of any provisions contained in the Act of Parliament, the effect of that conveyance was to convey the land to be covered by the railway to the company, together with a right to all reasonable subjacent and adjacent support. A right to such support is a right necessarily connected with the subject-matter of the grant. If the owners of a house were to convey the upper storey to a purchaser reserving all below the upper storey, the purchaser would, on general principles, have a right to prevent the owner of the lower stories from interfering with the walls and beams upon which the upper storey rested, so as to prevent them from affording proper support. The same principle applies to the case of adjacent support, so far, at all events, as to prevent a person who has granted a part of his land from so dealing with that which he retains as to cause what he has granted to sink or fall. How far such adjacent support must extend is a question which, in each particular case, will depend on its own special circumstances. If the line dividing that which is granted from that which is retained traversed a quarry of hard stone or marble, it may be that no adjacent support at all is necessary. If, on the other hand, it traverses a bed of sand or marsh, or a loose gravelly soil, it may be that a considerable breadth of support is necessary to prevent the land granted from falling away upon the soil of what is retained. Again, if the surface of the land granted is merely a common meadow or a ploughed field, the necessity for support will probably be much less than if it were covered with buildings or trees; and it must be further observed that all which a grantor can reasonably be considered to grant or warrant is such measure of support, subjacent and adjacent, as is necessary for the land in its condition at the time of the grant or in the state for the purpose of putting it into which the grant is made. Thus, if I grant a meadow to another, retaining both the minerals under it and also the adjacent lands, I am bound so to work my mines and to dig my adjoining land, as not to cause the meadow to sink or fall over;

- A** but if the grantee thinks fit to build a house on the edge of the land he has acquired, he cannot complain of my working or digging if, by reason of the additional weight he has put on the land, they cause his house to fall. If, indeed, the grant is made expressly to enable the grantee to build his house on the land granted, then there is an implied warrant of support, subjacent and adjacent, as if the house had already existed.
- B** Applying these principles to this case, it is clear that by the effect of the conveyance of Dec. 12, 1834, the Garnkirk company acquired a right to the surface of the ground traversed by the railway, together with a right, as against the respondent, to such subjacent and adjacent support as was necessary for enabling them to maintain and work the railway. The conveyance is in these terms :
- C** "I, Mark Sprot, esquire, of Garnkirk, considering that in the year 1826, by Act of Parliament, 7 Geo. 4, c. ciii, the Garnkirk and Glasgow Rail. Co. was incorporated, and that it was agreed between me and the committee or proprietors of said railway that the value of the land belonging to me to be occupied by the said railway, as well as all damage done to my property, should be ascertained by David Leighton, then factor at Coltness . . ."

- D** Then there is a calculation of the interest and certain other damages, making altogether £624 (the original purchase-money having been only £379). The conveyance proceeds thus :

- E** "And in consideration of the aforesaid sum of £379 being the specific and agreed on value of the land hereby conveyed, I, the said Mark Sprot, do by these presents grant and convey to the said company of proprietors, but always for the said railway and works thereto belonging and not otherwise, all and whole that portion of my estate described . . . declaring that I shall have full power to take into my own hands the slopes or banks on that portion of the line betwixt the parish and the crossing of the Cumberwauld Road, at or near Stepps, for the purpose of feuing or otherwise, under such conditions and restrictions always as shall not interfere with the due and regular operations
- F** of the said railway, I, the said Mark Sprot, and my foresaids paying such an annual value for said slopes and banks as may be fixed by the persons mutually chosen; and I hereby warrant this conveyance at all hands and against all mortals as law will, and declare that all fees, teind and other parish and public burdens whatsoever affecting the lands hereby conveyed, up to the term of Martinmas, 1833, have been paid, my said disponees being obliged to pay whatever proportion of such burdens have fallen due since, or may hereafter fall due, and be held as applicable to the said lands, reserving always to me, my heirs and successors, the whole powers and privileges of access to or crossing the said railway, and other ways conferred by the said recited Acts on the landed proprietors whose lands are intersected; also, always reserving to me,
- G** and my heirs and successors, the whole mines and minerals of whatsoever description within the said lands hereby conveyed, and full power and liberty to us, or any person authorised by us, to search for, win and carry away the same, and to make acqueducts . . ."
- H**

- Subject to the rights thus given to the company, the respondent retained a right to work the minerals under and adjoining the line, subject only as to the minerals
- I** under the line to the obligation of giving the security created by the first Act to which I have referred.

Starting, then, from this proposition, the next question is: Have the rights of each party been affected by the several Acts of Parliament relating to the railway? [His LORDSHIP examined the provisions of these private Acts in some detail, and continued:] It appears, from an examination of all these Acts that the rights acquired by the original company by virtue of the conveyance of Dec. 12, 1834, remained unaffected up to the time of their final transfer to the Caledonian company, and as the respondent rests his claim to relief on the ground that he is entitled

by virtue of the reservation of mines contained in his conveyance of 1834 to work those mines adjoining the railway without regard to the question whether by so doing he will be damaging the necessary support of the railway, and that the company can only prevent his doing so by purchasing the mines, I have only to add, having already explained the grounds on which I conceive this view of the case to be incorrect, that I think the Lord Ordinary was right when he held the plea was good.

I am aware that I adopt the view of the Lord Ordinary in opposition to the opinion of the four judges of the First Division of the Court of Session who concurred in reversing his decision. Those able judges seem to me to have overlooked or not to have given due weight to the effect of the conveyance of 1834. If I am right in saying that by that conveyance the respondent conveyed to the company not only the land to be covered by the railway, but also, by implication, the right to all necessary support, then he cannot, by reason of his having reserved the mines, derogate from his own conveyance by removing that support. In reserving mines he must be understood to have reserved them so far only as he could work them consistently with the grant he had made to the company. The judges of the court below have overlooked the principle, and in so doing have been led to an erroneous conclusion.

The subject of the right of the owners of the surface to adequate subjacent and adjacent support has, on several recent occasions, been discussed in the English courts. The principles which there govern the decisions were not derived from any peculiarities of the English law, but rested on grounds common to the Scottish and, as I believe, to every other system of jurisprudence. They were considered in *Harris v. Ryding* (1), and very fully developed in the judgment of the Court of Queen's Bench, delivered by LORD CAMPBELL, in *Humphries v. Brogden* (2). It may be proper that I should notice an argument relied on to some extent, namely, that the railway originally contemplated was not one on which the traffic would be equal to that which now exists, so that the support contemplated could not have been so great as that which is now required. To that I think there are two answers: first, when the respondent granted his land for the avowed purpose of enabling the disponees to make a railway without any limitation as to its nature, I think he must be understood to have warranted proper support, however the railway might be used, or to whatever purpose it might be applied; and secondly, the gentlemen to whom the Court of Session referred this very question expressly say, that neither increased traffic nor the alteration of the structure or uses of the railway have materially affected the practicability of working the minerals.

I may also add that although this judgment and the reasons I have given for it are my own, they are to be considered likewise as those of my noble and learned friend **LORD BROUGHAM**, to whom I communicated the judgment, and who has authorised me to express his entire concurrence in it.

Appeal allowed.

A

FENN AND ANOTHER v. BITTLESTON

[COURT OF EXCHEQUER (Pollock, C.B., Parke, Alderson and Platt, BB.), June 5, November 4, December 5, 1851]

B

[Reported 7 Exch. 152; 21 L.J.Ex. 41; 18 L.T.O.S. 197;
155 E.R. 895]

Bankruptcy—Property available for distribution—Sale of goods—Goods left in possession of bankrupt conditional on payment of interest for loan.
Bailment—Determination—Sale of chattels bailed.

C

By a deed dated Sept. 28, 1845, M. conveyed certain chattels to R. absolutely, with the proviso that, if M. should pay to R. £1,678 on Mar. 22, 1850, or at such earlier date as R. should appoint by giving twenty-four days' notice to M., and should pay interest in the meantime, the conveyance should be void, and it was thereby agreed that until default in payment of the principal sum or interest it should be lawful for M., his executors or administrators, to hold and enjoy the chattels. On Dec. 13, 1849, M. became bankrupt, and on Feb. 19, 1850, his assignees sold the chattels absolutely.

D

Held: the sale by the assignees was equivalent to a sale by M. himself; it destroyed the bailment of the goods; and trover would lie in an action by the assignees of R. against M.'s assignees for the conversion of the goods during the term.

E

Notes. Approved: *Brierley v. Kendall* (1852), 17 Q.B. 937. Followed: *Letts v. Whitmore* (1852), 18 L.T.O.S. 254. Distinguished: *Re Collins, Ex parte Harvey* (1854), 1 Bankr. & Ins.R. 194; *Spackman v. Miller* (1862), 12 C.B.N.S. 659. Considered: *Nyberg v. Handelaar*, [1891-4] All E.R.Rep. 1109; *North Central Wagon and Finance Co. v. Graham*, [1950] 1 All E.R. 780. Referred to: *Donald v. Suckling* (1866), 7 B. & S. 783; *Mulliner v. Florence* (1878), 3 Q.B.D. 484; *Whiteley v. Hilt*, [1918] 2 K.B. 808; *Alexander v. Railway Executive*, [1951] 2 All E.R. 442.

F

As to property available for distribution see 2 HALSBURY'S LAWS (3rd Edn.) 409 et seq.; and for cases see 5 DIGEST (Repl.) 679 et seq. As to rights of third parties where bailee by wrongful act has determined bailment, see 2 HALSBURY'S LAWS (3rd Edn.) 143, 144; and for cases see 3 DIGEST (Repl.) 117 et seq.

Cases referred to:

G

- (1) *Gordon v. Harper* (1796), 7 Term Rep. 9; 2 Esp. 465; 101 E.R. 828; 43 Digest 496, 354.
- (2) *Bradley v. Copley* (1845), 1 C.B. 685; 14 L.J.C.P. 222; 5 L.T.O.S. 198; 9 Jur. 599; 135 E.R. 711; 43 Digest 497, 361.
- (3) *Bryant v. Wardell* (1848), 2 Exch. 479; 154 E.R. 580; 3 Digest (Repl.) 113, 338.

H

- (4) *Youl v. Harbottle* (1791), Peake, 68, N.P.; 8 Digest (Repl.) 35, 203.
- (5) *Wilkinson v. King* (1809), 2 Camp. 335, N.P.; 33 Digest (Repl.) 491, 476.
- (6) *Loeschman v. Machin* (1818), 2 Stark. 311; 3 Digest (Repl.) 112, 333.
- (7) *Cooper v. Willomatt* (1845), 1 C.B. 672; 14 L.J.C.P. 219; 5 L.T.O.S. 173; 9 Jur. 598; 135 E.R. 706; 3 Digest (Repl.) 112, 334.

I

Also referred to in argument:

- Manders v. Williams* (1849), 4 Exch. 339; 18 L.J.Ex. 437; 13 L.T.O.S. 325; 154 E.R. 1242; 3 Digest (Repl.) 118, 377.
- Doe d. Parsley v. Day* (1842), 2 Q.B. 147; 2 Gal. & Dav. 757; 12 L.J.Q.B. 86; 6 Jur. 913; 114 E.R. 58; 35 Digest (Repl.) 465, 1549.
- Wilkinson v. Hall* (1837), 3 Bing.N.C. 508; 3 Hodg. 56; 4 Scott, 301; 6 L.J.C.P. 82; 182 E.R. 506; 35 Digest (Repl.) 370, 725.
- Chapman v. Beecham* (1842), 3 Q.B. 723; 3 Gal. & Dav. 71; 12 L.J.Q.B. 42; 6 Jur. 968; 114 E.R. 683; 18 Digest (Repl.) 249, 9.

- Rogers v. Grazebrook* (1846), 8 Q.B. 895; 7 L.T.O.S. 109; 115 E.R. 1111, 35 **A**
 Digest (Repl.) 454, 1464.
Jones v. Dowle (1841), 9 M. & W. 19; 1 Dowl.N.S. 391; 11 L.J.Ex. 52; 152 E.R. 9; 43 Digest 514, 517.
Wheeler v. Montefiore (1841), 2 Q.B. 133; 1 Gal. & Dav. 493; 11 L.J.Q.B. 34; 6 Jur. 299; 114 E.R. 53; 21 Digest (Repl.) 646, 1325.
Hutton v. Bragg (1816), 7 Taunt. 14; 2 Marsh. 339; 129 E.R. 6; 32 Digest (Repl.) **B**
 257, 33.
Isaac v. Belcher (1839), 5 M. & W. 139.
Hall v. Pickard (1812), 3 Camp. 187, N.P.; 3 Digest (Repl.) 118, 382.
Mullett v. Green (1838), 8 C. & P. 382, N.P.; 5 Digest (Repl.) 862, 7238.
Wilmshurst v. Bowker (1839), 5 Bing.N.C. 541; 8 L.J.C.P. 309.
Bloxam v. Sanders (1825), 4 B. & C. 941; 7 Dow. & Ry.K.B. 396; 107 E.R. 1309; **C**
 39 Digest (Repl.) 777, 2530.
McCarthy, Corner and Henderson v. Abel (1804), 5 East, 388.
Howes v. Ball (1827), 7 B. & C. 481; 1 Man. & Ry.K.B. 288; 6 L.J.O.S.K.B. 106; 108 E.R. 802; 39 Digest (Repl.) 779, 2549.
Smith v. Plomer (1812), 15 East, 607; 104 E.R. 972; 3 Digest (Repl.) 58, 27.
Newberry v. Colvin (1830), 7 Bing. 190, Ex. Ch.; affirmed sub nom. *Colvin v. Newberry and Benson* (1832), 1 Cl. & Fin. 283; 6 Bli.N.S. 167; 6 E.R. 923, H.L.; 41 Digest 353, 2036. **D**

Rule Nisi obtained by the defendants to set aside a verdict for the plaintiffs and enter a nonsuit in an action of trover for household goods, on the ground that the plaintiffs had no right to recover the chattels, the subject of the action, as against the defendants. **E**

At the trial of the action at Guildhall before POLLOCK, C.B., the plaintiffs claimed to recover the value of goods which had been conveyed to them by one Rhodes to whom one Malpas had conveyed them by a deed dated Sept. 28, 1845, the terms of which are set out in the judgment. It appeared that the goods had been subsequently seized and sold by the defendants who were the assignees of Malpas on his bankruptcy on Dec. 13, 1849, as being in the reputed ownership of the bankrupt at the time of his bankruptcy. The defendants pleaded Not Guilty and Not Possessed and issues were joined on these pleas. POLLOCK, C.B., directed a verdict for the plaintiffs for the value of the goods with leave to the defendants to move to set aside the verdict and enter a nonsuit. The defendants obtained the rule already mentioned. **F**

Hoggins and Cowling showed cause against the rule. **G**

Knowles, Crompton and Aspland supported the rule.

Cur. adv. vult.

Dec. 5, 1851. **PARKE, B.**, delivered the following judgment of the court.—This case was argued before us in last term on showing cause against a rule for setting aside a verdict for the plaintiff and entering a nonsuit, on the ground that the plaintiffs had no right to recover the chattels, the subject of the action in trover against the defendants, the assignees of a bankrupt named Malpas. **H**

Malpas and a person named Rhodes had married sisters, and were entitled in respect of their respective wives to distribute shares of the effects of their mother, who had died intestate. Malpas, the bankrupt, and his wife had carried on business with those effects and on an account and division taking place between Malpas and Rhodes Malpas was found indebted in £1,678 and upwards to Rhodes, and thereupon executed to him a mortgage of the goods and chattels in question in this action on Sept. 28, 1845. By the mortgage deed Malpas conveyed to Rhodes absolutely, subject to a proviso that if Malpas should pay Rhodes £1,678 on Mar. 22, 1850, or at such earlier days or times as Rhodes should appoint, by giving twenty-four days' notice to Malpas and should pay interest in the meantime, the conveyance should be void, and it was agreed between the parties that until default **I**

A should be made in the payment of the principal sum of £1,678 at the time before specified, or the interest, after fourteen days' notice, it should be lawful for Malpas, his executors and administrators, to hold and enjoy the chattels. Malpas continued to keep possession of the chattels according to the agreement until Dec. 13, 1849, when he became bankrupt, and his assignees, who were the defendants, on Feb. 19, 1850, sold the whole of them absolutely, not merely the bankrupt's interest. No demand was made by Rhodes or the plaintiffs for the principal money or interest in the meantime from Malpas. Rhodes, after the execution of the deed, assigned his effects to the plaintiffs.

It was contended, on behalf of the defendants, that by the covenants in the deed Rhodes gave an interest in the chattels in the nature of a demise until Mar. 22, 1850, defeasible by notice, according to the terms of the deed, to pay at an earlier period; consequently, that at the time of the conversion by the sale on Feb. 19, 1850, the plaintiffs, the assignees of Rhodes, had no present right of possession, and, therefore could not maintain an action of trover on the principles laid down in *Gordon v. Harper* (1) and *Bradley v. Copley* (2). The plaintiffs, on the other hand, contended that no interest at any time passed by the deed to Malpas, but that the covenant for enjoyment by Malpas either operated as a mere covenant, or, at most, as a bailment to hold at will; and if so, Rhodes might maintain an action of trover against the defendants.

We think the effect of the agreement of the parties in this case was to give not a mere possession and use of the chattels to Malpas as bailee, but the right of possession and use for the term ending Mar. 22, 1850, defeasible by nonpayment of the principal on twenty-four days' notice, and nonpayment of the interest in the meantime. The duration of the time of holding was not uncertain, as it would have been had it been only until such notice had been given, and in that case it might have been a term for life, which would not be the case of a demise of land, for want of livery of seizin. But it has a certain limit which it cannot exceed, namely Mar. 22, 1850. It is, therefore, good as a grant of a term defeasible, as suggested by Mr. PRESTON, in his commentary on the passage in SHEPHERD'S TOUCHSTONE, 272. It is too late to contend that the provision as to possession is a mere covenant after the cases on this subject, concluding with *Bradley v. Copley* (2). If, therefore, these goods had been simply taken by a third person out of Malpas's custody during the term stipulated for, no action of trover could have been maintained, because the plaintiffs would have had no present right to the possession. *Gordon v. Harper* (1) and *Bradley v. Copley* (2) would certainly have applied. But counsel for the plaintiffs contended that if the bailment was for that term it was put an end to by the act of the defendants, the assignees, whose act for this purpose is the same as that of Malpas himself, in selling the chattels themselves absolutely, before Mar. 22, 1850, and so preventing him from returning them at the end of the term, and that such sale is itself a conversion; and we are of that opinion.

H There is no reported case exactly like the present. In *Bryant v. Wardell* (3), the chattels were bailed for a time certain, and trover was held to lie by the bailor, because the bailee had done what was equivalent to the destruction of the chattels, and so brought himself within the principle laid down by LORD COKE in *Co. Litt.* 71a, namely,

I "That if one lends oxen to another to plough his lands, and he kills them, the owner may have trespass or trespass on the case at his election."

In some, the bailment has not been for a time certain. In *Youl v. Harbottle* (4), where a carrier was held liable in trover for misdelivery. So in *Wilkinson v. King* (5), *Loeschman v. Machin* (6) and *Cooper v. Willomatt* (7), it rather seems that the bailment was for a time certain, that is in each case from week to week, but no distinction appears to have been made by the court between such bailment and one at will. But it was held that the act of the bailee in doing an act entirely inconsistent with the terms of the bailment, although not amounting to a destruction

of the chattel, was a termination of the lawful bailment, and caused the possessory title to revert to the bailor, and entitled him to maintain an action of trover. A

It is true that if this had been done by the bailee *animo furandi*, and the entire chattel had not been in different portions, but the entire chattel disposed of at one time, it would not have been punishable as a larceny, because, being lawfully in possession of the chattel, the taking it could not be either a trespass *vi et armis* or felony, unless the nature of the article had been changed; as by breaking open the bail, and also, with the same consequences, according to the recent decisions, disposing of it in different portions. The reason for which distinction is somewhat subtle, but is fully explained in the YEAR BOOK, 13 Edw. 4, fol. 99b, namely, that the possession of the article in its original state was with the consent of the bailor, and, therefore, lawful, but there was no consent in the possession of the article in its altered state, so that, after its alteration, the bailment was determined. But, although the delivery of chattels to a third person in their entire state would not have been felony, at all events, the delivery under an absolute sale was wrongful, and the contract between those parties never meant to authorise Malpas, his executors and administrators (and they alone are mentioned, and not his assigns), to do more than use the chattels, and not to give the use to a third person, certainly not for a longer period than his own term. The transfer of the property absolutely to a stranger was, therefore, unquestionably wrong, and it operated like a disclaimer of tenancy at common law. We are of opinion, therefore, that the plaintiffs are entitled to recover, and the rule must be discharged. B C D

Rule discharged.

MITFORD v. REYNOLDS

[VICE-CHANCELLOR'S COURT (Shadwell, V.-C.), February 16, 24, 1848]

[Reported 16 Sim. 105; 17 L.J.Ch. 238; 10 L.T.O.S. 499;
12 Jur. 197; 60 E.R. 812]

Will—Gift—Failure—Failure of gift for specified purpose—Right of residuary beneficiary to property. G

A testator directed that a certain piece of land should be purchased by his executors for the purpose of erecting a monument for the reception of his remains and those of certain relatives. He then gave the rest of his property (after payment of certain legacies) for charitable purposes. The owner of the land refused to sell it.

Held: the failure of the gift for the purchase of the land enured for the benefit of the residuary fund; and, subject to the payment of the testator's debts and legacies, his whole estate was held for the charitable purposes specified in his will. H

Notes. Considered: *Fowler v. Fowler* (1864), 33 Beav. 616. Referred to: *Re Dean, Cooper-Dean v. Stevens* (1889), 41 Ch.D. 552; *Re Baynes, Public Trustee v. Leven Corpn.*, [1944] 2 All E.R. 597; *Re Astor's Settlement Trusts, Astor v. Scholfield*, [1952] 1 All E.R. 1067. I

As to effect of failure of gifts, see 39 HALSBURY'S LAWS (3rd Edn.) 946 et seq.; and for cases see 44 DIGEST 416 et seq.

Cases referred to:

(1) *Chapman v. Brown* (1801), 6 Ves. 404; 31 E.R. 1115; 8 Digest (Repl.) 400, 917.

- A (2) *A.-G. v. Davies* (1802), 9 Ves. 535; 32 E.R. 710, L.C.; 8 Digest (Repl.) 421, 1120.
- (3) *A.-G. v. Hinxman* (1820), 2 Jac. & W. 270; 37 E.R. 630; 8 Digest (Repl.) 401, 920.

Action to determine whether, under the will of the testator, Mitford, the effect of the failure of a bequest for the purchase of certain land which the owner thereof would not sell enured for the benefit of the residuary fund (which was given for charitable purposes) or for the benefit of the widow and next-of-kin under the Statute of Distributions [now Administration of Estates Act, 1925].

Mitford, who had formerly been a judge in India, and had amassed a considerable fortune, made his will, whereby, among other matters, he directed his executors or administrators to purchase and prepare, for the reception of his own remains and those of his father, mother, and sister, who were buried in the church of Chipping Ongar, in Essex, a piece of ground known by the appellation of the Mount, which adjoined the property of a gentleman by the name of Evans, and to erect on the summit a suitable and durable monument, planting the sides with cedars and cypress-trees, that it might be ornamental to the town—the expenses of which were to be paid out of the surplus property of the testator, after paying certain legacies before mentioned—and although he was aware that the Mount might not be consecrated, it was the testator's wish that his intentions should be carried out immediately after his decease. He then gave the remainder of his property, of what kind soever (after making certain payments in the will specified) to the government of Bengal, to be appropriated for charitable purposes at Dacca in Bengal, for the benefit of the native inhabitants of that province, as they or the government might deem to be most conducive to effectuate that purpose. The testator having died in the year 1886, and a doubt having arisen upon these two clauses in the will marked as the eighth and ninth clauses, his widow filed her bill in the present suit for the purpose of having the latter bequest declared void, and the former direction as to the mausoleum illegal, and praying also an injunction to restrain the executors from proceeding to carry out the directions contained in the will.

The widow also, together with the testator's next-of-kin, claimed the residuary property as undisposed of under the Statute of Distributions. Upon the original hearing of the cause before the vice-chancellor, his Honour had decreed that the charitable bequests to the native inhabitants of Dacca were good and valid, and directed the usual inquiries to be taken. This decree of his Honour was appealed from to LORD COTTENHAM, L.C., who refused to decide the question raised by it until the inquiries directed by the decree should have been made. The Master having made his report the appeal was then heard by LORD LYNTHURST, L.C. (1 Ph. 185), who confirmed the decree, but directed the Master to inquire what would be the expense of erecting the monument. The Master accordingly made his report, from which it appeared that the cost of the monument would amount to about £1,269. This finding, however, was afterwards proved to be unnecessary, from its having in the meantime been discovered that the owner of the Mount would not part with it, and the Master reported accordingly.

The cause now came on upon further directions and it was contended on behalf of the widow and next-of-kin, that as the testator's directions with respect to the monument failed from the circumstance of the owner of the property not being willing to sell it, the gift of the residue for the charitable purposes, which, in fact, formed part of the same fund out of which the monument was to be purchased, also became inoperative. For the other parties it was contended, that SIR WILLIAM GRANT had laid it down that the gift of a residue in general terms included in it all previous bequests that had failed of taking effect; and there being in this case a bequest of the general residuary property, the only way in which that bequest was affected must be considered in no other manner than beneficially. It was also suggested in the argument, that the direction as to the removal of the remains

of the testator's relatives was contrary to public policy, and that, in whatever way A considered, that bequest failing only operated in favour of the inhabitants of Dacca.

Bethell and *Heathfield* for the plaintiff, the testator's widow.

Rolt and *Stevens* for the testator's next-of-kin.

Stuart, *Loftus Wigram* and *Lloyd* for the East India Co., and Lord Auckland, the then Governor-General of India.

Wray for the Attorney-General.

Craig and *Shee* for the executors of the testator.

Lowdes and *Leach* for another party.

SHADWELL, V.-C.—In this case, I thought it right, before I decided what seems to be the last point in the cause, to read over the will and all the other papers in the cause, in order that I might see what had been done in it. MR. PHILLIPS, in his report of the case upon the first question, mentions (1 Ph. at pp. 187, 188) that, when an appeal was presented to LORD COTTENHAM against the decree which I originally made in 1838, his Lordship did not think fit to express any opinion upon the point which I had decided; and, as I understand, made no order except that, in addition to the inquiries directed by my decree of 1838, he directed one special inquiry, upon a point which was not raised when the cause was before me, and which seems to have been answered by the separate report of the Master. The Master, in pursuance of my decree, made a general report as to debts, legacies, etc., but did not notice his separate report. The appeal came before LORD LYN- D HURST in 1842, and his Lordship declared that the bequest contained in the ninth clause of the will, was a good charitable bequest. That is the whole of his Lord- ship's declaration with respect to that bequest, and, therefore, it must be taken to be a good bequest under all circumstances. With respect to the eighth clause, his Lordship, on the cause coming on to be heard before him for further directions, ordered the Master to inquire and state what sum would be reasonably required for the purpose of carrying into effect the direction of the testator which was given in that clause. His Lordship then states, at length, the words of the eighth clause, and then goes on to say:

"But such inquiry is to be without prejudice to any question as to the validity of the last-mentioned bequest."

It is quite plain, therefore, that his Lordship did mean that any declaration that might be made with respect to the eighth clause, should depend upon other circum- stances than those which appear on the face of the bequest itself.

Then the Master made a report (certainly of a very singular kind) to which exceptions were taken. LORD LYN DHURST thought it right neither to allow nor to disallow those exceptions; but directed the Master, not to review his report, but to inquire and state on what terms, if any, the owner of the land called the Mount, would sell it. In obedience to that order, the Master has made a report which is, in substance, that Sir John Swinburn, the owner of the Mount, will not sell it: and the consequence is that the eighth clause wholly fails.

That being the case, I was very much pressed, by counsel for the next-of-kin, to hold that the ninth clause also fails. I do not, however, think that I am at liberty to say so. For LORD LYN DHURST seems to me to have concluded the question; inasmuch as, when he made the order with respect to the eighth clause, he expressly declared that it should be without prejudice to any question as to the validity of the bequest contained therein: but, when he made the order as to the ninth clause, he finally, absolutely and without any qualification, declared that the bequest contained in that clause, was a good charitable bequest; and it cannot be a good charitable bequest without being a good bequest. That bequest then being good, and the bequest contained in the eighth clause totally failing, that portion of the personal estate which might have been required to answer the purposes of the eighth clause, necessarily falls into that which is the subject of the ninth clause. The same language, you will observe, is not used there, as is used in the eighth

A clause: but the remainder of his property, is the expression used. The language of the eighth clause (which seems to have been, in some measure, the subject of criticism upon the discussion before LORD LYNTHURST) after giving the direction to purchase the Mount, was this:

B "the expenses whereof for the purchase, the construction of the monument, etc., are to be met and provided from the surplus of property that will and may be found after the payment and discharge shall have been made of the above legacies and bequests, etc.: and, though aware that the monument-mount may not be consecrated, I direct and expressly will and command that this injunction of the place for final interment, be absolutely attended to and carried into instant effect and completion."

C These are the special words which are used in the eighth clause: and the fair inference from them is that the testator did not mean that, in order that there might be this unconsecrated re-burial of those who were dear to him and an unconsecrated burial of himself, those legacies should be disappointed; and, therefore, he says that the expenses are to be provided from the surplus property that will and may be found after the payment and discharge shall have been made of the above legacies, bequests, etc. But, when you come to the ninth clause, it is a simple bequest:

E "I will, devise, give, and bequeath the remainder of my property, of whatsoever kind and description and that may arise from the sale of my effects, after deducting the annual amount that will be requisite to defray the keep of my horses."

F Therefore, it appears to me that the matter is concluded. And, as I find it now established, by the Master's report, that the bequest in the eighth clause has totally failed, because the Mount cannot be purchased, it follows, as a legitimate consequence from the decree of LORD LYNTHURST, that the order to be made must be one which, after making provision for the horses and for the payment of such legacies (if any) as remain to be paid and directing the costs to be paid, will order the residue to be paid over to Lord Auckland, who, as I understand, it is conventionally agreed, for the purpose of this suit, shall represent the government in India.

G That is my opinion in consequence of what LORD LYNTHURST has decided. But, if he had not so decided, I should have been of the same opinion. For I have considered, very attentively, those three cases, *Chapman v. Brown* (1), *A.-G. v. Davies* (2), and *A.-G. v. Hinxman* (3), and the conclusion which I have arrived at, is that they do not affect the present case, because, in this case, there is no such implication of the subject-matter of the ninth bequest with the subject-matter of the eighth, as to make it a necessary consequence that, if the eighth fails, the ninth fails. Suppose that a testator were to say that, after payment of his funeral and testamentary expenses, debts and legacies, the residue of his property should go to A.B.: and then suppose that the testator were to be drowned at sea; in which case there could be no funeral expenses. Would anybody in Westminster Hall say that, because there was no interment, and, therefore, there could be no funeral expenses, the gift of the residue could not take effect? It seems to me that, in effect, *A.-G. v. Hinxman* (3), as far as it goes, is an authority in favour of the opinion which I have formed, if authority were wanting, which I deny; because I consider the point to be concluded by the general law of the land. In *A.-G. v. Hinxman* (3), it was held, as a matter of course, that, because the particular charity failed, what would have been appropriated to it, fell into the residue: that is, not for the benefit of the next-of-kin, for they were not parties to the suit, but for the benefit of a person of the name of King, who was the legatee of the residue.

I I admit, with respect to *Chapman v. Brown* (1), that the Master of the Rolls did hold that the ultimate disposition of the residue was so implicated with that which preceded it, that the one could not be separated from the other. But I have read

the eighth clause in the will now before me, most attentively, and I cannot see that there is anything whatever which affects the validity of the bequest in the ninth clause, owing to the circumstance that the bequest in the eighth clause has wholly failed, not on account of any matter of law, but on account of a matter of fact. I use that particular expression because I thought it right, before I decided the case, to read over this fantastical will; and I observe that the testator says that his will shall take effect whatever the law may be. That may be foolish enough; but you cannot assume anything so grossly absurd as that he meant that the bequest should take effect, if, in point of fact, it could not. And, as it has failed in point of fact, my opinion is that the case must be considered as if it had not been made at all, and that, therefore, the decree must be as I have stated.

However, my opinion is that LORD LYNDHURST's decree has concluded the point, and it is not for me, sitting in this inferior jurisdiction, to entertain the question whether the bequest is good or bad. I declare that, it appearing, by the Master's report, that the Mount cannot be purchased, the bequest in the eighth clause totally fails and the clear residue of the testator's estate, after payment of his funeral expenses, debts and legacies and the costs of the suit, ought to be paid to the Governor-General of India, for the charitable purposes expressed in the ninth clause.

Declaration accordingly.

BRIDGES v. HAWKESWORTH

[COURT OF QUEEN'S BENCH (Patteson and Wightman, JJ.), June 19, November 26, 1851]

[Reported 21 L.J.Q.B. 75; 18 L.T.O.S. 154; 15 Jur. 1079]

Chattel—Ownership—Rights of finder—Chattels found on private premises—Right of finder to chattels against all persons except real owner.

In October, 1847, the plaintiff, a traveller, visited the defendant's shop on business, and as he was leaving he noticed a parcel on the floor inside the shop which he picked up and showed to a shopman. On its being opened it was found to contain banknotes. The plaintiff informed the defendant and requested him to keep the notes until the owner appeared to claim them. The defendant advertised the discovery of the notes in a newspaper. Three years having elapsed and no owner having appeared to claim them, the plaintiff applied to the defendant for the return of the notes, offering to pay the expense of the advertising and to indemnify him in case the real owner should afterwards appear, but the defendant refused to deliver the notes to the plaintiff. In an action in the county court for their recovery the judge found as a fact that the plaintiff, when he handed over the notes to the defendant, did not intend to give up any title to them that he might possess.

Held: the fact that the plaintiff found the notes inside the defendant's shop did not take the case out of the general rule of law that the finder of a lost article is entitled to it as against all persons except the real owner; by handing the notes to the defendant the plaintiff had not divested himself of any title to them which he might have had; the steps taken by the defendant to find the real owner were taken by him as agent of the plaintiff; and, as the real owner could not be found, the plaintiff's title was paramount.

A Notes. Distinguished: *South Staffordshire Water Co. v. Sharman*, [1895-9] All E.R.Rep. 259. Followed: *Hannah v. Peel*, [1945] 2 All E.R. 288. Considered: *Corpn. of London v. Appleyard*, [1963] 2 All E.R. 834. Referred to: *Hibbert v. McKiernan*, [1948] 1 All E.R. 860.

As to the rights of a person finding lost chattels on the premises of another, see 2 HALSBURY'S LAWS (3rd Edn.) 99 et seq.; and for cases see 3 Digest (Repl.) 67 et seq.

Cases referred to:

- (1) *Armory v. Delamirie* (1722), 1 Stra. 505; 93 E.R. 664; 3 Digest (Repl.) 67, 83.
- (2) *Merry v. Green* (1841), 7 M. & W. 623; 10 L.J.M.C. 154; 151 E.R. 916; 3 Digest (Repl.) 69, 91.

Also referred to in argument:

- R. v. Kerr* (1837), 8 C. & P. 176; 3 Digest (Repl.) 70, 102.
Cartwright v. Green (1803), 8 Ves. 405; 2 Leach, 952; 32 E.R. 412; 3 Digest (Repl.) 69, 90.
Isaac v. Clark (1615), 2 Bulst. 306; Moore, K.B. 841; 1 Roll. Rep. 126; 80 E.R. 1143; 3 Digest (Repl.) 69, 96.
Sutton v. Moody (1697), 1 Ld. Raym. 250; 3 Salk. 290; Holt, K.B. 608; 1 Com. 34; Comb. 458; 5 Mod. 375; 91 E.R. 1063; 2 Digest (Repl.) 292, 12.
Smith v. Milles (1786), 1 Term Rep. 475; 99 E.R. 1205; 5 Digest (Repl.) 894, 7437.
Burn v. Morris (1834), 2 Cr. & M. 579; 4 Tyr. 485; 3 L.J.Ex. 193; 149 E.R. 891; 42 Digest 996, 236.
Swan's Case (1592), 7 Co. Rep. 15b; 77 E.R. 435; 19 Digest (Repl.) 198, 1381.
Semayne's Case (1604), 5 Co. Rep. 91a; 77 E.R. 194; sub nom. *Seyman v. Gresham*, Cro. Eliz. 908; sub nom. *Semayne v. Gresham*, Moore, K.B. 668; Yelv. 29; 21 Digest (Repl.) 566, 614.
May v. Harvey (1811), 13 East, 197; 104 E.R. 345; 3 Digest (Repl.) 124, 424.
Ogle v. Atkinson (1814), 5 Taunt. 759; 1 Marsh. 323; 128 E.R. 890; 3 Digest (Repl.) 107, 305.
Templeman v. Case (1711), 10 Mod. Rep. 24; 88 E.R. 608; 21 Digest (Repl.) 645, 1320.
R. v. Thurborn (1849), 1 Den. 387; T. & M. 67; 18 L.J.M.C. 140; 13 J.P. 459; sub nom. *R. v. Wood*, 4 New Mag. Cas. 27; 3 New Sess. Cas. 581; 13 L.T.O.S. 548; 3 Cox, C.C. 453, C.C.R.; 3 Digest (Repl.) 70, 103.

Appeal by the plaintiff from a decision of the Westminster County Court in an action brought by the plaintiff to recover from the defendant the value of several banknotes, which he had found on the floor of the defendant's shop.

In October, 1847, the plaintiff, a traveller for a firm with which the defendant, a shopkeeper, had dealings, went into the defendant's shop on business; and, as he was leaving, picked up from the floor a parcel containing banknotes to the amount of £65. He immediately showed it to the shopman; and thereupon the defendant was called in to the shop, and requested by the plaintiff to keep the notes, until the owner appeared to claim them. The defendant did so, and advertised the notes in a newspaper; but no owner claimed them. After three years had elapsed, the plaintiff applied to the defendant to return the notes, offering to pay the expenses of advertising, and to indemnify him in case the real owner should afterwards appear; but the defendant refused to do so, and consequently the present action was brought. The judge decided in favour of the title of the defendant, but found as a fact that the plaintiff, when he handed the notes over to the defendant, did not intend to divest himself of any title which he might have to them.

Gray (with him *Heath*) for the plaintiff.

Halc for the defendant.

Nov. 26, 1851. **PATTESON, J.**, delivered the following judgment of the court.—
The notes which are the subject of this action were dropped by mere accident in the defendant's shop by the owner of them. The facts do not warrant the supposition that they had been deposited there intentionally, nor has the case been put at all upon that ground. The plaintiff found them on the floor, they being manifestly lost by someone. The general right of the finder to any article which has been lost as against all the world except the true owner, was established in *Armory v. Delamirie* (1), which has never been disputed. This right would clearly have accrued to the plaintiff had the notes been picked up by him outside the shop of the defendant; and if he once had the right, the case finds that he did not intend by delivering the notes to the defendant, to waive the title (if any) which he had to them, but they were handed to the defendant merely for the purpose of delivering them to the owner, should he appear. B C

Nothing that was done afterwards has altered the state of things; the advertisements inserted in the newspapers referring to the defendant had the same object: the plaintiff has tendered the expense of these advertisements to the defendant, and offered him an indemnity against any claim to be made by the real owner, and has demanded the notes. The case, therefore, resolves itself to the single point on which it appears that the judge decided it, namely, whether the circumstance of the notes being found in the defendant's shop gives him, the defendant, the right to have them, as against the plaintiff who found them. There is no authority in our law to be found directly in point. Perhaps the nearest case is that of *Merry v. Green* (2), but it differs in many respects from the present. We were referred, in the course of the argument, to the work of VON SAVIGNY ON POSSESSION edited by PERRY, C.J.; but even this work, full as it is of subtle distinctions and nice reasonings, does not afford a solution of the present question. D E

It was well asked on the argument, if the defendant has the right, when did it accrue to him? If at all, it must have been antecedent to the finding by the plaintiff, for that finding could not give the defendant any right. If the notes had been accidentally kicked out of the shop, and there found by some one passing by, could it be contended that the defendant was entitled to them from the mere fact of their being originally dropped in his shop? If the discovery had never been communicated to the defendant, could the real owner have had any cause of action against him because they were found in his house? Certainly not. The notes never were in the custody of the defendant, nor within the protection of his house, before they were found, as they would have been had they been intentionally deposited there. The defendant has come under no responsibility, except from the communication made to him by the plaintiff, the finder, and the steps taken by way of advertisement. These steps were really taken by the defendant as the agent of the plaintiff, and he has been offered an indemnity, the sufficiency of which is not disputed. F G

We find, therefore, no circumstances to take this case out of the general rule of law that the finder of a lost article is entitled to it as against all persons, except the real owner; and we think that that rule must prevail, and that the judge was mistaken in holding that the place in which they were found makes any legal difference. Our judgment is, therefore, that the plaintiff is entitled to these notes as against the defendant; that the judgment of the court below must be reversed, and judgment given for the plaintiff for £50; the plaintiff to have the costs of appeal. H I

Appeal allowed.

A

HARMER v. BELL AND OTHERS. THE BOLD BUCCLEUGH

[PRIVY COUNCIL (Jervis, C.J., Pollock, C.B., T. Pemberton Leigh, Esq., and Sir Edward Ryan), December 10, 1851, April 24, 1852]

[Reported 7 Moo.P.C.C. 267; 19 L.T.O.S. 235; 13 E.R. 884]

B

Conflict of Laws—Lis alibi pendens—Action brought in foreign country by plaintiffs in English proceedings—Foreign proceeding in personam—English action in rem.

C

A Scottish steamer, having run down an English barque lying in the Humber, kept out of the jurisdiction of the Court of Admiralty. The owners of the steamer were then sued in Scotland and the steamer was arrested there, but she was released on bail, and then sold without notice of the unsatisfied claim. The Scottish suit still pending, she re-appeared in English waters and was arrested under an Admiralty warrant, an action for damage being entered in the Admiralty Court by the owners of the barque. The cause of action was the same, and instructions were sent to abandon the Scottish suit. The owner of the steamer appeared under protest to the Admiralty action, pleading *lis alibi pendens* and purchase without notice.

D

Held: (i) the plea of *lis alibi pendens* was bad, as the suit in Scotland was substantially a proceeding in personam, while the present action was in rem; (ii) the ship was liable, into whose hands soever she had come.

Shipping—Collision—Damage—Maritime lien—Action in rem—Attachment of lien into whosoever possession the vessel comes—Relation back to date of first attachment.

E

Per Curiam: When a vessel at sea causes damage a maritime lien emerges which is the foundation of an Admiralty action in rem. This lien travels with the vessel into whosoever possession it comes and when carried into effect by legal proceedings in rem, it relates back to the period when it first attached.

F

Notes. Considered: *Simpson v. Fogo* (1860), 1 John. & H. 18; *Castrique v. Imrie* (1861), 30 L.J.C.P. 177. Applied: *The Europa* (1863), Brown. & Lush. 89. Considered: *The Halley* (1867), L.R. 2 A. & E. 3; *The Feronia* (1868), L.R. 2 A. & E. 65; *The Charles Amelia* (1868), L.R. 2 A. & E. 330; *The St. Olaf* (1869), L.R. 2 A. & E. 360; *The Two Ellens* (1871), L.R. 3 A. & E. 345; *The City of Mecca* (1881), 6 P.D. 106. Applied: *The Fairport* (1882), 8 P.D. 48. Considered: *Laws v. Smith, The Rio Tinto* (1884), 9 App. Cas. 356; *The Christiansborg* (1885), 10 P.D. 141; *The Dictator*, [1892] P. 304. Approved: *Curry v. M'Knight*, [1897] A.C. 97. Considered: *The Ripon City*, [1895-9] All E.R.Rep. 487; *The Veritas*, [1900-3] All E.R.Rep. 501; *The Tervæte*, [1922] All E.R.Rep. 387; *The Stream Fisher*, [1926] All E.R.Rep. 513; *United Africa Co., Ltd. v. Owners of M.V. Tolten, The Tolten*, [1946] 2 All E.R. 372. Referred to: *Place v. Potts* (1853), 21 L.T.O.S. 130; *Harris v. Willis* (1855), 3 C.L.R. 609; *The Bengal, The John and Mary* (1859), 5 Jur.N.S. 1085; *Cammell v. Sewell* (1860), 6 Jur.N.S. 918; *Liverpool Bank v. Foggo* (1860), 2 L.T. 594; *Tatham v. Andrée* (1863), 1 Moo.P.C.C.N.S. 386; *The Ella A. Clark* (1863), Brown. & Lush. 32; *Nelson v. Couch* (1863), 15 C.B.N.S. 99; *The Mary Ann* (1865), L.R. 1 A. & E. 8; *The Mali Ivo* (1869), L.R. 2 A. & E. 356; *The Northumbria* (1869), 39 L.J.Adm. 3; *The Parlement Belge*, [1874-80] All E.R.Rep. 104; *I Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co.*, [1881-5] All E.R.Rep. 342; *Northcote v. The Henrich Björn, The Henrich Björn* (1886), 11 App. Cas. 270; *The Heinrich Björn* (1886), 2 T.L.R. 498; *The Tasmania* (1886), 13 P.D. 110; *The Africano*, [1894] P. 141; *The Burns*, [1907] P. 137; *The Marie Glaeser*, [1914] P. 218; *The Russland*, [1924] P. 55; *The Beldis*, [1935] All E.R.Rep. 760; *France Fenwick Tyne and Wear Co. v. H.M. Procurator-General*, [1942] 2 All E.R. 453.

I

As to *lis alibi pendens*, see 7 HALSBURY'S LAWS (8rd Edn.) 170 et seq.; and for cases see 11 DIGEST (Repl.) 371-551.

Cases referred to :

- (1) *The Johann Friederich* (1839), 1 Wm. Rob. 35; 1 Digest (Repl.) 132, 173.
- (2) *Turbill's Case* (1667), 1 Wms. Saund. 66a; 1 Sid. 362; 2 Keb. 346.
- (3) *The Volant* (1842), 1 Wm. Rob. 383; 1 Notes of Cases, 503; 5 L.T. 185, 525; 6 Jur. 540; 1 Digest (Repl.) 163, 507.
- (4) *The Aline* (1839), 1 Wm. Rob. 111; 1 Digest (Repl.) 143, 304.

Also referred to in argument :

- The Nied Elwin* (1811), 1 Dods. 50; 1 Digest (Repl.) 201, 886.
The John Dunn (1840), 1 Wm. Rob. 159; 1 Digest (Repl.) 243, 1387.
The Hope (1840), 1 Wm. Rob. 154; 1 Digest (Repl.) 265, 1659.
The Alexander Larsen (1841), 1 Notes of Cases, 185; 1 Wm. Rob. 288, 346; 5 Jur. 1066; 1 Digest (Repl.) 120, 61.
The Druid (1842), 1 Wm. Rob. 391; 1 Notes of Cases, 444; 6 Jur. 441; 1 Digest (Repl.) 163, 506.
The Fortitudo (1815), 2 Dods. 58; 1 Digest (Repl.) 230, 1201.

Appeal by the defendant, Harmer, from the High Court of Admiralty of England.

The *Bold Buccleugh* was a steamer belonging to the Edinburgh and Dundee Steam-packet Co., the partners of which company all resided in Scotland, and trading between the ports of Leith, Scotland, and Kingston-upon-Hull, Yorkshire. On the night of Dec. 14, 1848, as the barque *William* was lying at anchor in the river Humber, it was run down and totally destroyed by the *Bold Buccleugh*, then on her voyage to Leith. On Dec. 19 an action for damage was entered in the English Court of Admiralty on behalf of the owners of the *William*, who resided in England; and a warrant was forwarded to Hull to arrest the steamer, but she had left before the arrival of the warrant, which, consequently, could not be executed. The owners of the *Bold Buccleugh* were applied to, to give bail to this action entered in the Admiralty Court, but declined to do so. Thereafter the *Bold Buccleugh* kept out of the way, and ceased to ply to Hull, or to come within the jurisdiction of the court. The owners of the *William* being thus unable to obtain redress, resorted to the Court of Session, which is the Court of Admiralty in Scotland, and on Jan. 30, 1849, commenced a suit against the owners of the steamer, and she was forthwith arrested in Leith harbour, but on bail being given she was released.

While the Scottish suit was pending, the owners of the *Bold Buccleugh*, on June 26, 1849, by a bill of sale, absolutely sold her to Harmer, the appellant, for £4,800 and did not apprise him that there were any unsatisfied claims arising out of damage to the *William*. At the end of August the *Bold Buccleugh* reappeared on her old track, between Leith and Hull, whereupon the owners of the *William*, without discontinuing the Scottish suit, entered on August 27, 1849, an action in the English Admiralty Court in the sum of £2,600, and on her coming to Hull she was arrested by virtue of a fresh warrant under seal of that court. The appellant, her owner, then entered appearance under protest, and gave bail to the action. On the act of protest being brought in, affidavits were produced by the appellant that he had no notice of the unsatisfied claim when he purchased the steamer. The respondents, the owners of the *William* also produced an affidavit of their attorney in Scotland, which showed that, subsequent to the present action being brought, they had offered to abandon the Scottish suit, and that, although this was opposed by the appellant, who applied to be made a party, yet in respect of this abandonment the suit was at length finally dismissed by the Court of Session, on Dec. 6, 1849. The contents of the protest now insisted in before the judge of the Admiralty were—(i) That at the time of the arrest there was *lis alibi pendens*. (ii) The steamer had been sold prior to the arrest, and it was unjust that the innocent purchaser should suffer. Both points of the protest were overruled, and the appellant and his bail were condemned in costs. The appellant appealed.

Anderson, Q.C., and *Dr. Haggard* for the appellant.

Addams for the respondents.

A April 24, 1852. **JERVIS, C.J.**—There were two questions in this case. First, the effect of the pendency of another proceeding in Scotland for the same cause; secondly, the liability of the vessel by a proceeding in rem after a bona fide sale without notice. It is manifest that these two defences are of a totally different nature, the first being a declinatory plea, properly the subject of a protest; and the second an absolute bar. Generally it is inconvenient to depart from the settled rules of procedure, and to raise such questions differing in degree by the same defence; but as the court below did not object to this course, we merely notice it to observe, that we do not approve of such a proceeding, and pass on to deliver our opinions on the two points raised.

C On the first point, we have not, from the commencement of the discussion, entertained any doubt, but we desired the second question to be re-argued, because it was of great general importance, and because we were unable to find any authorities bearing directly upon it, and some of the cases to which we were referred were apparently conflicting with each other. The course which was taken on the second argument makes it convenient to dispose of the second question in the first instance.

D It is admitted that the Court of Admiralty has jurisdiction in a case of collision by a proceeding in rem against the ship itself; but it is said that the arrest of the vessel is only a means of compelling the appearance of the owners, that the damage confers no lien on the ship, and that the owners having appeared, the question is to be determined according to the interests of the party litigant, without reference to the original liability of the vessel causing the wrong. For these propositions, dicta have been referred to which are entitled to great respect, but which, on consideration, will be found not to support the propositions for which they were cited.

E In *The Johann Friederich* (1), Dr. LUSHINGTON is reported to have said, that proceedings in rem in the Court of Admiralty were analogous to those by foreign attachment in the courts of the city of London. For the purpose for which that allusion was made, viz., the liability of the property of foreigners to be arrested by process out of the Court of Admiralty and the courts of the city of London, the two proceedings may be analogous, but in other respects they are altogether different.

F The foreign attachment is founded on a plaint against the principal debtor, and must be returned nihil before any step can be taken against the garnishee; the proceeding in rem, whether for wages, salvage, collision, or on bottomry, goes against the ship in the first instance. In the former case the proceedings are in personam, in the latter they are in rem. The attachment, like a common law distringas, is merely for the purpose of compelling an appearance, and if the defendant appears within a year and a day, even after judgment and execution against the garnishee, and puts in bail, the attachment is abandoned.

G If the owners do not appear to the warrant arresting the ship, the proceedings go on without reference to their default, and the decree is confined exclusively to the vessel. Many other distinctions will be found on reference to the notes to *Turbill's Case* (2), (1 Wms. Saund. at p. 67, n. 1). It is not correct, therefore, to say that the proceeding in rem is in all respects analogous to the proceeding by foreign attachment, and that the former is merely to compel an appearance because the latter is undoubtedly for that purpose only.

H In all proceedings in rem, whatever be the foundation of the jurisdiction, the warrant is the same, and the proceedings are conducted in the same form, and there is no reason for saying that a different rule is to prevail where the foundation of the jurisdiction is a collision, from that which is admitted to be the practice when the suit is instituted for salvage, or the recovery of wages against the ship.

I It is further said, that the damage confers no lien on the ship, and a dictum of Dr. LUSHINGTON in *The Volant* (3) (1 Wm. Rob. at p. 387) is cited as an authority for this proposition. By reference to a contemporaneous report of the same case (1 Notes of Cases, at p. 508), it seems doubtful, whether the judge did use the expression attributed to him by Dr. W. ROBINSON. If he did, the expression is certainly inaccurate, and being a dictum merely, not necessary for the decision of that case, cannot be taken as a binding authority. A maritime lien does not include or require possession. The word is used in maritime law not in

the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive, but to express, as if by analogy, the nature of claims which neither pre-suppose nor originate in possession. This was well understood in the civil law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosoever possession it came. A

Having its origin in this rule of the civil law, a maritime lien is well defined by LORD TENTERDEN to mean a claim or privilege on a thing to be carried into effect by legal process, and STORY, J. (1 Sumner 78) explains that process to be a proceeding in rem, and adds that wherever a lien or claim is given on the thing, then the Admiralty enforces it by a proceeding in rem, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches, and whilst it must be admitted that where such a lien exists a proceeding in rem may be had, it will be found to be equally true that in all cases where a proceeding in rem is the proper course there a maritime lien exists, which gives a privilege or claim on the thing to be carried into effect by legal process. This claim or thing travels with the thing into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached. B C D

This simple rule, which, in our opinion, must govern this case, and which is deduced from the civil law, cannot be better illustrated than by reference to the circumstances of *The Aline* (4), referred to in the argument, and decided in conformity with this rule, though apparently on other grounds. In that case there was a bottomry bond before and after the collision, and the court held that the claimant for damage in a proceeding in rem must be preferred to the first bondholder, but was not entitled against the second bondholder to the increased value of the vessel, by reason of repairs effected at his cost. The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done with reference to his claim. So by the collision the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master, acting for all parties, and he would be bound by that transaction. This rule, which is simple and intelligible, is, in our opinion, applicable to all cases. It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay, where the rights of third parties may be thereby compromised, but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced into whosoever possession the thing may come. E F G

The remaining point may be disposed of in a few words. The pleadings show that the proceedings in Scotland were commenced by process against the person of the defendant and that the seizure of the vessel was collateral to that proceeding for the mere purpose of securing the debt. We have already explained that, in our judgment, a proceeding in rem differs from this, the one being in personam, the other in rem; and it follows that the two suits, being in their nature different, the pendency of the one cannot be pleaded in suspension of the other. For these reasons, we are of opinion that the judgment of the court below must be affirmed with costs. H I

Appeal dismissed.

A

BRADLEY AND ANOTHER v. COPLEY

[COURT OF COMMON PLEAS (Tindal, C.J., Coltman, Maule and Cresswell, JJ.),
May 30, 1845]

B

[Reported 1 C.B. 685; 14 L.J.C.P. 222; 5 L.T.O.S. 198;
9 Jur. 599; 135 E.R. 711]

*Bill of Sale—Rights of grantee—Goods in possession of grantor until default—
No demand for payment by grantee—Goods seized in execution for another
creditor.*

C

The payment of a sum owing to the plaintiffs was secured by a bill of sale on the goods of the debtor which contained covenants under which the plaintiffs were entitled to possession of the goods if the debtor failed to comply with a demand for payment. Until a default was made in payment the debtor was entitled to possession of the goods. Before any demand for repayment was made by the plaintiffs, the goods were seized by the sheriff under a writ of fieri facias and sold to satisfy the claim of another creditor. On a claim by the plaintiffs in trover to recover the value of the goods,

D

Held: the plaintiffs, not having made any demand for payment, had no immediate right to possession of the goods, and could not, therefore, maintain an action in trover against the Sheriff.

Gordon v. Harper (1) (1796), 7 Term Rep. 9, applied.

E

Notes. Considered: *Manders v. Williams* (1849), 4 Exch. 339. Distinguished: *Fenn v. Bittleston* (1851), 7 Exch. 152; *White v. Morris* (1852), 11 C.B. 1015; *Barker v. Furlong*, [1891] 2 Ch. 172. Explained: *Jelks v. Hayward*, [1905] 2 K.B. 460. Referred to: *Kahler v. Midland Bank, Ltd.*, [1949] 2 All E.R. 621; *North Central Wagon and Finance Co. v. Graham*, [1950] 2 K.B. 7.

As to the position where goods are seized by the Sheriff while retained by the debtor, see 16 HALSBURY'S LAWS (3rd Edn.) 52; and for cases see 21 DIGEST (Repl.) 592-594.

F

Cases referred to:

(1) *Gordon v. Harper* (1796), 7 Term Rep. 9; 2 Esp. 465; 101 E.R. 828; 21 Digest (Repl.) 592, 806.

(2) *Cooper v. Willomatt* (1845), 1 C.B. 672; 14 L.J.C.P. 219; 5 L.T.O.S. 173; 9 Jur. 598; 135 E.R. 706; 3 Digest (Repl.) 112, 334.

G

(3) *Main's Case* (1596), 5 Co. Rep. 20 b; 77 E.R. 80; sub nom. *Scot v. Mainy*, Poph. 109; 40 Digest (Repl.) 217, 1769.

Action to recover the value of goods seized in execution on a writ of fieri facias; the action contained two counts, that in trover being the count on which this case is reported.

H

By an order of COLTMAN, J., a Case containing the following facts was stated for the opinion of the court: The plaintiffs, William Bradley and John Newton Mappin, were possessed, for the residue of an unexpired term, of an inn at Rotherham, in Yorkshire, called the College Inn, together with the furniture and effects thereof. In August, 1842, the plaintiffs let the inn and sold the furniture and effects to one Boulton, and on Aug. 10, 1842, he was let into possession.

I

On Aug. 22, 1842, a bill of sale under seal was executed by Boulton and the plaintiffs by which, after reciting that Boulton was indebted to the plaintiffs in the sum of £196 6s. 5d., Boulton assigned to them absolutely his furniture, fixtures and effects, crops and tillages, subject to redemption on payment by Boulton to the plaintiffs of the £196 6s. 5d. and interest, on demand. In default of payment the following powers were given to the plaintiffs:

"If default be made in payment of the said sum of £196 6s. 5d. and interest, in manner aforesaid, it shall be lawful for the said William Bradley and John Newton Mappin, their executors, administrators, and assigns, immediately

thereupon or at any time thereafter, to seize and take possession of all and singular the said furniture, goods, chattels, stock, crops, tillages, and premises, and hold and enjoy the same to and for their own absolute use and benefit, for ever discharged from the aforesaid proviso for redemption thereof and all equity thereupon, without any hindrance from or by the said John Boulton, his executors, administrators, or assigns, or any other person whomsoever, and that freed and discharged from all former and other charges, liens, and encumbrances whatsoever."

The indenture contained also a covenant for further assurance and the following proviso:

"Provided always, and it is hereby declared and agreed, that until default shall be made in payment of the said principal sum of £196 6s. 5d. and interest, contrary to the covenant hereinbefore contained for payment thereof, it shall be lawful for the said John Boulton, his executors and administrators, to hold, make use of, possess, and enjoy all and singular the said furniture, goods, chattels, stock, crops, tillages, and premises, without any hindrance or denial from or by the said William Bradley and John Newton Mappin, their executors, administrators, or assigns."

Boulton, before he entered upon the College Inn or executed the bill of sale, was indebted to one Robert Taylor in the sum of £90 3s. 2d.; for which, on Aug. 11, 1842, he bona fide gave a warrant of attorney to Taylor, payable by instalments. Judgment was signed thereon on May 9, 1843, and a writ of fieri facias, under which writ the defendant, as sheriff, seized in execution all the goods and chattels at the College Inn comprised in the bill of sale given by Boulton to the plaintiffs. At the time of the seizure the said goods and chattels were and continued in the possession and under the control of Boulton, under and subject to the claims and rights of the plaintiffs under the said bill of sale, and the debt of £196 6s. 5d. remaining unpaid.

The plaintiffs, on May 15, 1843, gave Taylor and the defendant notice that the goods seized were the property of the plaintiffs. The goods were sold, however, and the proceeds received by the defendant. This action was brought for their recovery.

The question for the opinion of the court was whether, in the above circumstances, the plaintiffs, as against the said Robert Taylor, were entitled to the said goods and chattels taken in execution by the defendant.

Serjeant Manning for the plaintiffs.

Serjeant Channell (*Overend* with him) for the defendant.

TINDAL, C.J.—Ever since *Gordon v. Harper* (1), it has been held that the plaintiff must have the right of possession, as well as the right of property, to maintain the action of trover. That case has been followed by several others, and I cannot distinguish it from this, except that there the right of possession was parted with for a certain time; here it was for an uncertain time. The right of the plaintiffs to the possession is only if default be made in payment of the debt on demand; but no demand appears to have been made, and, therefore, they were not in a situation to have the possession of the furniture at the time of the conversion, and consequently cannot recover them in trover.

COLTMAN, J.—*Cooper v. Willomatt* (2) arose in circumstances somewhat analogous to the present case. There goods were demised to a party who was to deliver them up to the plaintiff on demand, and the party had himself wrongfully disposed of the property by selling it out and out. We held that the plaintiff might maintain trover without having made a demand, but it was expressly on the ground that the bailee had himself determined the bailment. *Main's Case* (3), though not there cited, would have been an authority which would have expressly distinguished that case from *Gordon v. Harper* (1). Here, as my Lord in the course of the argument

A has pointed out, the plaintiff's right to the possession on demand was subject to the option of the other party of paying instead the mortgage-money.

MAULE, J.—The present case cannot be distinguished from *Gordon v. Harper* (1), which has been always acted on, and cannot be overruled by us.

B **CRESSWELL, J.**—I am of the same opinion. The bill of sale did not give the plaintiffs a present right of possession to the goods, and this has not been altered by a sale by the sheriff. In order to entitle the plaintiffs to recover, there must have been a demand and a failure of payment; but here neither has happened.

Judgment for defendant.

C

D

GEE AND OTHERS v. LANCASHIRE AND YORKSHIRE RAIL. CO.

[COURT OF EXCHEQUER (Pollock, C.B., Bramwell, Channell and Wilde, BB.), November 14, 1860]

E

[Reported 6 H. & N. 211; 30 L.J.Ex. 11; 3 L.T. 328;
6 Jur.N.S. 1118; 9 W.R. 103; 158 E.R. 87]

Contract—Breach—Damages—Remoteness of damage—Damages not in contemplation of defendant at date of contract—Special circumstances not communicated to defendant.

F

The defendants, common carriers, agreed with the plaintiffs to carry a quantity of cotton to the plaintiffs' mill. The fact that the mill would be at a standstill if the cotton were not delivered immediately was not communicated to the defendants, and owing to delay in the delivery of the cotton the mill was kept idle for two-and-a-half days. In an action for damages the plaintiffs claimed the amount of wages paid to their workmen and their loss of profit during the time that the mill was idle.

G

Held: the damages claimed did not arise naturally from the defendants' breach of contract and could not reasonably be supposed to have been in the contemplation of both parties, and, therefore, they were not recoverable.

Hadley v. Baxendale (1) (1854), post; 9 Exch. 341, applied.

H

Notes. Considered: *O'Hanlan v. Great Western Rail. Co.* (1865), 6 B. & S. 484; *Hobbs v. London and South Western Rail. Co.*, [1874–80] All E.R.Rep. 458; *The Edison*, [1933] All E.R.Rep. 144. Referred to: *Boyd v. Fitt* (1864), 11 L.T. 280; *Wilson v. Newport Dock Co.* (1866), L.R. 1 Exch. 177; *The Arpad*, [1934] All E.R.Rep. 326; *Monarch Steamship Co. v. A/B. Karlshamns Oljefabriker*, [1949] 1 All E.R. 1; *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997.

I

As to measure of damages in contracts, see 11 HALSBURY'S LAWS (3rd Edn.) 241 et seq.; and for cases see 17 DIGEST (Repl.) 91 et seq.

Case referred to:

(1) *Hadley v. Baxendale* (1854), post; 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, 99.

Also referred to in argument:

Le Peintur v. South Eastern Rail. Co. (1860), 2 L.T. 170; 8 Digest (Repl.) 152, 959.

Fletcher v. Tayleur (1855), 17 C.B. 21; 25 L.J.C.P. 65; 26 L.T.O.S. 60; 189 E.R. 973; 17 Digest (Repl.) 95, 120. A

Smeed v. Foord (1859), 1 E. & E. 602; 28 L.J.Q.B. 178; 32 L.T.O.S. 314; 5 Jur.N.S. 291; 7 W.R. 266; 120 E.R. 1035; 17 Digest (Repl.) 128, 360.

Appeal by the defendants, the Lancashire and Yorkshire Rail. Co. by Case Stated from an order of the Oldham County Court, in an action in which the plaintiffs claimed from the defendants £20 10s. damages for breach of contract. The particulars annexed to the summons stated that the defendants, as common carriers, agreed with the plaintiffs for reward to carry on their railway, and to deliver to the plaintiffs, fifteen bales of cotton, yet they broke their agreement by not carrying and delivering them within a reasonable time; but on the contrary neglected and refused to carry and deliver the same for seven days, whereby the plaintiffs were injured in their trade and business as cotton spinners, and they were prevented from working their mill and machinery during each of the said days, and incurred expenses in compensating their workmen for loss of time, and lost great profits. B C

A short time before these proceedings the plaintiffs rented a mill at Bottom-o'-the-Moor, near Oldham, which they intended to work, in addition to another mill which they had previously worked. At the beginning of the week commencing Jan. 22, 1860, the mill was ready, and the plaintiffs had engaged a number of hands for it. On Tuesday, Jan. 24, Thomas Gee, the first plaintiff, went to Liverpool and purchased a quantity of cotton for the mill. Ten bales of cotton, part of the purchase, were, on Thursday, Jan. 26, at about 11 a.m., delivered to the defendants at the station at Liverpool, to be carried to Oldham to the plaintiffs' mill there. It was proved that the plaintiffs had been constantly in the habit of purchasing cotton at Liverpool for their old mill and having the same carried by the defendants; and that, on all former occasions, the cotton delivered to the defendants at Liverpool on the afternoon of one day had been delivered at the plaintiffs' mill at Oldham by 9 a.m. on the following morning at latest. D E

The cotton in question was not delivered at the plaintiffs' mill until Monday, Jan. 30 at 11.30 a.m.; and in consequence of the delay the plaintiffs' mill was prevented from being worked on Friday, Jan. 27. Saturday, 28 and half of Monday, 30. F

The plaintiffs claimed £20 10s. made up as follows :

	£	s.	d.	
Plaintiffs' work people were kept idle for the time, to whom they had to pay wages	7	0	0	G
Rent of the mill was £410 p.a., a proportion of which for the time in question was	3	10	0	
Plaintiffs had £8,000 capital invested in the business, interest on which for the time in question was	2	10	0	
Profits that they would have made	7	10	0	H

Thomas Gee stated in evidence that he made numerous inquiries of the defendants' manager about the delivery of the cotton on Jan. 25, 26, 27 and 28 and on each occasion he told him that the mill was at a standstill solely on account of the non-delivery of the cotton and also that the plaintiffs would look to the defendants for compensation for the loss occasioned. In cross-examination Gee stated that the new mill had not started working when the delay in delivery occurred but that it was in every respect ready to start on receipt of the cotton; that the fact that the mill would be at a standstill if the cotton was not delivered immediately was not stated to the defendants or their agent at Liverpool by the person who delivered the cotton there at the time of such delivery, and that the cotton was delivered to be carried in the ordinary way, without any special terms or contract as to delivery thereof at the plaintiffs' mill at Oldham; and that the company had a daily delivery of goods at Oldham. I

A No witnesses were called by the defendants, but it was objected by their advocate that *Hadley v. Baxendale* (1) showed that the plaintiffs were not entitled to the damages they sought to recover. The judge in directing the jury said that the question of neglect was not disputed by the defendants, because the plaintiffs established it in their evidence, and it was not contradicted that he thought it was too nice to seek as damages the interest on capital, and the proportion of rent, and he should tell the jury not to consider these two items in estimating the damage to which the plaintiffs were entitled; but when under circumstances such as existed in the present case, by neglect of the carrier, a man had no material to carry on his business, he had a right, in his opinion, to charge as legal damage such loss as naturally and immediately arose from the stoppage of his mill. That the question they would have to decide was what has been the actual loss and actual detriment that the plaintiffs had suffered by the non-arrival in due course of the cotton. The plaintiffs were entitled to the money they had actually paid as wages, £7. The rent and the interest on capital were matters too remote for a calculation of damage, but the profit the plaintiffs would have made was a fair subject of calculation, and Gee put it at £7 10s. No doubt, however, Gee had calculated it at the highest amount. The jury would, therefore, give such damages as they should think proper over £7, such amount, in fact, as in their opinion would be the actual loss and detriment that the plaintiffs had suffered by the non-arrival of the cotton in due course.

The jury found a verdict for the plaintiffs with £15 damages. The defendants, being dissatisfied with the judge's direction relating to damages appealed.

E Gray for the defendants.
Wheeler for the plaintiffs.

POLLOCK, C.B.—This is a Case Stated by way of appeal from a county court, on the ground that the county court judge misdirected the jury before whom the cause was tried; and that there was an error in the direction which he gave to the jury in respect of two of the items claimed by the plaintiffs' particulars of damage. I am of opinion that there was a misdirection in point of law, and that the cause should be sent down again for another trial.

G The summing-up of the judge was not susceptible of two interpretations. He had told the jury that the plaintiffs were legally entitled to damages for the loss actually occasioned by the stoppage of the mill, and that having estimated the loss of profit, they ought to give it. Was the ruling in accordance with the law as laid down in *Hadley v. Baxendale* (1)? The damage did not accrue from the non-arrival of the cotton alone; but was the consequence of the non-arrival coupled with the fact that the plaintiffs had no cotton to resort to? If it could have been proved that every carrier must know that when cotton did not arrive, the particular mill to which it was consigned would be kept from work, and that when cotton is delivered to a railway company to carry it is also notice that the mill to which it is to be delivered is stopped, and the men employed there at a standstill, waiting for that particular cotton, then such a ruling might probably be correct. The railway company would then have the option of saying, "We will not take the responsibility upon ourselves unless you agree to pay a very much higher price for it accordingly, and so insure the extra risk."

I No doubt the company would be bound to carry goods at a reasonable rate, with ordinary care; but this is an extra risk sought to be imposed on them without any special contract or any proof or evidence of the course of trade of these mills, or that the railway company knew anything about it, or (if there be any such limited working of the mills) that only one quantity of goods is consigned at a time, that the mills and men are stopped till another is supplied, which must be delivered in a particular time or the men's wages go on without work, the mills stopped, and the profits lost. The judgment in *Hadley v. Baxendale* (1) is correct, but that was not followed by the judge on this occasion; the plaintiffs' loss was occasioned partly

from the delay in the delivery by the defendants, but also partly from the plaintiffs A
having no other cotton to go on with, which was not the fault of the defendants.

BRAMWELL, B.—I am of the same opinion. The damages will very probably
be the same on the next occasion as they were at the first trial. I at first doubted
whether the judge had not laid down correctly the case to the jury, but, as it is
reported to us by the case, I think he has not. *Hadley v. Baxendale* (1) is correct. B
It is there said :

“Where two parties have made a contract which one of them has broken, the
damages which the other party ought to receive in respect of such breach of
contract should be such as may fairly and reasonably be considered either arising
naturally, i.e., according to the usual course of things from such breach of
contract itself, or such as may reasonably be supposed to have been in the
contemplation of both parties at the time they made the contract as the probable
result of the breach of it.” C

If the special circumstances under which the contract was actually made were
communicated by the plaintiffs to the defendants, and thus known to both parties,
the damages resulting from the breach of such a contract which they would reason- D
ably contemplate would be the amount of injury which would ordinarily follow from
a breach of contract under these special circumstances so known and communicated.
On the other hand, if these special circumstances were wholly unknown to the party
breaking the contract, he, at the most, could only be supposed to have had in his
contemplation the amount of injury which would arise generally, and in the great
multitude of cases not affected by any special circumstances, from such a breach
of contract. For, had the special circumstances been known, the parties might
have specially provided for the breach of contract by special terms as to the damages
in that case, and of this advantage it would be very unjust to deprive them. These
are the principles by which the jury ought to be guided in estimating the damages
arising out of breach of contract. E

If the defendants break their contract to carry the plaintiffs' goods, then the
first thing is to find out the loss sustained in consequence, and next to abide by
the law as laid down in *Hadley v. Baxendale* (1). Suppose the cotton-spinners
have no goods for consumption on their premises at the time when others are bought
and sent, the plaintiffs are not to recover more damages from the defendants in
consequence of it. We cannot say, as a matter of law, that the plaintiffs are to
recover these two items objected to, although as a matter of fact the circumstances
may be stated to the jury. Counsel for the plaintiffs says the whole summing-up
should be looked at together, and no doubt that is so, and as a proposition of fact,
if stated or left in that way, it would be right; but here it is not susceptible of that
interpretation. [His LORDSHIP referred to the Case Stated, and the ruling of the
county court judge.] I cannot say that that is correct in point of law; therefore,
the summing-up was erroneous and open to the vice which has been pointed out. F
G
H

CHANNELL, B.—I am also of opinion that the defendants are entitled to the
judgment of the court, and that the rule as laid down in *Hadley v. Baxendale* (1)
is correct. We are not to take, it is true, one part of the summing-up alone, but
to see if, on looking at all, we can construe the whole as a correct summing-up
in point of law; but doing so, and looking at the whole of it, it seems to me from the
case, that the judge directs the jury that the plaintiffs were entitled to the money I
they had actually paid as wages of £7, and the profit the plaintiffs would have made
if the cotton had arrived in due course, and I cannot but think a new trial ought to
be granted for this misdirection.

WILDE, B.—I am of the same opinion. There are four items in the plaintiffs'
particulars of claim, two of which are objected to with reference to the direction
given to the jury on them, one of £7 for workmen's wages when the plaintiffs' mill
is alleged to have been kept idle for the non-delivery of this cotton in due course,

A and the other of £7 10s. for the profit the plaintiffs would have made by working their mill for the time in question. I do not think the summing-up of the judge with reference to these two items is susceptible of the interpretation counsel for the plaintiffs has put on it. No doubt it was laid down from the case, as stated to us, that the plaintiffs were entitled to these as legal damage.

[HIS LORDSHIP read the summing-up as stated in the Case, and continued:]

B The only question is whether that is correct according to *Hadley v. Baxendale* (1), where it was held that the damages which one party ought to receive in respect of a breach of contract by another should be such as may fairly and reasonably be considered, either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as

C the probable result of the breach of it.

Here this is not the consequence arising naturally, or such as was supposed to have been in the contemplation of the parties, but partly because the plaintiffs have no other cotton to go on with to keep their mill at work, and it was not solely the fault of the defendants. It was said there was a general rule that, in a feverish or excited state of the market, the cotton or millowners only bought their goods as

D it were from hand to mouth; that the defendants well knew it, and that the mill was stopped at this time when the goods were to have been sent off. I know no such general rule, nor was there any evidence of it in this case. Those matters indeed are not the legal measure of damage; nor is it the province of a judge to tell the jury what specifically they are to find as damage—there is no legal measure of damage at all. The facts are to be stated to the jury, and the damages are

E peculiarly for them to determine. The circumstances of this case will not support the ruling of the judge at the trial, and for these reasons I think it wrong, and that there should be a new trial.

Appeal allowed; order for a new trial.

MAY v. BURDETT

[COURT OF QUEEN'S BENCH (Lord Denman, C.J., Patteson, Coleridge and Wightman, JJ.), January 13, 15, 26, 1846]

[Reported 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253;
10 Jur. 692; 115 E.R. 1213]

*Animal—Ferae naturae—Injury to plaintiff—Ferocious nature known to keeper—
No default on part of keeper—Liability of keeper.*

The plaintiff was attacked by a monkey kept by the defendant, which the defendant knew was of a mischievous and ferocious nature, and accustomed to attack and bite mankind. In an action for damages for the injuries which the plaintiff sustained there was no averment of negligence or of default in the securing or taking care of the animal on the part of the defendant.

Held: a person who kept an animal accustomed to attack and bite mankind, with knowledge that it was so accustomed, was *prima facie* liable in an action on the case at the suit of any person who was attacked and injured by the animal without any allegation of negligence or default in the securing or taking care of it; the gist of the action was the keeping of the animal after knowledge of its mischievous propensities.

Per Curiam: (i) It would be no defence if the monkey had escaped, without default on the part of the defendant, and had committed the injuries while at large, because the monkey being *ferae naturae*, a person keeping such an animal must keep it secure at all events; (ii) it might, however, be a defence if the injury was solely occasioned by the wilfulness of the plaintiff after warning, but the court would express no opinion as to this.

Notes: Applied: *Jackson v. Smithson* (1846), 15 M. & W. 563. Considered: *Card v. Case* (1848), 5 C.B. 622. Distinguished: *Hill v. Balls* (1857), 2 H. & N. 299; *Filburn v. People's Palace and Aquarium Co.* (1890), 25 Q.B.D. 258. Considered: *Marlor v. Ball* (1900), 16 T.L.R. 239; *Baker v. Snell*, [1908-10] All E.R.Rep. 398. Referred to: *Rylands v. Fletcher*, [1861-73] All E.R.Rep. 1; *Cooke v. Waring* (1863), 2 H. & C. 332; *Smith v. Cook* (1875), 1 Q.B.D. 79; *Jones v. Lee*, [1911-13] All E.R.Rep. 313; *Charing Cross, West End, and City Electricity Supply Co., Ltd. v. London Hydraulic Power Co.*, [1914-15] All E.R.Rep. 85; *Knott v. L.C.C.*, [1933] All E.R.Rep. 172; *Gould v. McAuliffe*, [1941] 1 All E.R. 515; *Read v. J. Lyons & Co.*, [1946] 2 All E.R. 471; *Pearson v. Coleman Bros.*, [1948] 2 All E.R. 274; *Rands v. McNeil*, [1954] 3 All E.R. 593.

As to injuries caused by dangerous animals, see 1 HALSBURY'S LAWS (3rd Edn.) 666-667; and for cases see 2 DIGEST (Repl.) 328-330.

Cases referred to:

- (1) *Thomas v. Morgan* (1835), 2 Cr.M. & R. 496; 1 Gale, 172; 5 Tyr. 1085; 5 L.J.Ex. 64; 150 E.R. 214; 2 Digest (Repl.) 385, 593.
- (2) *Mason v. Keeling* (1699), 1 Ld. Raym. 606; 12 Mod. Rep. 332; 91 E.R. 1305; 2 Digest (Repl.) 382, 566.
- (3) *Smith v. Pelah* (1747), 2 Stra. 1264; 93 E.R. 1171; 2 Digest (Repl.) 379, 546.

Also referred to in argument:

- Anon.* (1537), 1 Dyer, 25 b; 78 E.R. 56; 2 Digest (Repl.) 376, 526.
- Jenkins v. Turner* (1696), 1 Ld. Raym. 109; 2 Salk. 662; 91 E.R. 969; 2 Digest (Repl.) 385, 592.
- R. v. Huggins* (1730), 17 State Tr. 309; 2 Ld. Raym. 1574; 1 Barn.K.B. 396; Fitz-G. 177; 2 Stra. 883; 92 E.R. 518; 2 Digest (Repl.) 328, 214.
- Scetchet v. Eltham* (1681), 1 Freem.K.B. 534; 89 E.R. 400; 2 Digest (Repl.) 333, 235.
- Buxentine v. Sharp* (1696), 3 Salk. 12; 91 E.R. 661; sub nom. *Bayntine v. Sharp*, 1 Lut. 90; 2 Digest (Repl.) 333, 237.

- A** *Michell (Michael) v. Allestry* (1676), 3 Keb. 650; 2 Lev. 172; 84 E.R. 932; sub nom. *Mitchil v. Alestree*, 1 Vent. 295; 2 Digest (Repl.) 331, 226.
Dixon v. Bell (1816), 5 M. & S. 198; 1 Stark. 287; 105 E.R. 1023; 36 Digest (Repl.) 80, 431.
Townsend v. Wathen (1808), 9 East, 277; 103 E.R. 579; 2 Digest (Repl.) 375, 522.
- B** *Blackman v. Simmons* (1827), 3 C. & P. 138; 2 Digest (Repl.) 331, 224.
Curtis v. Mills (1833), 5 C. & P. 489; 2 Digest (Repl.) 380, 552.
Cropper v. Matthews (1659), 2 Sid. 127; 82 E.R. 1293; 2 Digest (Repl.) 382, 565.
Brock v. Copeland (1794), 1 Esp. 203; 2 Digest (Repl.) 379, 547.
Leame v. Bray (1803), 3 East 593; 102 E.R. 724; 43 Digest 420, 429.
Jordin v. Crump (1841), 8 M. & W. 782; 11 L.J.Ex. 74; 5 Jur. 1113; 151 E.R. 1256; 2 Digest (Repl.) 375, 518.
- C** *Jones v. Perry* (1796), 2 Esp. 482; 2 Digest (Repl.) 382, 569.
Hartley v. Harriman (1818), 1 B. & Ald. 620; 106 E.R. 228; 2 Digest (Repl.) 382, 562.

D **Rule Nisi** to arrest judgment in an action by the plaintiff, Sophia May, the wife of Stephen May, for damages for injuries caused by a monkey kept by the defendant Burdett.

The declaration stated that defendant, before and at the time of the damage and injury hereinafter mentioned to Sophia, the wife of the plaintiff Stephen May, wrongfully and injuriously kept a monkey, he, the defendant, well knowing that the monkey was of a mischievous and ferocious nature and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the monkey to be at large and unconfined: which monkey, while the defendant kept the same as aforesaid, heretofore and before the commencement of this suit, to wit on Sept. 2, 1844, did attack, bite, wound, lacerate and injure the plaintiff's wife, whereby she became and was greatly terrified and alarmed, and became and was sick, sore, lame and disordered, and so remained and continued for a long time, to wit from the day and year last aforesaid to the time of the commencement of this suit; whereby, and in consequence of the alarm and fright occasioned by the monkey so attacking, biting, wounding, lacerating and injuring her as aforesaid, she has been greatly injured in her health. The defendant denied liability. At the trial, before WIGHTMAN, J., at the sittings in Middlesex after Hilary term, 1845, a verdict was found for the plaintiff with £50 damages. The defendant, in the ensuing term, obtained a rule to show cause why judgment should not be arrested.

G *Watson and Couch* showed cause against the rule.
Cockburn and Pickering supported the rule.

Cur. adv. vult.

H June 2, 1846. **LORD DENMAN, C.J.**, read the following judgment of the court.—This was a motion to arrest the judgment in an action on the case for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the female plaintiff. The declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large; and that the monkey, while the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby she became injured in her health. It was objected, on the part of the defendant, that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal; and it was said that, consistently with this declaration, the monkey might have been kept with due and proper caution, and that the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself.

A great many cases and precedents were cited upon the argument; and the conclusion to be drawn from them appears to us to be that the declaration is good

upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities.

The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. A great many were referred to upon the argument, commencing with the REGISTER and ending with *Thomas v. Morgan* (1), and all in the same form, or nearly so. In the REGISTER, 110, 111, two precedents of writs are given, one for keeping a dog accustomed to bite sheep, and the other for keeping a boar accustomed to attack and wound other animals. The cause of action, as stated in both these precedents, is the propensity of the animals, the knowledge of the defendant, and the injury to the plaintiff; but there is no allegation of negligence or want of care. In *Mason v. Keeling* (2), much relied upon on the part of the defendant, want of due care was alleged, but the scienter was omitted; and the question was, not whether the declaration would be good without the allegation of want of care, but whether it was good without the allegation of knowledge, which it was held that it was not.

No case was cited in which it had been decided that a declaration stating the ferocity of the animal and the knowledge of the defendant was bad for not averring negligence also; but various dicta in the books were cited to show that this is an action founded on negligence, and, therefore, not maintainable unless some negligence or want of care is alleged. In COMYNS'S DIGEST, tit. Action upon the case for Negligence (A 5), it is said that "an action upon the case lies for a neglect in taking care of his cattle, dog, etc."; and passages were cited from the older authorities, and also from some cases at *nisi prius*, in which expressions were used showing that, if persons suffered animals to go at large, knowing them to be disposed to do mischief, they were liable in case any mischief actually was done; and it was attempted to be inferred from this that the liability only attached in case they were suffered to go at large or to be otherwise ill secured.

But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril, and that, if it does mischief, negligence is presumed, without express averment. The precedents as well as the authorities fully warrant this conclusion. The negligence is in keeping such an animal after notice. *Smith v. Pelah* (3), and a passage in 1 HALE'S PLEAS OF THE CROWN, 430, put the liability on the true ground. It may be that, if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence, by plea in confession and avoidance: but it is unnecessary to give any opinion as to this; for we think that the declaration is good upon the face of it, and shows a *prima facie* liability in the defendant.

It was said, indeed, further, on the part of the defendant, that, the monkey being an animal *ferae naturae*, he would not be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control; but we cannot allow any weight to this objection: for, in the first place, there is no statement in the declaration that the monkey had escaped, and it is expressly averred that the injury occurred while the defendant kept it: we are besides of opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events. The rule, therefore, will be discharged.

Rule discharged.

A

DOE d. SHALLCROSS v. PALMER AND OTHERS

[COURT OF QUEEN'S BENCH (Lord Campbell, C.J., Patteson, Coleridge and Wightman, JJ.), January 20, 29, February 1, May 5, 1851]

B

[Reported 16 Q.B. 747; 20 L.J.Q.B. 367; 17 L.T.O.S. 252;
15 J.P. 689; 15 Jur. 836; 117 E.R. 1067]

Will—Alteration—Time of making—Presumption—After execution of will—Rebuttal—Evidence—Declaration by testator—Production of draft will or instructions to solicitor.

C

There is a presumption that an alteration made in a will was made after the will was executed, but that presumption is rebuttable, the onus being cast on the person who seeks to derive an advantage from the alteration to adduce evidence from which it may be inferred that the alteration was made before the will was executed. That evidence may be of declarations made by the testator *semble*, before and nearly down to the date of the will) of his intention to provide by his will for the person relying on the alteration, or it may be provided by the production of a draft will corresponding with the will in its altered form, or written instructions to a solicitor to draw a will in the altered form, or by proof of verbal instructions to that effect. A declaration by the testator, made after the will was executed, that the alteration in the will had been made before the execution of the will would be inadmissible.

D

E

Notes. Applied: *In the Goods of Foley* (1855), 2 Ecc. & Ad. 206; *In the Goods of Ripley* (1858), 1 Sw. & Tr. 68. Considered: *Williams v. Ashton* (1860), 1 John. & H. 115. Applied: *Re Sykes* (1873), L.R. 3 P. & D. 26. Considered: *In the Goods of Adamson* (1875), L.R. 3 P. & D. 253; *Sugden v. Lord St. Leonards*, [1874–80] All E.R.Rep. 21. Applied: *Dench v. Dench* (1877), 2 P.D. 60; *Atkinson v. Morris*, [1897] P. 40; *Re Jessop*, [1924] All E.R.Rep. 692. Considered: *In the Estate of Oates, Callow v. Sutton*, [1946] 2 All E.R. 735. Referred to: *In the Goods of Hardy* (1861), 30 L.J.P.M. & A. 142; *Staines v. Stewart and Jones* (1861), 31 L.J.P.M. & A. 10; *Christmas v. Whinyates* (1863), 32 L.J.P.M. & A. 73; *Quick v. Quick and Quick* (1864), 3 Sw. & Tr. 442; *Woodward v. Goulstone*, [1886–90] All E.R.Rep. 234.

F

G

As to alterations in a will, see 39 HALSBURY'S LAWS (3rd Edn.) 885–887; and for cases see 44 DIGEST 305–315.

H

I

Cases referred to:

- (1) *Cooper v. Bockett* (1846), 4 Moo.P.C.C. 419; 4 Notes of Cases, 685; 10 Jur. 931; 13 E.R. 365, P.C.; 44 Digest 311, 1440.
- (2) *Doe d. Allen v. Allen* (1840), 12 Ad. & El. 451; 4 Per. & Dav. 220; 9 L.J.Q.B. 395; 4 Jur. 985; 113 E.R. 882; 44 Digest 633, 4648.
- (3) *Doe d. Ellis v. Hardy* (1836), 1 Mood. & R. 525; 174 E.R. 181, N.P.; 44 Digest 220, 447.
- (4) *Bateman v. Pennington* (1840), 3 Moo.P.C.C. 223; 13 E.R. 95; 44 Digest 250, 767.
- (5) *Earl of Newburgh v. Countess Dowager of Newburgh* (1820), 5 Mad. 364; on appeal (1825), *Sugden's Law of Property*, 367; 8 Bing. at p. 254, H.L.; 44 Digest 625, 4555.
- (6) *Miller v. Travers* (1832), 8 Bing. 244; 1 Moo. & S. 342; 1 L.J.Ch. 157; 131 E.R. 395; 44 Digest 625, 4559.
- (7) *Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363; 2 H. & N. 54; 9 L.J.Ex. 27; 3 Jur. 955; 151 E.R. 154; 44 Digest 543, 3609.

Also referred to in argument:

Bond v. Seawell (1765), 3 Burr. 1773; 1 Wm. Bl. 454, n.; 97 E.R. 1092; 44 Digest 283, 1153.

Hope v. Harman (1847), 16 Q.B. 751, n.; 8 L.T.O.S. 554; 11 Jur. 1097; 117 E.R. A
1069; 44 Digest 232, 573.

Knight v. Clements (1838), 8 Ad. & El. 215; 3 Nev. & P.K.B. 375; 1 Will. Woll. &
H. 280; 7 L.J.Q.B. 144; 2 Jur. 395; 112 E.R. 819; 6 Digest (Repl.) 363, 2616.

Hippesley v. Homer (1804), Turn. & R. 48, n.

Thomas d. Evans v. Thomas (1796), 6 Term Rep. 671; 101 E.R. 764; 44 Digest B
613, 4403.

Whitaker v. Tatham (1831), 7 Bing. 628.

Rule Nisi to enter a verdict for the lessor of the plaintiff in an action for ejectment for cottages and a garden in the borough of Stafford.

At the trial, before LORD CAMPBELL, C.J., at the Stafford Summer Assizes in 1850, it appeared that the lessor of the plaintiff claimed as devisee of Francis Brookes. C Francis Brookes was the heir-at-law of his brother Colonel William Brookes, who died in 1834, seised in fee of the premises in question. The defendant Palmer claimed, in right of his wife Appollina, as devisee of William Brookes. The will under which he claimed was entirely in the handwriting of William Brookes, duly executed and attested, and date July 27, 1833. It appeared on the face of it that it had originally been drawn so as to devise the property in question to Francis Brookes in fee, and that, by interlineations in the handwriting of William Brookes, this devise was changed into a devise to Francis Brookes for life with remainder to the defendant, Appollina Biddulph. The question in the cause was whether the alterations were made before or after execution of the will. In the will, which was produced at the trial, the material clause stood as follows:

"I do give and bequeath to Francis Brookes, of Moss Pit Bank, in the county of Stafford, gentleman, all those six lots of land and houses which I purchased from Mr. John Allan Stokes, and situate in the Crabberly and Church Lanes during his natural life and at his decease the Churchyard Cottages to descend [his heirs and assigns for ever] I also give and
to Mary Thornton and at her death to Ann Thornton her daughter—Noah's F
Ark cottages and garden to Appollina Biddulph, daughter of Mary Ann Biddulph. I do bequeath to the said Francis Brookes the sum of £1,000 to be realized from my funds in the Bengal treasury" etc.

The words within brackets were cancelled with a pen, but so as to be still legible; the words printed in italics were interlineations. The Noah's Ark cottages and garden were the premises sought to be recovered in this action. Appollina Biddulph, the wife of one of the defendants, was a natural daughter of Francis Brookes. The testator had purchased these premises after the making of a prior will which he had revoked. By the will of July 27, 1833, he disposed of the whole of his real and personal property, without making any provision for Appollina Biddulph, except by the above mentioned limitation of the premises in question. The execution of the will was proved by two of the subscribing witnesses. The testator signed the will in their presence, and said it was his will; but they were not informed of the contents. Charles Dawson, one of the executors, swore that the testator killed himself on the morning of April 5, 1834 and that he (the witness), on the same day, went to the testator's house in Stafford, and received from Mary Thornton, who had been his housekeeper and mistress, the will of July 27, 1833, enclosed in an envelope with three seals upon it, then unbroken. It was folded like a letter, with an endorsement upon it in the testator's handwriting, and in the envelope was a letter from him addressed to the witness. Ann Lookesly, who had lived as servant with the testator, swore that two or three months before his death she saw him give the packet containing the will to Mary Thornton, saying: "Mary, take this and keep it; if it should be wanted and I am not in the way, you will have it in your possession."

- A The defendants' counsel contended that the presumption was that the alteration in the devise was made before the will was executed, but the Lord Chief Justice, on the authority of *Cooper v. Bockett* (1), held the contrary. The defendants' counsel then proposed to call witnesses to prove declarations of the testator, before the will was executed, that he intended to make provision by his will for Appollina Biddulph. This evidence was objected to, but the Lord Chief Justice received it,
- B subject to the opinion of the court upon its admissibility. Dr. Knight, a physician at Stafford, was then called, and stated, in his examination in chief, that he knew the testator well, and attended him professionally; that he was one of his executors; that he had heard him talk of a testamentary disposition; and that he had frequently heard the testator say that he would make provision for Appollina Biddulph, of whom he appeared to be very fond. In cross-examination, the witness said that in
- C the latter end of 1833 (but he was indistinct as to the time) he applied to the testator for a loan of money for his brother Francis, and the testator said, "I cannot assist my brother; I have provided for his natural daughter." Ann Lockesly was recalled, and stated that, many a time before the will was executed in July, she had heard the testator say that, die when he might, he would leave Appollina two or three houses, and that he would leave the Churchyard cottages to Mary Thornton
- D for her life, and afterwards to Ann Thornton, his own natural daughter, who was then at school. Charles Passman, an attorney at Stafford, swore that in 1830 he received instructions from the testator to prepare a will of which he produced a draft, containing a legacy of £500 to Appollina Biddulph, payable at the age of twenty-one, the interest to be applied to her maintenance. There was a will engrossed from this draft and executed. The testator was not then possessed of the
- E property in question. He went to India immediately after, and remained there two years. The defendants' counsel likewise contended that the appearance of the will afforded evidence that the alteration must have been made before it was executed; it was said that this was shown by the appearance of the folds, and of the ink upon it.

- The Lord Chief Justice permitted the jury to look at the will and left it to them
- F to say whether, from the evidence, they were satisfied that the alteration was made before the will was executed. The jury said they were so satisfied. The Lord Chief Justice then directed a verdict for the defendants, with leave to move to enter a verdict for the lessor of the plaintiff if the court should be of opinion that there was no admissible evidence to show that the alteration was made before the will was executed. In the ensuing term, accordingly, a rule nisi was obtained on
- G behalf of the plaintiff's lessor.

Keating and Whitmore showed cause against the rule.

Whateley and Phipson supported the rule.

Cur. adv. vult.

- May 5, 1851. **LORD CAMPBELL, C.J.**, read the following judgment of the
- H court in which he stated the facts, and continued: After a long and very attentive consideration of the authorities and the arguments on both sides, we have come to the conclusion that the verdict for the defendant rests on legitimate evidence, and that it ought not to be disturbed.

- We agree that there is a presumption that the alteration was made after the will was executed, and, of course, this presumption must stand till some evidence
- I is adduced to rebut it. We are not absolutely bound by *Cooper v. Bockett* (1) as if that were a decision of the House of Lords, the tribunal to which an appeal lies in the last resort from the courts of common law, but we entirely approve of that decision. We are not called upon to give an opinion respecting an alteration apparent on the face of a deed or of a negotiable instrument. But, having regard to the Statute of Frauds, and to the Wills Act, 1837, respecting wills, we entertain no doubt that the onus is cast upon the party who seeks to derive an advantage from such an alteration in a will, to adduce some evidence from which the jury may infer that the alteration was made before the will was executed. Without this

rule there would be a dangerous facility given to a testator to alter a holograph will after its execution; all wills might be altered by false declarations, and the presumption contended for by the defendant is inconsistent with s. 21 of the Wills Act, which enacts:

"No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid . . . unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will . . ."

Then follows the exception that the signature and attestation in such a case may be in the margin instead of at the foot of the will.

We have to consider, therefore, whether in this case there was any admissible evidence to rebut the presumption. The evidence relied upon consisted of declarations by the testator, frequently made, before and nearly down to the time when the will was executed, that he intended to make provision by his will for Appollina Biddulph (the present defendant Mrs. Palmer), coupled with the fact that without this alteration the will, which disposes of the whole of his property, real and personal, makes no provision for her. Are these declarations admissible evidence to rebut the presumption? Or, in other words, ought the judge to have received this evidence, and to have told the jury that from this evidence they would be justified in inferring that the alteration had been made at the time when the will was executed, although they were not bound to do so?

It may be convenient, first, to consider the question, whether, if in a will which is not in the handwriting of the testator an alteration appears, evidence might be received of previous declarations by him that he intended to dispose of his property in the manner in which it is disposed of by the will in its altered form. If the draft of the will could be produced, corresponding with the will in its altered form, would it not be admissible evidence, and might not the jury infer from it that before the will was executed the draft and the will had been compared, and the mistake rectified? Would not written or verbal instructions from the testator to his solicitor to draw the will in the altered form be equally admissible? In what respect do such verbal instructions differ, for this purpose, from a contemporaneous declaration by the testator to another person that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? What distinction can be drawn between the draft of the will or the written instructions for the will, and the verbal declaration of the testator's intention, except as to the strength of the evidence which they respectively afford?

As to admissibility, they all seem to rest on the same principle, and, if the verbal declaration of intention must be rejected, so must the draft of the will with the initials of the testator affixed to it. It would not be very creditable to the law if such evidence were to be excluded, as a logical inference might be fairly drawn from it respecting the priority of two events, that is to say, the making of the alteration and the execution of the will, and I am not aware of any principle, rule of law, decided case or dictum against the admissibility of such evidence. I allow we cannot be guided alone by the consideration that both parties claim under the testator, for declarations of the testator after the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires; and, for the same reason, a declaration by the testator, after the will was executed, that the alteration had been made previously would be inadmissible. But the previous declarations of the testator as to his testamentary intentions do not seem to be liable to the same objections. They demonstrate that the alteration is not an afterthought; they cannot have been uttered with any view of evading the law respecting the execution of wills; and they still leave upon the devisee the burden of proving by reasonable evidence that this law has been complied with.

There certainly is evidence which, in particular cases, would weigh with a reasonable man in forming a belief on a doubtful question, and which the law excludes because, if generally admitted it would more frequently mislead than guide to a

- A just conclusion. But this evidence is not of that nature, for, although it may vary very much with respect to the weight to be given to it, it seems liable to no greater objection than the declarations of the testator respecting his testamentary intentions where a will is impeached on the ground of incompetency or of fraud. If declarations of the testator are receivable to rebut the presumption respecting an alteration in a will in the handwriting of another person, is there to be a different rule
- B as to a holograph will? There being a greater facility in altering such a will after its execution, the declarations may be entitled to less weight, but surely, if they are admitted with respect to the alteration of one class of wills, they cannot be excluded with respect to the other.

- Although no decision can be quoted in which such evidence for rebutting this specific presumption has been admitted, no case has occurred in which it has been
- C rejected, and in cases closely analogous similar evidence has often been received. Declarations of the testator have been admitted to rebut the presumption that a legacy is satisfied by a provision in the lifetime of the testator, and to rebut the presumption as to an executor being entitled to the residue of the personal estate. Not only where the competency of the testator is in dispute, but in all cases where there is any imputation of fraud in the making of the will, the declarations of the
- D testator are admitted respecting his dislike or affection for his relations, or those who appear in the will to be the objects of his bounty, and respecting his intentions either to benefit them or to pass them by in the disposition of his property: *Doe d. Allen v. Allen* (2), and *Doe d. Ellis v. Hardy* (3).

- Bateman v. Pennington* (4), although not adverted to in the argument, appears entitled to great consideration. The executors of Richard Sparling Berry, the testator having died suddenly, propounded for probate in the Prerogative Court of
- E Canterbury two papers found in his escritoire. The first was a will written in ink, with the date, October 5, 1837, written in pencil in the third line, with the signature of the testator likewise written in pencil, and preceded by the following words also written in pencil: "In case of accident I sign this my will." This paper had a clause of attestation, but without the subscription of any witness. The other paper,
- F without date, in the form of a will, was subscribed by the testator in ink; this paper had a clause of attestation without the subscription of any witness. The deceased at the time of his death was seised of real estates and possessed of personal property of great value which were all disposed of by these testamentary papers. Prima facie, these papers were not entitled to probate, the presumption being that they were only deliberative, and SIR HERBERT JENNER rejected an allegation, in
- G support of them, which relied chiefly upon the declaration in pencil—"In case of accident I sign this my will." But upon appeal to the Judicial Committee this sentence was reversed, and, the cause being then retained, probate was granted, although the date and signature, being in pencil, were presumptively deliberative, and the circumstance of the attestation clauses being unwitnessed afforded a strong presumption against the will, the Judicial Committee being influenced by the
- H declaration of the deceased that he intended to die testate. Might not a similar declaration in writing by the deceased on another paper, or by word of mouth, have been admitted equally to rebut the presumption?

- Almost all the cases cited on the part of the plaintiff were merely instances of the rejection of declarations of the testator where the question was upon the construction of ambiguous language used by him in his will. But this is not a case of
- I patent ambiguity, or upon the meaning of words at all, the question being entirely one of fact upon the priority of two events, the making of the alteration and the execution of the will. It, therefore, much more nearly resembles the cases respecting the factum of the will, in which the declarations of the testator have often been admitted.

The plaintiff's counsel relied much upon *Earl of Newburgh v. Countess Dowager of Newburgh* (5), where, the testator having executed a will devising to his wife lands in the county of Sussex, it was proposed, with a view of making the will likewise carry to her lands in the county of Gloucester, to prove that the draft of

the will, prepared by the solicitor and settled by the conveyancer, devised to the wife lands in the counties of Sussex and Gloucester, which the testator approved of and desired to be copied for his execution, and that the stationer who copied it inadvertently left out the words "and Gloucester," and changed the word "counties" into "county." LEACH, V.-C., and afterwards the House of Lords, according to the unanimous advice of all the judges, decided that the evidence was not admissible to enlarge the devise as it appeared on the face of the will. There can be no doubt as to the propriety of that decision, for the proposed addition would have been a new will, contrary to the Statute of Frauds. But in the present case the evidence admitted was to show that the devise under which the defendants claimed was part of the will when it was duly executed.

Miller v. Travers (6) is equally well decided, and equally inapplicable. There the testator devised all his freehold estates in the county of Limerick and city of Limerick, having no estates in the county of Limerick, and a very small estate in the city of Limerick, but large estates in the county of Clare, which he intended to pass by his will, but did not mention. The devisee proposed to show by parol evidence that the estates in the county of Clare were devised to him in the draft of the will; that the draft was sent to a conveyancer to make certain alterations, not affecting the estates in the county of Clare; that by mistake he erased the county of Clare; and that the testator, after keeping the will by him for some time, executed it without adverting to this alteration. LORD BROUGHAM, L.C., by the advice of TINDAL, C.J., and LORD LYNTHURST, C.B., most properly held that the proposed evidence was inadmissible.

The only other case cited worth mentioning was *Doe d. Hiscocks v. Hiscocks* (7). There a testator devised lands to his son *John Hiscocks* for life, and on his decease to the testator's grandson, *John Hiscocks*, eldest son of the said *John Hiscocks*, for life, and on his decease to the first son of the body of his said grandson *John Hiscocks*, in tail male, with remainder over. At the time of making the will the testator's son, *John Hiscocks*, had been twice married. By his first wife he had one son, *Simon*; by his second an eldest son *John*, and other younger children, sons and daughters. The question was whether this *John* or *Simon* should take, neither of them answering fully the description given in the will. An ejectment being brought by *Simon* against *John*, it was proposed to offer in evidence the instructions given by the testator for his will, and also declarations made by him after its execution, to show that *Simon* was really the person in his contemplation as the object of his bounty at the time of making the will. This evidence was received, but the Court of Exchequer set aside a verdict founded upon it, being of opinion that for the purpose of removing this ambiguity the declarations of the testator ought not to be received as to what he intended to do in making his will. The object of the evidence was to assist in the construction of the will; and the real question was whether this should be considered as an instance of latent or patent ambiguity. The decision, therefore, whether right or wrong, is no authority in this case, where the question is totally different.

Upon the whole, there being no authority adverse to the defendants, analogous cases being in their favour, and the admission of the contested evidence appearing to us to be conducive to truth and justice, we are of opinion that it was rightly admitted. This is the only question which we have to determine. If the evidence was admissible, the weight to be given to it was a question for the jury.

But it may be proper to notice an argument much pressed at the Bar, that the declarations in favour of *Appollina Biddulph* are completely outweighed by the subsequent deliberate intention which the testator is supposed to have entertained to leave the premises in question in fee simple to his brother *Francis*. Although we should believe that the limitation of the premises, as first framed, was by deliberation and not by mistake, this does not show that the testator had ever for one moment changed his intention to make a provision by his will for *Appollina Biddulph*. Here, the alteration consists in turning a devise in fee of certain cottages to *Francis Brookes* into a limitation to him for life, with a remainder in fee to

- A** Appollina Biddulph. If for a moment he intended she should take no interest in these cottages, we must recollect the declarations proved were not that he meant to leave these specific cottages to her, only that he meant to provide for her by his will; and it might easily have happened that before he had finished the writing of his will, or upon reading it over before it was executed, he recollected that he had made no provision for her, and that he then introduced the alteration, with a view
- B** to keep the promise which he had often made. This seems much more probable than that he introduced the alteration after the will was executed, and before it was sealed up in the manner described, although it afterwards remained in his own custody. Not only may all be presumed to know the law upon the subject, but this testator himself had executed a prior will and was acquainted with the solemnities required for a valid devise of real estate. There appears to be no ground
- C** for the conjecture that he might have altered the will after its execution, intending to have it re-attested and re-published; he had an ample opportunity to have done so if he had so intended. There seems every reason to believe that he sealed up the will immediately after its execution; and he certainly delivered it in a sealed packet a few weeks before his death to Mary Thornton, intending that it should remain in her custody till he should commit the fatal act which he then meditated.
- D** We, therefore, think that the jury were fully justified in coming to the conclusion that the alteration was made before the will was executed. If the lessor of the plaintiff had proved that down to the execution of the will the testator did not know of the existence of Appollina Biddulph, or that he had expressed a purpose to exclude her from his will, an answer would have been given to the evidence offered by the defendants to rebut the presumption that the alteration was subse-
- E** quent to the will, but the obliterated words showing that these premises had, at the first writing of this clause in the will, been limited in fee to Francis, afford a sufficient answer. It being quite certain that the testator intended that Appollina Biddulph should take the premises after the death of Francis, and the intention appearing to us to be testified according to the rules of law, we think that she ought to be allowed to remain in the possession of them; and that this rule to enter the
- F** verdict for the lessor of the plaintiff ought to be discharged.

Rule discharged.

COLLEN v. WRIGHT AND OTHERS

[COURT OF EXCHEQUER CHAMBER (Sir Alexander Cockburn, C.J., Pollock, C.B., Williams and Willes, JJ., Bramwell, Watson and Channell, BB.), June 13, November 30, 1857]

[Reported 8 E. & B. 647; 27 L.J.Q.B. 215; 30 L.T.O.S. 209;
4 Jur.N.S. 357; 6 W.R. 123; 120 E.R. 241]

Agent—Misrepresentation—False representation of authority to act for principal—Liability of agent on implied warranty of authority—Relevance of honest belief by agent of possession of authority.

A person who professes to contract as agent for another impliedly undertakes with the person who enters into the contract on the faith of the agent's being duly authorised that the authority which he professes to have does in fact exist. Should the principal repudiate the contract the agent is liable to the person whom he has induced to enter into the contract for any damage which that person sustains through the assertion of authority being untrue. The fact that the agent honestly believed that he had the authority does not affect the question of his liability.

So held by POLLOCK, C.B., WILLIAMS and WILLES, JJ., and BRAMWELL, WATSON, and CHANNELL, BB., SIR ALEXANDER COCKBURN, C.J., dissentiente.

Notes. Explained: *Worthington v. Sudlow* (1862), 31 L.J.Q.B. 131. Considered: *Cherry v. Colonial Bank of Australasia* (1869), 6 Moo.P.C.C.N.S. 235; *Beattie v. Ebury* (1872), 7 Ch. App. 777. Considered and Explained: *Dickson v. Reuter's Telegraph Co.* (1877), 3 C.P.D. 1. Explained and Applied: *Firbank v. Humphreys* (1886), 56 L.J.Q.B. 57. Considered: *Hammond v. Bussey* (1887), 20 Q.B.D. 79. Applied: *Cross v. Fisher* (1892), 40 W.R. 265. Considered and Explained: *Dunn v. Macdonald*, [1897] 1 Q.B. 401. Considered and Applied: *Halbot v. Lens* (1900), 70 L.J.Ch. 125. Explained: *Oliver v. Bank of England, Starkey, Leveson and Cooke*, [1901] 1 Ch. 652. Approved: *Starkey v. Bank of England*, [1903] A.C. 114. Considered: *Sheffield Corpn. v. Barclay*, [1904-7] All E.R.Rep. 747. Explained and Approved: *Salvesen & Co. v. Rederi Aktiebolaget Nordstjernen*, [1904-7] All E.R.Rep. 886. Applied: *Yonge v. Toynbee*, [1908-10] All E.R.Rep. 204. Considered: *Edwards v. Porter, McNeill v. Hawes*, [1923] 2 K.B. 538; *Edwards v. Porter* (1924), 41 T.L.R. 57. Applied: *British Russian Gazette and Trade Outlook, Ltd. v. Associated Newspapers, Ltd., Talbot v. Same*, [1933] All E.R.Rep. 320. Referred to: *Randall v. Raper* (1858), E.B. & E. 84; *Robson v. Turnbull* (1858), 1 F. & F. 365; *Oxenham v. Smythe* (1862), 3 F. & F. 85; *Hughes v. Graeme* (1863), 3 F. & F. 885; *Mountstephen v. Lakeman* (1871), L.R. 7 Q.B. 196; *Weeks v. Propert* (1873), L.R. 8 C.P. 427; *Chapleo v. Brunswick Benefit Building Society and Smith* (1881), 50 L.J.Q.B. 372; *Re National Coffee Palace Co.* (1883), 53 L.J.Ch. 57; *Hollman v. Pullin* (1884), Cab. & El. 254; *Gaskell v. Gosling*, [1896] 1 Q.B. 669; *Bank of England v. Cutler*, [1907] 1 K.B. 889; *Fernée v. Gorlitz*, [1915] 1 Ch. 177; *Weigall v. Runciman* (1916), 115 L.T. 61; *Gowers v. Lloyds and National Provincial Foreign Bank, Ltd.*, [1937] 3 All E.R. 55; *Heskell v. Continental Express, Ltd.*, [1950] 1 All E.R. 1033.

As to warranty of authority by an agent, see 1 HALSBURY'S LAWS (3rd Edn.) 231-233; and for cases see 1 DIGEST (Repl.) 758-768.

Cases referred to:

- (1) *Thomson v. Davenport, Fynney v. Pontigny, Davenport v. Thomson* (1829), 9 B. & C. 78; Dan. & H. 278; 4 Man. & Ry.K.B. 110; 7 L.J.O.S.K.B. 134; 109 E.R. 30; 1 Digest (Repl.) 669, 2352.
- (2) *Jones v. Downman* (1842), 4 Q.B. 235, n.; reversed sub nom. *Downman v. Williams* (1845), 7 Q.B. 103; 115 E.R. 427; sub nom. *Downman v. Jones*, 14 L.J.Q.B. 226; 5 L.T.O.S. 77; 9 Jur. 454, Ex. Ch.; 1 Digest (Repl.) 721, 2672.

- A (3) *Thomas v. Hewes* (1834), 2 Cr. & M. 519, 530, n.; 4 Tyr. 335; 149 E.R. 866; 1 Digest (Repl.) 722, 2686.
- (4) *Smout v. Ilbery* (1842), 10 M. & W. 1; 12 L.J.Ex. 357; 152 E.R. 357; 1 Digest (Repl.) 715, 2638.
- (5) *Polhill v. Walter* (1832), 3 B. & Ad. 114; 1 L.J.K.B. 92; 110 E.R. 43; 1 Digest (Repl.) 760, 2967.
- B (6) *Jenkins v. Hutchinson* (1849), 13 Q.B. 744; 18 L.J.Q.B. 274; 13 L.T.O.S. 401; 13 Jur. 763; 116 E.R. 1448; 1 Digest (Repl.) 721, 2674.
- (7) *Lewis v. Nicholson* (1852), 18 Q.B. 503; 21 L.J.Q.B. 311; 19 L.T.O.S. 122; 16 Jur. 1041; 118 E.R. 190; 1 Digest (Repl.) 720, 2665.

Also referred to in argument :

- C *Evans v. Collins* (1843), 5 Q.B. 804; 1 Dav. & Mer. 72; 12 L.J.Q.B. 339; 7 Jur. 743; 114 E.R. 1453; reversed sub nom. *Collins v. Evans* (1844), 5 Q.B. 820; 1 Dav. & Mer. 669; 13 L.J.Q.B. 180; 2 L.T.O.S. 425; 8 Jur. 345; 114 E.R. 1459, Ex. Ch.; 35 Digest (Repl.) 30, 214.
- Haycraft v. Creasy* (1801), 2 East, 92; 102 E.R. 303; 35 Digest (Repl.) 8, 26.
- D *Ormrod v. Huth* (1845), 14 M. & W. 651; 14 L.J.Ex. 366; 5 L.T.O.S. 268; 153 E.R. 636, Ex. Ch.; 35 Digest (Repl.) 30, 210.
- Burnby v. Bollett* (1847), 16 M. & W. 644; 17 L.J.Ex. 190; 9 L.T.O.S. 176; 11 J.P. 790; 11 Jur. 827; 153 E.R. 1348; 39 Digest (Repl.) 549, 808.
- Morley v. Attenborough* (1849), 3 Exch. 500; 18 L.J.Ex. 148; 12 L.T.O.S. 532; 13 J.P. 427; 13 Jur. 282; 154 E.R. 943; 39 Digest (Repl.) 526, 640.
- E *Randell v. Trimen* (1856), 18 C.B. 786; 25 L.J.C.P. 307; 139 E.R. 1580; 1 Digest (Repl.) 767, 3012.
- Walker v. Hatton* (1842), 10 M. & W. 249; 2 Dowl.N.S. 263; 11 L.J.Ex. 361; 152 E.R. 462; 30 Digest (Repl.) 520, 1591.
- Beech v. Jones* (1848), 5 C.B. 696; 136 E.R. 1052; 6 Digest (Repl.) 62, 556.
- Penley v. Watts* (1841), 7 M. & W. 601; 10 L.J.Ex. 229; 151 E.R. 907; 30 Digest (Repl.) 519, 1583.
- F *Tindall v. Bell* (1843), 11 M. & W. 228; 12 L.J.Ex. 160; 152 E.R. 786; 12 Digest (Repl.) 605, 4677.
- Hadley v. Baxendale* (1854), post; 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, 99.

G **Appeal** by the defendants against the decision of the Court of Queen's Bench on a Special Case, stated without pleadings under the Common Law Procedure Act, 1852.

H In 1853, the plaintiff was desirous of obtaining a lease of a farm, situated in Soham Fen, Cambridgeshire, belonging to William Dunn Gardiner, of Fordham Abbey, then about to become unoccupied. Robert Wright, deceased, was a land agent and valuer residing at Norwich, and up to within a short time before the plaintiff's application to him had the management of the property of W. D. Gardiner in and near Soham. The plaintiff, believing Wright still to have the management of the property and to be the general agent of Gardiner for the letting of the farm in Soham Fen, applied to Wright, as the supposed agent of Gardiner, for a lease thereof, and, after some negotiation between them, on April 21, 1853, an agreement in writing was prepared by Wright, and signed by him as the agent of Gardiner, and by the plaintiff, for a lease of the farm for a term of twelve years and a half from Lady Day, 1853. It was further agreed between the plaintiff and Wright that an agreement, stating in detail the terms referred to in the agreement, should be prepared without delay and be signed by the parties, and on April 22, 1853, the plaintiff, on the faith of the signing of the agreement by Wright, took possession of the farm. On May 31, 1853, an agreement in writing for a lease, stating the terms in detail, was signed by him and the plaintiff, as follows :

"Witness our hands this 31st day of May, 1853,
 R. WRIGHT,
 Agent to William Dunn Gardiner, Esq., lessor.
 JOHN COLLEN.
 (Witness) THOMAS HUSTWICK."

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Before September, 1853, the plaintiff, relying upon the agreement and believing that Wright had authority to make and sign the same as the agent of Gardiner, and that a lease would be granted in accordance therewith, expended a considerable sum of money in the cultivation and improvement of the farm. On Nov. 16, 1853, he was informed that Gardiner refused to sign the lease on the ground that Wright was not authorised to let the farm on the terms set forth in the agreements. Shortly afterwards, the plaintiff, believing that Wright was duly authorised by Gardiner to sign the agreement as his agent, instituted a suit in the Court of Chancery against Gardiner for the specific performance of the contract, and for a decree directing Gardiner to execute and deliver to the plaintiff a lease according to the terms thereof. The suit came on to be heard on Feb. 29, 1856, before the Master of the Rolls, and judgment was pronounced therein that the plaintiff's bill should be dismissed without costs, on the ground that Wright had no authority from Gardiner to sign the said agreement as his agent, or on his behalf.

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On April 7, 1855, after the suit had been commenced, and Gardiner had put in his answers to the plaintiff's bill, from which it appeared that he defended the suit upon the ground that Wright had no authority from him to sign the agreements as his agent, the plaintiff gave the defendant notice that he (the plaintiff) would proceed with the suit at the defendant's risk and expense, and that, in the event of the bill being dismissed on the ground of the defendant's not having had authority to sign the agreements, or to let the farm for the term of years therein mentioned, he (the plaintiff) would commence an action against the defendant to recover from him in respect of the damage sustained, or to be sustained, by him by reason of the defendant not having had authority to sign the agreements as agent for Gardiner, and also the costs and charges sustained and incurred by the plaintiff in prosecuting the suit. To that notice, on April 11, 1855, the defendant's solicitors replied:

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"Sir,—We beg on the part of Mr. Wright, who has consulted us relative to the notice which you served upon him on Saturday last, to apprise you that Mr. Wright will resist any attempt on the part of Mr. Collen to saddle him with the risk and expense of the suit in Chancery mentioned in such notice. The suit was instituted by Mr. Collen at his own risk and expense, and for his own purposes, without Mr. Wright's privity or sanction, and it has been carried on by Mr. Collen's solicitor without Mr. Wright's consent or concurrence. We have also to inform you that Mr. Wright will defend all actions, if any, which Mr. Collen may bring against him for the purposes mentioned in the said notice.

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We are, Sir, yours obediently,

ADAM and CLEMENT TAYLOR."

R. Wright died in January, 1856, leaving the defendants his executrix and executors, and on or about Mar. 22, 1856, the plaintiff received from Gardiner a notice to quit the farm on Sept. 29 next or at the expiration of the current year of his tenancy. The plaintiff quitted the farm in pursuance of that notice. When the action came to trial the Court of Queen's Bench gave judgment for the plaintiff on the ground that there was an implied contract by Wright that he had authority to let the farm, and that for the breach of it the defendants were liable to the plaintiff, and that the plaintiff was entitled to recover the costs of the Chancery suit. The defendants appealed to the Court of Exchequer Chamber.

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Phipson (H. Lloyd with him) for the defendants.

O'Malley (Couch with him) for the plaintiff.

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Cur. adv. vult.

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Nov. 30, 1857. **WILLES, J.**, delivered the following judgment.—This was an action brought by John Collen against the personal representatives of Robert Wright, in which a Special Case was stated for the opinion of the Court of Queen's Bench. It appears that Robert Wright, the testator, professed to act as the agent of a Mr. Gardiner, and as such agent professed to enter into an agreement with the plaintiff for a lease from Gardiner to him of a farm. The plaintiff was not aware that Mr. Wright had no authority from Gardiner, and he proceeded to considerable expense in preparing the farm for cultivation. On Mr. Gardiner denying that Wright had his authority, he, still relying upon Wright's assertion that he had, filed a bill in Chancery, to procure specific performance of the agreement into which Wright had entered. The result of that was that it was established that Wright had not authority. The only fact which it is necessary further to mention is that Wright never withdrew the assertion that he had authority from Gardiner to let the farm, and upon a notice being given to him after the Chancery suit for specific performance had been commenced, namely, on April 7, 1853, giving him notice that he would be held responsible if the suit failed in consequence of want of authority—his answer was, not that he had no authority, and it was no use, therefore, going on with the suit in Chancery, but it was: "I will resist any claim you make upon me." Therefore, in the end, Mr. Wright did not withdraw the assertion that he had authority. The Court of Queen's Bench decided for the plaintiff on the ground that Wright warranted to Collen that he had authority, and did so by the representation of himself as being the agent of Gardiner; that the fact of his not having authority was a breach of an implied contract that he had, and that, accordingly, the plaintiff was entitled to recover against his executors. They further held that the plaintiff was entitled to recover the costs of the Chancery suit among other expenses to which he had been put, and which he recovered in the present action; and the question is whether that decision was right?

It appears to me that the judgment of the Queen's Bench ought in all respects to be affirmed. I am of opinion that a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent is answerable to the person who so contracts for any damages he sustains by means of the assertion of the authority being untrue. This is not the case of a bare mis-statement to a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he had authority affects the moral character of his act, but his moral innocence, so far as the person he has induced to contract is concerned, in no way aids him or alleviates the inconvenience and damage which he sustains. If one of the two in such case is to suffer, it ought not to be the person who has been guilty of no error, but he who, by an untrue assertion believed and acted upon, as he intended it should be, and touching a subject within his peculiar knowledge and as to which he gave the other party no opportunity of judging for himself, has brought about the damage. The obligation arising in such a case is well expressed by saying that the person professing to contract as agent for another impliedly undertakes with the person who enters into such a contract upon the faith of his being duly authorised that the authority he professes to have does, in point of fact, exist. This was, in effect, the view taken by the Court of Queen's Bench, to which I adhere.

With respect to the amount of damages, I retain the opinion thrown out in the course of the argument that all the expenses sought to be recovered were occasioned by the assertion of authority made at the time of the contract being continued and persisted in by the defendant and bona fide acted on by the plaintiff. That assertion was never withdrawn, not even in the letter of April 11, 1855, in answer to the defendant's notice to the plaintiff long after the proceedings in Chancery had terminated. I am, therefore of opinion, that the judgment of the Court of Queen's Bench is right, and ought to be affirmed. I may mention that **POLLOCK, C.B.**,

WILLIAMS, J., BRAMWELL, WATSON, and CHANNELL, BB., concur in the judgment which I have pronounced. A

SIR ALEXANDER COCKBURN, C.J.—I regret most unfeignedly to find myself differing in this case from so many of my learned brethren, for whose opinions I entertain the profoundest respect and deference, and in whose views I should have every disposition to acquiesce if, after considering the subject with the most anxious desire to concur with them, I could persuade myself that, in giving judgment for the plaintiff, we were not going beyond what the law warrants. B

The proposition we are called upon to affirm is that by the law of England a party making a contract as agent in the name of a principal impliedly contracts with the other contracting party that he has authority from the alleged principal to make the contract, and that, if it turns out that he has not this authority, he is liable in an action on such implied contract. It appears to me that there is no sufficient authority to warrant this proposition, and that even assuming, for the purpose of the argument, that such a rule might be desirable, in establishing it we shall be creating a new law instead of expounding that which already exists. I believe I am fully justified in saying that this doctrine is altogether a novel one. I have looked carefully into the treatises and textbooks on the law of contract, and, so far as I have been able to discover, although the doctrine of implied contract has been fully discussed and the instances of implied contract as existing in the law of this country carefully enumerated, no mention is to be found of the implied contract contended for in this case. Nor is any trace of such an action to be found, so far as I am aware, in the printed books of precedent on the forms of action and of pleading. C
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What is still more remarkable, in the learned and elaborate works which treat of the law relating to agency, and in which the liabilities of agents, or persons professing to act as such towards third parties, are fully considered, not even a hint is to be found of any implied contract on the part of the agent as to the existence of authority. In PROFESSOR STORY'S work on AGENCY, ch. 10, s. 264 and note 3, while it is laid down as clear that a person contracting as agent without authority will be liable to the party with whom the contract is made, yet when the question as to the mode in which that liability is to be enforced is considered, the alternative is put between a special action on the case, on the one hand, and an action on the contract against the professed agent as principal, on the other; but it does not appear to have occurred to that very learned and scientific jurist that either by the law of England or that of America an action could be maintained on an implied contract as to the existence of authority. In like manner, in the note to *Thomson v. Davenport* (1), in 2 SMITH'S LEADING CASES (4th Edn.), p. 298, where the principles as to liability, as collected from the cases on agency, are laid down, it is asserted that if a man state himself to be an agent, but has really no principal, he is, in law, himself the principal; but it is not suggested that he is liable *ex contractu* in any other form than as principal on the original contract. Nor is that silence to be wondered at, for on looking to the repeated decisions of our own and of the American courts, it will be found that, at the time these learned authors wrote, no such doctrine had ever been broached, but the remedy against a party contracting on behalf of another without authority was assumed to be either by an action on the case for the false representation or by an action against him as principal on the original contract. F
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The doctrine that a person professing to act as agent without sufficient authority might be made responsible as principal, was only subverted at a comparatively recent period. In PALEY'S work on the LAW OF PRINCIPAL AND AGENT (3rd Edn.), ch. 6. s. 1, p. 386, it is laid down, and supported by authorities, that a party contracting as agent is responsible as principal where there is no responsible principal to resort to, and where he exceeds his authority, so that the principal is not bound. STORY, we have seen, holds the like language. In *Jones v. Downman* (2), which was an action *ex contractu*, the doctrine of STORY—that I

A "whenever any party undertakes to do any act as the agent of another, if he does not possess any authority from the principal, or if he exceeds the authority delegated to him, he will be personally responsible, therefore, to the person with whom he is dealing for or on account of his principal"

B —was adopted by the Court of Queen's Bench and said to be "supported by numerous authorities and founded on plain justice," and the defendant, who was there sued as principal, was held to be liable on the contract. It is true that that case was afterwards reversed on [appeal] in the Court of Exchequer Chamber, but solely on the ground that the absence of authority was not shown, and the court in other respects appears to have recognised the propriety of the decision of the Court of Queen's Bench. In a note to *Thomas v. Hewes* (3), 2 Cr. & M. at p. 530, n., the same law is stated to have been laid down on different occasions by BAYLEY, B., and by LORD WENSLEYDALE, when a baron of the Exchequer, and in *Smout v. Ilbery* (4), where an action was brought against a married woman for goods purchased by her on her husband's account after his authority to pledge his credit had terminated by his death, of which fact she was ignorant, though the court held that the action could not be maintained under the circumstances, it was never doubted that the action was rightly brought in contract.

D *Polhill v. Walter* (5), in which it was held that a person accepting a bill drawn upon another, in the name of the drawee without authority, could not be sued upon the bill as acceptor, seems first to have given rise to a contrary impression, though that case turned mainly on the peculiar character of a bill of exchange as being incapable of being accepted by anyone but the drawee except for honour of the latter. But the more recent case of *Jenkins v. Hutchinson* (6), laid down the position broadly, that an action ex contractu could not be maintained against the professed agent as principal, and the same doctrine was fully confirmed and acted upon in the succeeding case of *Lewis v. Nicholson* (7). In the meantime the liability of a professed agent for the unwarranted assertion of authority in an action on the case underwent further consideration, and the doctrine of some writers than any misrepresentation whereby another was induced to do, or omit to do, an act from which injury resulted would render the party making it liable underwent material modification, the modern decisions having established that such misrepresentation will not afford a ground of action where made in good faith, and without knowledge that it was untrue.

G The effect of these doctrines being to leave a person who made a contract with another as agent without a remedy where the professed agent had acted under a mistaken impression as to his authority, it occurred to the judges of the Court of Queen's Bench, who decided in *Lewis v. Nicholson* (7) that an action would not lie against the agent as principal, to suggest that, possibly, the agent might, under such circumstances, be held liable on an implied contract that he had authority to contract in the name of the principal, and the opinion thus incidentally thrown out in that case has been acted upon in this. It was, of course, impossible, so long as the doctrine prevailed that the professed agent could be sued as principal, that he could be held to be liable on this implied contract. It would have been obviously inconsistent to say that upon one and the same contract a man could at the same time be liable upon an express, and also upon an implied, promise. To my mind, it by no means follows that, because that which was believed to be the remedy in law turns out upon further consideration not to be so, we are, therefore, justified in resorting to the fiction of an implied contract hitherto unknown to our law. To me it seems a very strong argument against the existence of any such implied contract that, frequently as the question of the absence or excess of authority in supposed agents has been before our courts, and much as the question of the liabilities of agents has been discussed, no trace of the doctrine is to be found in our law books until within the last few years. I do not think we are justified in introducing such a remedy by the mere fiat of a judicial decree.

I do not stop to discuss the expediency or policy of the proposed rule. Otherwise, A
 I think it might be shown that there are two sides even to this part of the case.
 I doubt whether there is any sufficient ground why erroneous representation in
 the absence of falsehood or fraud should create a greater responsibility in the case of
 a contract than in the case of any other transaction, especially as the other con-
 tracting party might always protect himself by insisting on communicating with the
 alleged principal or by requiring a warranty of authority from the agent. But I by B
 no means desire to rest my opinion on this ground. My view is that the implied
 contract to be established by this case is a thing unknown to our law—that we are
 dealing, not with a mere mode whereby an acknowledged liability may be en-
 forced, but, a supposed liability having turned out to be unfounded in law, we are
 now creating a new species of liability on a new contract—new for the first time
 to be implied as to a warranty of authority which, if the party now to be charged C
 had been required expressly to give, he would, possibly, have refused. If it is
 desirable to establish such a rule, it seems to me it should be done by legislative
 enactment, and that to establish it by judicial decision is to make the law which it
 is only our province to expound. Against this course, though in all humility, and
 with the utmost deference to the better opinions of my colleagues, I feel it my duty
 to record my protest. D

Appeal dismissed.

LE FANU AND OTHERS v. MALCOMSON AND OTHERS

[HOUSE OF LORDS (Lord Cottenham, L.C., and Lord Campbell), June 27, 1848] F

[Reported 1 H.L.Cas. 637; 13 L.T.O.S. 61; 9 E.R. 910]

Libel—Plaintiff—Individual not named or specifically described—Evidence connecting plaintiff with words complained of—Question for jury.

If a libel, though not naming any individual or specifically describing him
 by any express form of words, nevertheless uses such language that persons
 acquainted with the circumstances have no doubt that the writer of the libel
 meant a certain individual, that individual has a right of action against the
 publisher of the libel. When a class is referred to, it is a question of fact for
 the jury to determine whether the libel refers to a member of that class. G

Libel—Innuendo—Extension of natural meaning of words complained of—Identification of plaintiff. H

The innuendo which is placed on words alleged to be defamatory cannot
 extend the natural meaning of those words. Where a libel does not expressly
 refer to the plaintiff recourse may be had to the innuendo pointing to the
 plaintiff as the person referred to in the libel.

Libel—Partnership—Libel referring to trading by partnership firm—Joint action by partners. I

Partners may maintain a joint action for a libel referring to the partnership
 firm in the trade which is carried on.

Notes. Applied: *Merywether v. Turner* (1849), 19 L.J.C.P. 10. Considered:
South Hetton Coal Co. v. North-Eastern News Association, Ltd., [1891-4] All
 E.R.Rep. 548; *Jones v. Hulton*, [1909] 2 K.B. 444; *Knupffer v. London Express*
Newspaper, Ltd., [1944] 1 All E.R. 495. Referred to: *Russell v. Webster* (1874),
 23 W.R. 59.

- A As to identification of the plaintiff with the libel and actions by partners, see 24 HALSBURY'S LAWS (3rd Edn.) 15, 17-19; and for cases see 32 DIGEST (Repl.) 12, 13, 15-18.

Case referred to:

- (1) *Solomon v. Lawson* (1846), 8 Q.B. 823; 15 L.J.Q.B. 253; 7 L.T.O.S. 185; 10 Jur. 796; 115 E.R. 1084; 32 Digest (Repl.) 79, 1013.

- B Also referred to in argument:

James v. Rutleth (1599), 4 Co. Rep. 17a; Moore, K.B. 573; 76 E.R. 900; 32 Digest (Repl.) 66, 876.

Hambleton v. Veere (1670), 2 Saund. 169; 85 E.R. 916; 17 Digest (Repl.) 86, 65.

Griffiths v. Lewis (1846), 8 Q.B. 841; 15 L.J.Q.B. 249; 7 L.T.O.S. 177; 10 Jur. 711; 115 E.R. 1091; 32 Digest (Repl.) 42, 349.

- C *Brown v. Low* (1618), Cro. Jac. 443.

Pierson v. Dawson (1848), Aleyn, 32.

Hughes v. Rees (1838), 4 M. & W. 204.

Ayre v. Craven (1834), 2 Ad. & El. 2; 4 Nev. & M.K.B. 220; 4 L.J.K.B. 35; 111 E.R. 1; 32 Digest (Repl.) 43, 366.

- D *Brayne v. Cooper* (1839), 5 M. & W. 249; 9 L.J.Ex. 80; 151 E.R. 106; 32 Digest (Repl.) 38, 280.

Robinson v. Marchant (1845), 7 Q.B. 918; 15 L.J.Q.B. 135; 10 Jur. 156; 115 E.R. 733; 32 Digest (Repl.) 12, 35.

Forster v. Lawson (1826), 3 Bing. 452; 11 Moore, C.P. 360; 130 E.R. 587; sub nom. *Foster v. Lawson*, 4 L.J.O.S.C.P. 148; 32 Digest (Repl.) 12, 36.

- E *Pechell v. Watson* (1841), 8 M. & W. 691; 11 L.J.Ex. 225; 151 E.R. 1217; 33 Digest (Repl.) 396, 92.

Smith v. Cooker (1638), Cro. Car. 512.

Cook v. Batchellor (1802), 3 Bos. & P. 150; 127 E.R. 83; 32 Digest (Repl.) 12, 34.

Coriton and Harvey v. Lithby (1670), 1 Vent. 167; 2 Keb. 803, 822; 2 Wms. Saund. 112; sub nom. *Lithebury v. Coriton*, 2 Lev. 27; 17 Digest (Repl.) 13, 118.

- F *Craft v. Boite* (1669), 1 Wms. Saund. 241 f.

Bell v. Stone (1798), 1 Bos. & P. 331; 126 E.R. 933; 32 Digest (Repl.) 19, 97.

Thorley v. Lord Kerry (1812), 4 Taunt. 355; 3 Camp. 214, n.; 128 E.R. 367; 32 Digest (Repl.) 19, 98.

Clement v. Chivis (1829), 9 B. & C. 172; 4 Man. & Ry.K.B. 127; 7 L.J.O.S.K.B. 189; 109 E.R. 64; 32 Digest (Repl.) 20, 110.

- G *Wiseman v. Wiseman* (1606), Cro. Jac. 107.

Appeal from a decision of the Court of Exchequer Chamber in Ireland affirming a decision of the Court of Exchequer in Ireland in an action of libel brought by the respondents, Messrs. Malcomson and others, the owners of a factory in the county of Waterford for the manufacture of cottons, linens, and other fabrics, against the appellants, Messrs. Le Fanu, the proprietors of "The Warder" newspaper, in respect of alleged defamatory matter published in the journal on June 1, 1844.

The respondents said that the passages in the newspaper complained of meant, and were intended to mean, that they, the plaintiffs in the action, had been and were guilty of tyranny and oppression towards their workpeople, sabbath breaking, and extortion. The alleged libel was as follows:

- I "THE FACTORY QUESTION IN IRELAND.

"We beg leave to invite the express attention of our readers to the following letter. We had no notion that the abuses of the factory system were so triumphant in this country; we scarcely thought that there were any factories in Ireland; but it seems that the abuses in the county of Waterford exceed even those committed in England. The Factory Bill must have been an United Kingdom bill, that is, a bill extending to the United Kingdom, and, therefore, of force in Ireland. If this be so, working on Sundays, or beyond the twelve

hours limited, must be illegal, to say nothing of the breach of the common law in the desecration of the Sabbath, as the Christian religion is part and parcel of the common law of Great Britain and Ireland. The public must feel greatly indebted to our correspondent for his valuable communication. It is a discovery of an outrageous and tyrannical violation of the laws for the protection of the poor labourer; and we hope that the subject will be followed up. Our columns shall be ever open to vindicate the cause of the oppressed. It is scandalous that such slave-driving despotism should be practised with impunity.

“To the Editor of ‘The Warder.’

“Power, when lodged in their [meaning the plaintiffs] possession,
“Grows tyranny and rank oppression.”—GAY.

“Sir,—I beg you will say, in the next ‘Warder,’ whether there is a law at present in force which prevents the proprietors of factories from employing their operatives by night and on Sundays; and, if there is, who is supposed to enforce it. If the same tyranny is carried on in English factories as in some of the Irish ones [meaning the factory of the plaintiffs], the English members who opposed Lord Ashley’s motion can, I think, lay very little claim to humanity. Factories being much more numerous in England than in Ireland, the English members had a much better opportunity of knowing the great hardships to which the factory labourers are exposed than the Irish members. No person, unless one who is perfectly acquainted with the working of the Irish factories, can form any, the slightest, idea of the cruelties and miseries to which the Irish factory hands are subject.

“I know some factories [meaning the factory of the plaintiffs] in this country; and the cruelty with which the operatives in them [meaning the factory of the plaintiffs] are used, is really incredible. The cruelties of the slave trade or the Bastille are not equal to those practised in some of the Irish factories [meaning the factory of the plaintiffs, and meaning thereby that the plaintiffs had treated the persons in the employment in said factory with cruelty.]

“In this country, and I suppose in England also, the factory proprietors [meaning the plaintiffs] keep their own bread shop, their own grocer’s shop, their own shoe shop, their own butcher’s shop, etc., and they [meaning the plaintiffs] compel their operatives to buy bread from their baker, groceries from their grocer, shoes from their shoemaker, and meat from their butcher, though they [meaning the operatives in the employment of the plaintiffs] could purchase much superior articles in any other shop at a lower rate, but they [meaning the said operatives] dare not; if they did, they would be turned out of work [thereby meaning that, unless the persons in the employment of the said plaintiffs purchased the before-mentioned commodities of life from the plaintiffs, at an exorbitant or unfair rate, the said operatives would be deprived by the said plaintiffs of their employment]. [The writer of this letter had not, apparently, heard of the Truck Act, 1831.]

“If in one of the factory rooms [meaning in one of the rooms of the factory of the plaintiffs], where there are perhaps two or three hundred persons at work, a pane of glass is broken by accident, every person in the room is fined sixpence, and perhaps some of those wretched beings [meaning the said persons in the employment of the plaintiffs] who are thus fined, do not earn more than one shilling and sixpence or two shillings a week. Now, admitting the number in one room [meaning a room of the factory of the plaintiffs] not to exceed two hundred, the fine would amount to the enormous sum of five pounds for one pane of glass; and that is a thing frequently done.

“Whenever the proprietors [meaning the said plaintiffs] are in a hurry to get any work done, the hands [meaning the operatives in the employment of the plaintiffs] must work both by night and on Sundays until it is completed; and if one member of a family [meaning of a family in the employment of the plain-

A tiffs] refuse to work on the Sunday, the whole family are turned off on the following day. Incredible as this may appear, it is a positive fact. I have frequently seen them [meaning the operatives of the plaintiffs] on Sundays going in to work at a certain factory in the south of Ireland [meaning the factory of the plaintiffs]; and I beg, through the columns of your widely circulating paper, to call the attention of the authorities to it, in order that some

B measure may be taken to put a stop to such an iniquitous practice [meaning that the plaintiffs were in the habit of violating the due observance of the Sabbath, and calling on the authorities of the land to prevent such violation of the Sabbath day].

"We may talk of slavery in a foreign country; but if the present factory law allows this, and remains unchanged, we have worse, far worse, at home. We

C have given millions to abolish foreign slavery, and why not do away with slavery at home? [meaning that the labourers in the employment of the said plaintiffs were treated as slaves.] A laudable effort has been made by a few to alleviate the slavery at home, but that humane effort has been defeated by the power of a faction. I hope, however, before long to see humanity triumph over monopoly; and as your paper has always advocated the cause of the

D oppressed, I beg you will use the power of 'The Warder' to do justice to the poor factory operatives of this country. I am, sir, your obedient and faithful servant, H."

The defendants denied liability. The action came on for trial at the spring assizes for the county of Waterford, in 1845, before LEFROY, B., and a special

E jury, when a general verdict with £500 damages was found for the plaintiffs. Upon this verdict judgment was entered in Easter Term, 1845. The defendants appealed to the Court of Exchequer Chamber in Ireland, who affirmed the judgment of the Court of Exchequer. The defendants then appealed to the House of Lords.

T. F. Ellis for the appellants.

Sir Fitzroy Kelly, Q.C., and *Cowling* for the respondents.

F

LORD COTTENHAM, L.C.—I have paid great attention to the arguments raised in objection to the judgment pronounced below, and I see no reason to reverse that judgment.

The first proposition contended for is that this is a complaint of the publication of a libel which, although found by the jury as intended to apply to the plaintiffs

G in the action, is so framed that no innuendo, even after verdict, can support the declaration in which that complaint is made. The question is not whether the matter complained of is libellous, for about that no question can be raised. If it had been addressed to the plaintiffs by name, and it had been said that the plaintiffs had done so and so in their factory, no question could have been suggested but that that would have been libellous. But the way in which the plaintiffs are

H referred to is expressed by the term "some factories." It is said: "If the same tyranny is carried on in the English factories as in some of the Irish ones," and a little further it goes on:

"No person, unless one who is perfectly acquainted with the working of the Irish factories, can form any, the slightest, idea of the cruelties and miseries to which the Irish factory hands are subject. I know some factories in this

I country; and the cruelty with which the operatives in them are used is really incredible. The cruelties of the slave trade or the Bastille are not equal to those practised in some of the Irish factories."

The declaration, after introducing those words, has the innuendo—"meaning the factory of the plaintiff"; and the jurors have, by finding a verdict for the plaintiffs, found that the words were used in allusion to the factory of the plaintiffs.

In that state the question arose below, and arises here, whether the judgment founded upon that verdict can be maintained on such a declaration—that is to say,

where terms are used which must have reference to some one (for the terms "some of the Irish factories" must evidently mean to apply to some Irish factories), and the innuendo is that the words do apply to the plaintiffs' factory, and the jurors have found that that innuendo is true, and that the plaintiffs, who are the proprietors and owners of a factory in Ireland, were the persons meant. If a party can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have found it to be here, and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbours as being the parties alluded to, and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels.

Some old cases were referred to, in which some singular opinions appear to have been expressed and some singular doctrines laid down, but I was anxious to find whether the counsel was able to refer to any modern case in which, after the jurors had found as in this case, the court had held that a party so circumstanced as the plaintiffs were here was not entitled to the benefit of a verdict so obtained. I have found none but *Solomon v. Lawson* (1), and that is supposed to be a case containing the law as it now exists on this subject. Expressions of LORD DENMAN, C.J., who delivered judgment in that case, have been relied on, but it is more important to look at the whole case, and see what it is to which that judgment was intended to apply. All expressions must be construed with reference to the matter then under consideration, and it is clear that the decision in that case turned on the point whether the matter was in fact libellous of a particular individual. Whether a right conclusion from the facts of the case was or was not drawn by the court in that instance is immaterial, but the judgment proceeded on that point. The language used by LORD DENMAN is:

"The question, therefore, is whether the alleged libel has any reference to the tank being used; and looking at the libel, I should say it certainly had not; it described injury arising from water having been supplied to shipping which had been kept in copper cisterns, and then it says 'it required the authorities to look after it.'"

So far from referring to any individual as having been the author of that mischief it says "it behoves the authorities at St. Helena," (that being the place where the injury was supposed to have been committed) "to look into it." Therefore, looking merely at the terms used, so far from being an imputation on any individual, it would appear to apply to some arrangement made by the authorities at St. Helena who had improperly permitted water to be kept in a copper tank instead of being kept in an iron reservoir. In the judgment of the court the alleged libel was not a libel on the individual complaining of it, but, if a libel at all, was a libel on the authorities. That is the ground on which LORD DENMAN put his judgment. He says:

"This does not impute a libel to anybody, no individual can come forward and say, I am the person intended to be referred to by the libel so used."

That being the only case in support of the argument that the individual libelled must be expressly named, or unmistakably referred to, and there being, I believe, a very general practice to the contrary, and common sense being entirely to the contrary, I cannot think the proposition is at all established that under the circumstances of this case the innuendo found to be proved by the jury is not sufficient to entitle the party to the remedy he asks.

A Other objections are made, applicable to particular counts in the declaration. The complaint is made by the plaintiffs in their character of owners and conductors of a factory, and in some of the counts, it is now said, they have made the complaint as if there was an injury to themselves individually, and not to them in their character as joint proprietors of the factory. It is very properly admitted that, if the count contains a complaint of that which affects them in their joint character as proprietors, though it may also make a complaint of certain matters which may affect them individually, inasmuch as the complaint of that which affects them in their joint character may be sufficient to support the action, the additional fact that the count also makes another complaint which cannot be maintained, is not sufficient to vitiate the judgment that has been pronounced. Therefore, in looking through these counts, we must see whether there is anything which contains matter applying to the plaintiffs individually, and not to their joint character.

I have looked through these counts, and it appears to me that, although there may be expressions which, taken by themselves, refer to the individual character of some of the plaintiffs, they contain matter which shows that the complaint is addressed to their character of joint proprietors of the factory. The fifth count states that the defendants

D "did compose and publish, etc., a certain other false, wicked, scandalous, and defamatory libel of and concerning the said plaintiffs and of and concerning the said factory of the said plaintiffs, and of and concerning the manufacturing of cottons, linens, and other fabrics by the said plaintiffs in the said factory, and of and concerning the said trade and calling of the said plaintiffs."

E Can it be contended that this is a complaint made of injury sustained by the plaintiffs in their individual character? Is it not in terms descriptive of the injury alleged to be sustained by them in their character of proprietors and managers of the factory in question? It seems to me to be clear that it is so, and that although there may be expressions which ought not to be there if the complaint was intended to be made of injury sustained by them in their character of joint proprietors, it is quite sufficient on every one of these counts to show that the complaint was intended to apply to the property which belonged to them jointly, in respect of which, therefore, they are entitled to support an action by themselves as proprietors.

On these grounds, on the two points which were relied on as objections to the judgment of the court below, I am of opinion that the judgment of the court below should be affirmed.

G **LORD CAMPBELL.**—I am likewise of opinion that the judgment of the court below ought to be affirmed.

H The first objection which has been relied on by counsel for the appellants is that this libel applies to a class of persons, and that, therefore, an individual cannot apply it to himself. I am of opinion that that is contrary to all reason, and is not supported by any authority. It may well happen that the singular number is used, and where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is done, as would be done if his name and Christian name were ten times repeated.

I Where is the authority for the argument which has been urged by the plaintiff in error? Counsel for the appellants relies on *Solomon v. Lawson* (1), but the proposition there laid down, and which I adopt, is that where there is a publication or a sentence spoken verbally which clearly conveys an imputation of crime on

some person, in that case it may by innuendo be applied to the plaintiffs. If that proposition is well supported in law, the objection made here fails because, in this case, there clearly is a gross imputation on some individuals, and the question is whether it may not be applied to the plaintiffs. What is there to show that that proposition is not well founded according to authority? There is *Solomon v. Lawson* (1), but there it was an historical fact that was narrated; all that was there stated might be true, without imputing blame to any person. There was no charge brought against either a class or an individual, and by mere innuendo you cannot give a new sense to words which they do not naturally bear. It comes round to the old rule that you cannot by an innuendo extend the natural meaning of the words which are spoken or written, but by the innuendo you may point out the particular individual to whom these words apply, those words, in themselves, clearly imputing a crime on the part of some one individual. That being so, I think, according to principle and authority, this objection ought to be overruled. A
B
C

The other objection which is relied upon is that this is an action brought by several persons, seven I think, and that no joint injury is pointed out on the record, but a joint injury is pointed out on the record if the libel is speaking of them in a trade which they jointly carry on. The declaration here alleges that the plaintiffs are partners in carrying on this factory in Ireland, and it alleges that the libel is speaking of them in their trade, and there are innuendoes applying the different parts of the libel to the plaintiffs in their trade. Assuredly that is not enough, unless the language employed will naturally bear the interpretation put on it, and can be shown to refer to them. Then does it so refer to them? I think it does. D

There is another count, the fourth count, in which the libel imputes to the owners of these factories that they are guilty of gross oppression; and the fifth count is respecting the working in the factory. All these impute misconduct to the plaintiffs in carrying on their factory, and they all relate to the trade of the plaintiffs. Suppose that several persons were in partnership as grocers, and it was alleged that they sold by short measure or false weight, or that they adulterated their goods. They might bring a joint action for that; it would be an allegation as to the manner in which the business was carried on, and I apprehend wherever there is libel or slander imputing to partners that they fraudulently and contrary to law employ a particular mode to carry on business, that is a libel in which they must be jointly included as partners in their trade. I know of no case which at all impugns that proposition, and, therefore, I am of opinion that this is a case in which the plaintiffs below, being libelled as regards the manner in which they carry on their trade, sustain a joint injury, for which they may maintain a joint action. E
F

G
Appeal dismissed.

A

PIERS v. PIERS

[HOUSE OF LORDS (Lord Cottenham, L.C., Lord Brougham and Lord Campbell),
March 20, 22, 1849]

B

[Reported 2 H.L.Cas. 331; 13 L.T.O.S. 41; 13 Jur. 569;
9 E.R. 1118]

Marriage—Presumption of marriage—Rebuttal—Need of strong, clear, satisfactory evidence—Disproof of every reasonable possibility supporting legality.

The presumption of law in favour of the legality of a marriage is not to be lightly repelled. The evidence to rebut it must be strong, distinct, satisfactory, and conclusive; per LORD COTTENHAM, L.C.

C

I should say "clear, distinct, and satisfactory evidence." I do not like ever to lay down the rule that evidence must be "conclusive," because that gives occasion very frequently to needless and inconvenient doubt: per LORD BROUGHAM.

D

A presumption of this sort in favour of a marriage can only be negated by disproving every reasonable possibility which supports the validity of the marriage: per LORD CAMPBELL.

E

Notes. Considered: *De Thoren v. A.-G.* (1876), 1 App. Cas. 686; *Sastry Velaidar Aronegary v. Sembecutty Vaigalie* (1881), 6 App. Cas. 364. Applied: *Lauderdale Peerage* (1885), 10 App. Cas. 692. Considered: *Andrewes v. Uthwatt* (1886), 2 T.L.R. 895. Applied: *Re Duvall, Duvall v. Craddock* (1892), 36 Sol. Jo. 398; *Goldstone v. Goldstone* (1922), 127 L.T. 32; *Spivack v. Spivack*, [1930] All E.R.Rep. 133. Considered: *Re Taylor*, [1961] 1 All E.R. 55. Applied: *Mahadervan v. Mahadervan*, [1962] 3 All E.R. 1108. Referred to: *Sichel v. Lambert* (1864), 15 C.B.N.S. 781; *Collins v. Bishop* (1878), 48 L.J.Ch. 31; *Fox v. Bearblock* (1881), 44 L.T. 568; *Re Shephard, George v. Thyer*, [1904-7] All E.R.Rep. 186; *Holdowanski v. Holdowanska* (otherwise *Bailoszewska*) and *Price* (otherwise *Roth*) v. *Taczanowski*, [1956] 3 All E.R. 457; *Hill v. Hill*, [1959] 1 All E.R. 281.

F

As to presumption of marriage, see 19 HALSBURY'S LAWS (3rd Edn.) 812, 813; and for cases see 27 DIGEST (Repl.) 70 et seq.

Case referred to:

(1) *Morris v. Davies* (1837), 5 Cl. & Fin. 163; 1 Jur. 911; 7 E.R. 365, H.L.; 3 Digest (Repl.) 399, 14.

G

Appeal from a decree of BRADY, L.C., in the Court of Chancery in Ireland in a suit instituted by the appellants, the daughters of Sir John Bennett Piers and Lady Piers to compel the respondent, Sir H. S. Piers, who was in possession of certain estates in Ireland, to raise a sum of £4,000, by sale, if necessary, of a part of those estates in pursuance of a charge thereon, which their father had created.

H

The appellants claimed as lawfully born children of the late Sir John Piers. The respondent, the nephew of their father, had succeeded to the title and the entailed estates. By a marriage settlement, Sir John had a power to create a jointure in favour of his wife of £600 per annum, and also to charge the estates with £4,000 in favour of younger children. Both these powers Sir John had executed in his lifetime.

I

In 1803, Sir John went to reside in the Isle of Man with a female of the name of Denny, by whom he had several children. In 1815, the lady becoming again pregnant, Sir John expressed a wish to solemnise a marriage with her in order that his future children by her should inherit his property, and on May 21, 1815, the ceremony was performed by one of the curates of St. George's, at Douglas, Isle of Man, a chapel of ease to the parish of Bradden in that island, the curate, being a member of the Church of England, had been chaplain to a former Bishop of Sodor and Man. The fact of marriage was not disputed, but it was contended to have been an illegal marriage as the ceremony had taken place at the private residence

of Sir John Piers in the island and no special licence, as required by the relevant statute of the Isle of Man, for such a marriage, had been obtained. In the suit, the Bishop of Rochester, who, at the time in question was Bishop of Sodor and Man, deposed that he had not granted any special licence authorising the marriage. One of the reasons given by him for coming to the conclusion that he had not granted any such licence was that he must have been aware of the fact that Sir John had been living in a state of concubinage with Miss Denny for many years, and another was that he would not, under any circumstances, have granted a licence without a personal application from Sir John, which he felt positive had never been made to him. Evidence had also been given to show that Sir John and Lady Piers had celebrated a second marriage in 1821, in Dublin, and that the appellants had been born between the time of the first marriage in 1815 and the second in 1821. The fact of the second marriage was, among other things, relied on as evidence against the presumption of the first marriage, coupled as it was with the non-production of a special licence, or the entry of the marriage in any registry or other official document. The execution of the deed of settlement by Sir John, by which he settled the jointure on his wife, and raised the charge on the estate in favour of his future children by her was also proved.

Bethell and Glasse for the appellants.

Parker and Goldsmidt for the respondent.

Mar. 22, 1849. The following opinions were delivered.

LORD COTTENHAM, L.C.—This is an appeal from the decision of the Lord Chancellor of Ireland as to the legal validity of the marriage upon which the legitimacy, and, therefore, the rights of the appellants, depended. It appears that the Lord Chancellor ultimately decided that point on the evidence before him, but he, at the same time, offered an issue, which he thought would try the question of the validity of the marriage. The issue which he offered to the parties was “whether there had been a special licence from the Bishop of Sodor and Man, authorising the clergyman of that island to celebrate the marriage.” It does appear to me that the issue so tendered goes very much to explain the ground upon which the Lord Chancellor decided the case, because it shows that, according to the view which he took of it, the question in dispute depended upon the greater or less weight of the evidence upon the one side or the other; otherwise the issue would not reach the question so as to decide upon the validity of the marriage. Such an issue would rest upon the balance of evidence as to a particular fact, upon the result of which the validity of the marriage undoubtedly would depend, but that is not the mode in which the law contemplates matters of proof relating to the lawfulness of a marriage. It entirely lays aside all that strong legal presumption [in favour of the legality of a marriage] upon which the law proceeds in the case of marriage, and adjudicates upon the point as upon any other matter of fact, with respect to which there is no presumption one way or the other, but where, upon the result of the investigation as to the existence of the fact, the right of the parties might depend.

I have not found that the rule of law is anywhere laid down more to my satisfaction than it is by LORD LYNDBURST in *Morris v. Davies* (1), as determined in this House. It is not precisely the same presumption as exists in the present case, but the principal is strictly applicable to the presumption which we are considering. He says (5 Cl. & Fin. at p. 265):

“The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.”

No doubt, every case must vary as to how far the evidence may be considered as “satisfactory and conclusive”; but he lays down this rule that the presumption must prevail unless it is most satisfactorily repelled by the evidence in the cause appearing conclusive to those who have to decide upon that question.

A Applying that rule to the circumstances of this case, he could not but arrive at the opinion that the marriage which had taken place in 1815 ought to be maintained with regard to the difficulty raised by the respondent because the second marriage had taken place, he did not consider that that fact affected the question as it was well known and admitted that many persons who had been properly and legally married abroad again went through a ceremony on returning to their own country. Therefore, he moved the judgment of the House that the decree of the court below should be reversed, and the charge on the estates of the respondent, created in favour of the appellants, the children of the marriage, should be declared a good and valid charge thereon.

C **LORD BROUGHAM.**—I am altogether of the same opinion, and for the same reasons. I consider the rule of law to have been very clearly laid down in *Morris v. Davies* (1), by my noble and learned friend, LORD LYNTHURST. He there laid down that rule in very plain terms, and if I had any doubt as to any one of the four descriptions which he gave of the evidence required to rebut the legal presumption of legitimacy, it is as to the last. I should say "clear, distinct, and satisfactory evidence." I am not quite prepared to use the word "conclusive." I think some D doubt may arise upon that, which it is unnecessary to raise because if the evidence required be clear and satisfactory, that is quite sufficient for me. I do not like ever to lay down the rule that evidence must be "conclusive," because that gives occasion very frequently to needless and inconvenient doubt. I agree that this case was wrongly decided below and that the decision must be reversed.

E **LORD CAMPBELL.**—It seems to me that this case depends entirely upon the effect to be given to the presumption of law in favour of the marriage. It is allowed that there is a presumption in its favour, and, until the contrary is proved, we are bound to draw the inference that everything existed which was necessary to constitute a valid marriage, and among other things, that there was a special licence from the Bishop of Sodor and Man. But it is likewise admitted, on the other F hand, that this is not a *praesumptio juris*, that it may be rebutted, and that it can only stand subject to the contrary being proved. The whole question, therefore, depends upon what sort of evidence is required to prove the negative, and to give effect to it. It seems to me, my Lords, as if the learned Lord Chancellor of Ireland had been of opinion that the only effect of the presumption was to shift the burden of proof, and that, instead of the party who stood on the validity of the marriage being obliged to show that there was a licence, it lay on the other side G to impeach the validity of the marriage and prove that there was no licence. It seems to me that that is entirely contrary to well established principles of law which have been long laid down and acted upon for the security of marriage. Indeed, leading counsel for the respondent allowed at the Bar, as he was bound to do, that that was not the mode in which the validity of the marriage was to be tried, and H said that you must show a high degree of probability that there was not a licence. That comes pretty much within the definition of the mode in which the presumption is to be rebutted which has been cited from LORD LYNTHURST, by my noble and learned friend on the Woolsack, and acquiesced in by my noble and learned friend who last addressed your Lordships with some slight modification. My opinion is that a presumption of this sort in favour of a marriage can only be negated by I disproving every reasonable possibility. I do not mean to say that you must show the impossibility of any supposition which can be suggested to support the validity of the marriage, but you must show that this is most highly improbable, that it is not reasonably possible. Because, otherwise there is a tremendous responsibility cast upon you with regard to the status of this woman and of the appellants. See the peril which you are encountering; you may be deciding that a woman is a concubine and that the children are bastards upon a mere speculation, when, in fact, contrary evidence may afterwards be produced, when it is too late, to show that there was that in existence which would render the marriage valid, the woman

the wife of the person to whom she was married, and the children legitimate. To avoid such a peril, the law requires that you should negative every reasonable possibility. . . . I must draw your Lordships' attention to the presumption of law which requires a judge not to exercise his own private notion or to indulge in his own private opinions upon the subject, but to believe that everything was solemnly and effectively done. That is greatly strengthened here by the facts of the case. It appears to me that the presumption of law which exists in this case and is strengthened by the facts, is not at all met by contrary evidence.

Appeal allowed.

CROFT v. LUMLEY AND OTHERS

[HOUSE OF LORDS (Lord Cranworth and Lord Wensleydale), June 29, 30, 1857, February 15, 17, 1858]

[Reported 6 H.L.Cas. 672; 27 L.J.Q.B. 321; 31 L.T.O.S. 382; 22 J.P. 639; 4 Jur.N.S. 903; 6 W.R. 523; 10 E.R. 1459]

Landlord and Tenant—Covenant—Covenant to "improve" opera house for performing operas, plays, etc.—House closed when not remunerative to open—Covenant not to let stalls for longer than one year—Stalls let for year from future date—Covenant not to charge or encumber demised property—Grant by lessee of warrants of attorney.

The appellant let an opera house to the first respondent who entered into certain covenants on the breach of which a right of entry was reserved.

Held: (i) keeping the opera house shut for two seasons because it would not have paid to open it was not a breach of a covenant by which the lessee undertook that he would "use his utmost endeavours to improve the house" for performing operas, plays, etc., the covenant on its true construction referring to the lessee maintaining proper scenery and having the house painted and kept in order; (ii) letting some stalls to hold for one year from a future date was not a breach of a covenant not to let boxes or stalls "for any longer period than one year": **quære**, what would be the position if a lease were granted made to a lessee for one year and at the same time leases were granted to begin at the end of the first year and so on; (iii) granting warrants of attorney authorising judgment to be forthwith entered, the warrants being given bona fide to secure debts and to avoid the expense and delay of legal proceedings and not colourably to evade a prohibition against assignment, was not a breach of a covenant "not to charge or encumber the theatre by mortgaging the same or granting any rentcharge or any other encumbrance whatsoever," for all that the parties meant to do by the covenant was to guard against a direct encumbrance on the house.

Notes. Considered: *Price v. Wormwood* (1859), 4 H. & N. 512; *Davenport v. Reginam*, [1874-80] All E.R.Rep. 157; *Lancashire Waggon Co. v. Nuttall* (1879), 40 L.T. 291; *James v. Young* (1884), 27 Ch.D. 652; *Harman v. Ainslie*, [1904] 1 K.B. 698; *Hartnell v. Blackler*, [1920] 2 K.B. 161; *Windmill Investments (London), Ltd. v. Milano Restaurant, Ltd.*, [1962] 2 All E.R. 680; *Segal Securities, Ltd. v. Thoseby*, [1963] 1 All E.R. 500. Referred to: *Dendy v. Nicholl* (1858), 4 C.B.N.S. 376; *Ward v. Day* (1864), 5 B. & S. 359; *Clough v. London and North Western Rail. Co.*, [1861-73] All E.R.Rep. 646; *Toleman v. Portbury* (1871), L.R. 6 Q.B. 245; *Morrison v. Universal Marine Insurance Co.* (1873), L.R. 8 Exch. 197;

A *Keith, Prowse & Co. v. National Telephone Co.*, [1894] 2 Ch. 147; *Wulfsberg v. Weardale Steamship Co.* (1916), 85 L.J.K.B. 1717; *The Kin Tye Loong v. Seth* (1920), 89 L.J.P.C. 113; *R. v. Paulson*, [1921] 1 A.C. 271; *Abram Steamship Co., Ltd. v. Westville Steamship Co., Ltd.*, [1923] All E.R.Rep. 645; *Wilkins v. Carlton Shoe Co.* (1930), 94 J.P. 207; *Creery v. Summersell and Flowerdew & Co.*, [1949] L.J.R. 1166; *Clarke v. Grant*, [1949] 1 All E.R. 768.

B As to covenants generally, see 23 HALSBURY'S LAWS (3rd Edn.) 578 et seq., and cases there cited.

Cases referred to :

(1) *Lane v. Horlock* (1856), 5 H.L.Cas. 580; 25 L.J.Ch. 253; 2 Jur.N.S. 289; 4 W.R. 408; 10 E.R. 1028, H.L.; 35 Digest (Repl.) 586, 2588.

C (2) *Doe d. Mitchinson v. Carter* (1798), 8 Term Rep. 57; 101 E.R. 1264; subsequent proceedings (1799), 8 Term Rep. 300; 31 Digest (Repl.) 409, 5381.

Also referred to in argument :

Simpson v. Clayton (1838), 4 Bing.N.C. 758; 1 Arn. 299; 6 Scott, 469; 8 L.J.C.P. 59; 2 Jur. 892; 132 E.R. 981; 31 Digest (Repl.) 67, 2241.

Linder v. Pryor (1838), 8 C. & P. 518, N.P.; 31 Digest (Repl.) 109, 2519.

D *Re Boyle, Ex parte Boyle* (1853), 3 De G.M. & G. 515; 22 L.J.Bcy. 78; 22 L.T.O.S. 110; 17 Jur. 979; 43 E.R. 202, L.J.J.; 4 Digest (Repl.) 518, 4541.

Hill v. Cowdery (1856), 1 H. & N. 360; 25 L.J.Ex. 285; 27 L.T.O.S. 204; 4 W.R. 681; 156 E.R. 1242; 12 Digest (Repl.) 339, 2625.

Johnson v. Holdsworth (1850), 1 Sim.N.S. 106; 20 L.J.Ch. 63; 15 Jur. 31; 61 E.R. 41; 35 Digest (Repl.) 637, 3095.

E *Hawkins v. Gathercole* (1855), 6 De G.M. & G. 1; 3 Eq. Rep. 348; 24 L.J.Ch. 332; 24 L.T.O.S. 281; 19 J.P. 115; 1 Jur.N.S. 481; 3 W.R. 194; 43 E.R. 1129, L.J.J.; 38 Digest (Repl.) 783, 7.

Watts v. Porter (1854), 3 E. & B. 743; 2 C.L.R. 1553; 23 L.J.Q.B. 345; 23 L.T.O.S. 228; 1 Jur.N.S. 133; 118 E.R. 1319; 30 Digest (Repl.) 190, 345.

Countess of Sussex v. Wroth (1582), Cro. Eliz. 5; 78 E.R. 272; sub nom. *Leaper v. Wroth*, cited in 6 Co. Rep. at p. 33a; sub nom. *Lepur and Wroth's Case*, 1 Leon. 35; sub nom. *Wroth and Countess of Sussex Case*, 3 Leon. 130; sub nom. *Countess of Sussex and Worth's Case*, 4 Leon. 65; 40 Digest (Repl.) 772, 2567.

F *Colebrook v. Layton* (1833), 4 B. & Ad. 578; 1 Nev. & M.K.B. 374; 2 L.J.K.B. 95; 110 E.R. 573; 19 Digest (Repl.) 438, 2548.

G *Doe d. Duke of Norfolk v. Hawke* (1802), 2 East, 481; 102 E.R. 453; 21 Digest (Repl.) 668, 1592.

Doe d. Cherry v. Batten (1775), 1 Cowp. 243; 98 E.R. 1066; 31 Digest (Repl.) 507, 6324.

Doe d. Morecraft v. Meux (1824), 1 C. & P. 346, N.P.; 31 Digest (Repl.) 564, 6846.

H *Jones v. Carter* (1846), 15 M. & W. 718; 153 E.R. 1040; 31 Digest (Repl.) 530, 6527.

Doe d. Nash v. Birch (1836), 1 M. & W. 402; 2 Gale, 26; Tyr. & Gr. 769; 5 L.J.Ex. 185; 150 E.R. 490; 31 Digest (Repl.) 561, 6819.

Green's Case (1582), Cro. Eliz. 3; 78 E.R. 269; 31 Digest (Repl.) 555, 6741.

Hardman v. Bellhouse (1842), 9 M. & W. 596; 11 L.J.Ex. 135; 152 E.R. 251; 1 Digest (Repl.) 513, 1483.

I *Doe d. Davis v. Elsam* (1828), Mood. & M. 189, N.P.; 31 Digest (Repl.) 513, 6366.

Doe d. Muston v. Gladwin (1845), 6 Q.B. 953; 14 L.J.Q.B. 189; 4 L.T.O.S. 432; 9 Jur. 508; 115 E.R. 359; 31 Digest (Repl.) 561, 6814.

Doe d. Palk v. Marchetti (1831), 1 B. & Ad. 715; 9 L.J.O.S.K.B. 126; 109 E.R. 953; 31 Digest (Repl.) 587, 7069.

Doe d. Abdy v. Stevens (1832), 3 B. & Ad. 299; 110 E.R. 112; sub nom. *Doe d. Abdy v. Jeapes*, 1 L.J.K.B. 101; 31 Digest (Repl.) 512, 6362.

Fox v. Collyer, And. 65.

Read v. Nashes (1589), Leon. 147.

Doe d. Griffith v. Pritchard (1833), 5 B. & Ad. 765; 2 Nev. & M.K.B. 489; 3 L.J.K.B. 11; 110 E.R. 973; 31 Digest (Repl.) 528, 6511.

Bois v. Cranfield (1650), Sty. 239; 82 E.R. 677; 12 Digest (Repl.) 536, 4064.

Appeal from a decision of the Court of Exchequer Chamber (CRESSWELL, WILLIAMS and CROWDER, JJ., MARTIN and ALDERSON, BB.), reported 5 E. & B. 682, affirming a decision of the Queen's Bench (LORD CAMPBELL, C.J., COLERIDGE, WIGHTMAN and ERLE, JJ.), reported 5 E. & B. 648, in an action of ejectment brought by the plaintiff, Faithful Croft, to recover possession of the Opera-house in the Haymarket.

In 1845 the plaintiff demised the premises as to part for sixty-six years from Sept. 29, 1825, and as to the other parts for fifty-one years from Sept. 29, 1840. In the lease a power of re-entry was reserved to the plaintiff in case the reserved annual rent of £1,934 14s. should not be paid, or in case certain covenants in the lease should not be performed. The covenants, so far as material, were three: (i) that the lessee should not convert the opera-house to any other use than that of performing operas, plays, etc., but should, during all the terms, use his utmost endeavours to improve the same for that use and purpose; (ii) that the lessee should not, without the lessor's previous leave in writing, assign, let, charge or dispose of the boxes or stalls of the theatre, or any of them (except a certain number of boxes and stalls to be selected as in the lease mentioned), for any term or number of years whatsoever or for any longer period than one year or season; (iii) that the lessee should not charge or encumber the theatre, or the income thereof, or the terms thereby granted, or either of them, or any part thereof respectively, by mortgaging the same or granting any rentcharge or any other encumbrance whatsoever. The action of ejectment was commenced on Dec. 28, 1854, on the ground that Lumley, the lessee, had broken these covenants.

The defendant Lumley appeared and defended the action, and the other defendants were allowed to appear and defend on the ground that they claimed rights to various parts of the property under the defendant Lumley.

The action was tried at the Middlesex sittings after Hilary Term, 1855, when a verdict was taken by consent, subject to the opinion of the court on a Special Case, which set forth the material facts as follows: As to the covenant not to convert the opera-house to any other use than that of acting operas, etc., and to use his utmost endeavours to improve the same, the breach was attempted to be proved as follows. The defendant used the opera during the season up to August, 1852, when the season closed for that year. Since then the opera-house had not been opened for entertainments of any sort, but it had not been converted to any other uses than those contemplated by the lease. It was given in evidence, by a competent witness, that the fact of the house not having been opened since 1852 was injurious to the property. There was no evidence that the defendant had not used his best endeavours to keep the house open every season. As to the covenant not to grant or let boxes or stalls for more than one year, the evidence of a breach was as follows. By an indenture of Aug. 5, 1852, Lumley for valuable consideration let to Hughes certain boxes to hold from Feb. 1, 1853, or from such subsequent day during 1853 upon which the opera-house should be first opened, for the full term of one year to be computed from that date, provided, if the theatre should not be opened during 1853, then for the same period during any future year. As to the covenant not to charge or encumber the opera-house, the evidence of a breach was as follows. On Oct. 6, 1852, Lumley granted a warrant of attorney to Hughes, authorising an attorney to confess judgment, etc. The defeasance recited an indenture, and expressly bore that the judgment to be entered up was intended to be a concurrent security for £290. Judgment was entered up on Oct. 20, 1852, and registered on Dec. 30, 1852. Other warrants of attorney were granted and judgment signed and registered, the defendants being *bona fide*.

A On Oct. 26, 1854, it was arranged that Mr. Martelli, as the authorised agent of the plaintiff, should call on Mr. Barnes, of the firm of Lyon, Barnes and Ellis, acting on the part of Mr. Lumley. Mr. Barnes having called accordingly, produced a sum of money equal to the amount of the Midsummer and Michaelmas rent, and on behalf of the defendant tendered the amount to Martelli, stating that he tendered to him the half-year's rent due at Michaelmas, and that he did so without any
B condition or reservation. Martelli stated that he would not receive the money as rent due under an existing unforfeited lease, but that he was willing to accept it as compensation for the occupation merely and without prejudice to the lessor's right of re-entry for breach of covenant. Mr. Barnes thereupon said that he assented to no such condition; that he tendered the money unconditionally as rent due, and that as rent Mr. Martelli must take it or leave it. After some further
C conversation, in which Martelli and Barnes adhered to their intention previously expressed, Martelli took up the money, saying at the time of so taking it that he took it as compensation for the occupation of the premises merely, and not as rent due under an existing and unforfeited lease, and that he did not waive the lessor's right of re-entry, but expressly reserved it. No receipt was asked for or given.

The Court of Queen's Bench decided that the lease had been forfeited by reason
D of the giving of the warrants of attorney and the judgments signed thereon, but that the forfeitures, both those known and those unknown to Mr. Martelli, had been waived by his having under the circumstances mentioned in the Case received a sum of money tendered as two quarters' rent. On appeal, the Court of Exchequer Chamber decided that the lease had been forfeited, but gave no opinion as to the waiver of the forfeiture. The plaintiff appealed to the House of Lords, and the
E following judges attended, MARTIN, BRAMWELL, CHANNELL and WATSON, BB., and ERLE, CROMPTON, WILLIAMS, WIGHTMAN and COLERIDGE, JJ.

Sir Richard Bethell, Q.C., H. Hill, Q.C., and Unthank for the appellant.

Sir Frederick Thesiger, Q.C., Sir Fitzroy Kelly, Q.C., Lush, Wells and Maude for the respondents.

F At the conclusion of the arguments the House put the following questions to the judges: (i) Whether the Special Case discloses a breach of the covenant not to grant, let, or otherwise dispose of any of the boxes or stalls of the theatre for any longer period than one year or one season? (ii) Whether the Special Case discloses a breach of the covenant not to charge or encumber the theatre, or any part thereof?
G (iii) Whether, by reason of such breaches (if any), or either of them, the appellant acquired a right of re-entry on the theatre, or any part thereof? (iv) Whether such right of re-entry (if any) was waived by the appellant? The judges all answered question (i) in the negative; seven out of the nine answered question (ii) in the negative; of the remaining two one thought there was a breach of the covenant not to encumber, but that the right of re-entry was waived by the subsequent acceptance of rent, while the other thought that there was a breach and no waiver.

H Their Lordships took time for consideration.

April 17, 1858. The following opinions were delivered.

LORD CRANWORTH.—This was an action of ejectment which was brought by the appellant, Croft, against the respondent, Lumley, and a number of other persons, to recover possession of the opera-house in the Haymarket, London. The respondent
I Lumley is the lessee of the opera-house under the appellant. The other respondents need only be described as persons who have an interest under Lumley. The ejectment was brought upon a right of entry which was reserved in the lease from Croft to Lumley for breach of several covenants. At the trial a verdict by consent was taken for the appellant, subject to a Special Case. The Court of Queen's Bench was of opinion that there was no breach of any covenant, except the covenant not to charge. Lumley having given warrants of attorney (under which it is hardly necessary to say the persons to whom the warrants were given, by entering up judgment, might eventually take in execution, and so obtain possession of the

property, as to which it was covenanted that there should be no charge), the Queen's Bench held that the giving of those warrants of attorney was a breach of the covenant not to charge. But that court also held that that was immaterial because the right of re-entry was gone by reason of the appellant Croft having accepted rent after he had notice of the breach in question. Therefore, the Queen's Bench held that there should be judgment for the respondents, holding that there was a breach of one covenant, and one only, the covenant not to encumber, but that as to that covenant, though there was a breach which gave a right of re-entry, that right of re-entry was gone by reason of the waiver or abandonment of it by the landlord having accepted rent after he had notice of the breach.

The appellant was dissatisfied with that decision of the Queen's Bench, and took the case to the Court of Exchequer Chamber and that court, having had the matter elaborately argued before them, came to a conclusion having the same result as that at which the Queen's Bench had arrived, though not exactly upon the same grounds, for whereas the Queen's Bench had held that there was no breach of any covenant but one, but that no advantage could be taken of that breach because there had been a waiver, the Exchequer Chamber held that there had been no breach of any of the covenants, and, consequently, that the judgment for the respondents was right, they not meaning to say that they did not concur with the Court of Queen's Bench as to there having been a waiver if there had been a breach of the covenant. From that decision the appellant appealed to your LORDSHIPS' HOUSE.

With regard to the alleged breach of the covenant that Lumley would use his best endeavours to improve the opera-house for the purpose for which it was demised to him, of which it was alleged there was a breach by his not having kept it open in the seasons of 1853 and 1854, your Lordships at the time of the argument intimated a very strong and decided opinion that there was no pretence for saying that there had been any breach of the covenant upon that ground; that the meaning of the covenant was that he should, by having proper scenery, and by having the house properly painted and kept in order, improve the house, but not, if he found that there would be no benefit in opening the house, if it would not pay the expenses of having theatrical representations at all, that he should at his loss, with no benefit to the landlord, keep it open. Your Lordships expressed so clear an opinion upon that point at the time of the argument, that your Lordships did not desire even to hear what the opinions of the learned judges upon it were and did not put any question to them on that point. I happen to know by communicating with them at the time that they never had the slightest doubt upon the subject.

In this state of things, it is now your Lordships' duty to decide in the first place upon the first question upon which all the learned judges concur. I think there can be no possible doubt that your Lordships will at once accede to the view which they took on that subject. This is a question as to the forfeiture of a lease. The covenant is that the lessee will not underlease any of the boxes or stalls for more than one year or one season. The leases in question which were considered to be breaches of that covenant were leases entered into in the month of August, 1853, for the year commencing from February, 1852. That was not the exact form of all of them, but that statement will substantially embrace the whole question as to that breach. It is said that that is a breach of the covenant not to lease for more than one year, but the learned judges all hold that is not so. How is that a breach of the covenant not to lease for more than a year? It is a lease for only one year. The covenant is that he will not lease for more than a year. He has not leased for more than a year, and, therefore, he has not in terms broken the covenant. I doubt whether we ought to go beyond that. But it was said that that construction might enable the lessee entirely to defeat the primary object of the parties to this covenant. I do not think it is so at all. We need not decide what would be the case if a lease had been made to a party for one year and at the same time there had been made a lease for another year to commence at the end of the first year, and so on. It might be that that might have been held to be a lease for more than a year, although in point of fact it may appear to be otherwise, but that

A is not the question which we have to decide. But this is simply a question whether in form or in substance it is any violation of the covenant to have made a lease which was to endure for one year and one year only, commencing at the beginning of the ensuing season. I am of opinion that it was not, and that, therefore, the learned judges are quite right.

B The second alleged breach is certainly one which gives rise to more difficulty, namely, whether the warrants of attorney which have been given were or were not a breach of the covenant not to encumber. The warrants of attorney relied upon are these. There was a warrant to Hughes on June 25, 1852, to confess judgment for £2,000, with a declaration that it was merely as a security for £1,140, being the amount of a great number of bills of exchange which were enumerated and would become due in the ensuing months of August, September and October. Upon that judgment was signed and duly registered both in the office and in the county of Middlesex. There was another warrant of attorney on July 29, 1852, for £2,200, to secure £1,070 on Sept. 30, upon which judgment was also signed, and there was another upon Oct. 6, 1852, for £12,000 to secure £6,000. There were also a number of judge's orders, I think from twelve to twenty, to secure sums of money, for which Lumley had been sued, which orders had been given (I think in every case it is so stated) after issue had been joined, and all for bona fide debts. The question here arises upon the Judgments Act, 1838, s. 13 [replaced by Law of Property Act, 1925, s. 195] whether these instruments do or do not amount to such an assignment or charge of the property as to constitute a breach of the covenant not to encumber. Section 13 enacts :

E "A judgment already entered up or to be hereafter entered up against any person in any of Her Majesty's superior courts . . . shall operate as a charge on all lands, tenements, rectories, advowsons, tithes, rents and hereditaments . . . of or to which such person shall at the time of entering up such judgment, or at any time afterwards be seised, possessed or entitled for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up
F such judgment, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might without the assent of any other person cut off and debar from any
G remainder reversion or other interest in or out of the said lands . . . and every judgment creditor shall have such and the same remedies in a court of equity, against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been entered up had power to charge the same hereditaments, and had
H by writing under his hand agreed to charge the same with the amount of such judgment-debt."

The question is whether a warrant of attorney given under the circumstances stated in this case—namely, bona fide given to secure debts, and nothing more being stated than that—does or does not amount to giving an encumbrance within the meaning of this clause? This is a point which has been several times of late
I under discussion. I have more than once, in the discharge of my official duties, had occasion to consider it; and I confess it is a point upon which I have very often had great difficulty in making up my mind, but in the result I adhere to the opinion which I expressed in this House two or three years ago in the course of the argument of *Lane v. Horlock* (1), that this is a point upon which it is impossible to state any abstract opinion which shall govern every case. I am of opinion, as I there stated, that simply giving a warrant of attorney, if it is bona fide given to secure a debt which the creditor might recover by process of law, does not constitute a charge within the meaning of that statute. But if a person, not having a power

of assigning or charging the property, gives a warrant of attorney with a view to evade that restriction which is imposed upon him, then the circumstances may be such as to make it amount to a charge, or encumbrance, or at least to estop him from saying that it is not a charge or encumbrance to all intents and purposes. The distinction is admirably illustrated by *Doe d. Mitchinson v. Carter* (2), in which the principle was elucidated in both its aspects, for, in the first instance, there had been an ejectment brought, and there it was found that a party who was restrained from assigning had given a warrant of attorney. The Court of Queen's Bench, after a long argument, held that that did not amount to a breach of the restriction against his charging. He could not help his creditors bringing an action and recovering judgment, and if he, to save the expense and vexation and delay of an action, gave a warrant of attorney in order to close the proceedings at once, the court held that he might lawfully do that in order to arrest the legal consequences, and that, therefore, that was no breach. But a second ejectment was afterwards brought, in which upon a special verdict it was found that the lessee, wishing to assign the property, entered into a compact with the person to whom it was to be assigned, and because he could not do that per directum he gave him a warrant of attorney, which would enable him to take the property in execution. When that second verdict came to be considered the Court of King's Bench held that that entirely varied the case, the warrant of attorney was held to be a breach of the covenant not to assign, and judgment was given accordingly.

Applying that principle to the present case, in advising your Lordships, I am to say whether there is upon the face of this Special Case anything which ought to satisfy your Lordships that the giving of this warrant of attorney was a contrivance by Mr. Lumley to effect an assignment which he could not effect directly. I think there is nothing to warrant any such conclusion. In the first place, although it is stated that it was known to the creditor Mr. Hughes that Mr. Lumley was the lessee of the opera-house, I do not find it anywhere distinctly stated that that was the moving cause on his part, but it would be necessary to show, not merely that it was the moving cause on his part, but that it was known to Lumley that he had not the power to assign and that he gave this warrant of attorney for the purpose of enabling him to do that which he could not do according to the terms of his lease. I think that when we look at what occurred afterwards it is perfectly clear that that was not the meaning of the parties, and that in point of fact no proceedings have ever been adopted in order to get possession of the opera-house. The warrants of attorney remain just as they were, the property of Mr. Hughes—whether they have been paid or not is not stated. It does not appear that the opera-house was transferred from the one party to the other. It remains just as it was. Therefore, upon this point I am inclined to advise your Lordships most strongly to concur in the opinions of seven out of the nine learned judges who heard the case, and I should, accordingly, move that your Lordships should give judgment for the respondents.

LORD WENSLEYDALE.—I have no difficulty in concurring in the advice which has just been given by my noble and learned friend, and I have very little to add to the reasons which he has given for that advice.

There are three covenants contained in the lease which are alleged to have been broken. The first is that the lessee will not, during the term demised to him, convert the opera-house, or any part thereof, to any other use than for "acting or performing operas, plays, concerts, balls, masquerades, etc.," and that he will, during all the said term, use his utmost endeavours to improve the same for that use and purpose. The breach alleged is that he did not do that. The evidence is that there was a part of the term during which the opera-house was not open. The Court of Queen's Bench were of opinion that the lessee's conduct in this respect was not a breach of the covenant, and the judgment of the Court of Exchequer Chamber confirmed that. Upon this point no opinion has been given by the learned judges, as your Lordships, feeling no doubt upon it, did not think

A it necessary to put any question to the judges upon that part of the case. It is quite out of the question to say that that covenant has been broken.

The next covenant is that the lessee, during the continuance of this term, would not

B "grant away, assign or let, charge or dispose of the boxes or stalls of the theatre or any of them for any term or number of years whatsoever, or for any longer period than one year or season."

The lessee granted a term in futuro, and the Court of Queen's Bench were of opinion that that was not a breach of the covenant, the meaning of which was that he should let the boxes only for one season. In that opinion the Court of Exchequer Chamber concurred; and all the learned judges, in the opinions they

C opinion I entirely agree.

The third covenant raises a more important question. It was that the lessee would not charge or encumber the theatre

D "or the income thereof, or the terms hereby granted or either of them, or any part thereof respectively, by mortgaging the same or granting any rentcharges, or any other encumbrance or encumbrances whatsoever."

The breach alleged of that covenant was that he did grant an encumbrance by giving a warrant of attorney to enter up judgment, and that by virtue of that warrant of attorney judgment was entered up, in consequence of which it was said that he had committed a breach of the covenant by charging the theatre. The Court of Queen's Bench, in their unanimous opinion which was delivered by LORD CAMPBELL, held

E that that was a breach of the covenant to encumber; that every man must be considered as contemplating the result of his acts; that if Lumley gave a warrant of attorney and the effect of that warrant was, under the Judgments Act, 1838, that upon it the property would be charged exactly in the same way as if he had given an equitable charge upon it, he must be considered to have contemplated that result, and that, therefore, it was a breach of that covenant. That was the

F opinion which the Court of Queen's Bench expressed. From that there was [an appeal] to the Exchequer Chamber. That court formed a different conclusion. They were unanimously of opinion that what had been done did not fall within the terms of this covenant.

I agree entirely in the view which they took of this covenant, because, if we look at the terms of the covenant, it is not a covenant that he will do nothing whereby the estate may be encumbered, but it is a covenant that he will not

G "charge or encumber the theatre or the term by mortgaging of the same"—that is a direct charge—"or by granting any rentcharges"—that is also a direct charge—"or by granting any other encumbrance or encumbrances whatsoever." That clearly means the same as the former words of the same nature—that he will not

H grant any direct charge or encumbrance. If the terms of the covenant were that he would do no act whereby the property should become encumbered, then there is no doubt he would be guilty of a breach of the covenant by giving a warrant of attorney, which, by the operation of the Act of 1838, might cause an encumbrance upon the theatre. The argument *noscitur a sociis* applies here, and it is clear that all that the parties meant to do was to guard against the direct encumbrance

I upon the theatre. In that opinion all the judges concur.

Appeal dismissed.

EVANS v. BREMRIDGE AND OTHERS

[VICE-CHANCELLOR'S COURT (Page-Wood, V.-C.), December 7, 11, 1855]

[Reported 2 K. & J. 174; 25 L.J.Ch. 102; 26 L.T.O.S. 164;
2 Jur.N.S. 134; 4 W.R. 161; 69 E.R. 741]

[COURT OF APPEAL IN CHANCERY (Knight-Bruce and Turner, L.J.J.), February 22, 23, 1856]

[Reported 8 De G.M. & G. 100; 25 L.J.Ch. 334; 27 L.T.O.S. 8;
2 Jur.N.S. 311; 4 W.R. 350; 44 E.R. 327]

Guarantee—Discharge—Co-sureties —Guarantee not signed by one surety—Other surety not informed.

The release by a creditor to one of two co-sureties is a release to the other.

The deed securing a loan granted by an insurance company to a debtor contained a covenant by the plaintiff and his co-surety that they or one of them would be responsible for, and would pay, any moneys due from the debtor to the insurance company and being unpaid by him. Only the plaintiff signed the deed, which was kept by the insurance company who did not inform him that his co-surety had not signed it. The debtor defaulted.

Held: the intention of the parties to the deed was that there should be a joint and several liability on the part of the two co-sureties, the deed being prepared and executed on that basis, and, as that course had not been followed, the plaintiff was relieved of his liability as a surety and entitled to delivery up of the deed for cancellation.

Notes. Considered: *Spaight v. Cowne*, *Edwards v. Spaight* (1863), 1 Hem. & M. 359. Distinguished: *Cooper v. Evans* (1867), L.R. 4 Eq. 45. Considered: *Naas v. Westminster Bank, Ltd.*, [1940] 1 All E.R. 485. Referred to: *Cumberlege v. Lawson* (1857), 26 L.J.C.P. 120; *Luke v. South Kensington Hotel Co.* (1879), 27 W.R. 514; *Beckett v. Addyman* (1882), 9 Q.B.D. 783; *Royal Albert Hall Corpn. v. Winchilsea* (1891), 7 T.L.R. 362; *Ellesmere Brewery Co. v. Cooper*, [1895-9] All E.R.Rep. 1121; *National Provincial Bank of England v. Brackenbury* (1906), 22 T.L.R. 797; *Re Parent Trust and Finance Co.*, [1936] 3 All E.R. 432.

As to the requirement that all sureties must execute a deed, see 18 HALSBURY'S LAWS (3rd Edn.) 451; and for cases see 26 DIGEST (Repl.) 73. As to the right of a surety to be relieved of his liability and for delivery up of his guarantee, see 18 HALSBURY'S LAWS (3rd Edn.) 501; and for cases see 26 DIGEST (Repl.) 210.

Cases referred to:

- (1) *Ex parte Gifford* (1802), 6 Ves. 805; 31 E.R. 1318, L.C.; 26 Digest (Repl.) 143, 1045.
- (2) *Nicholson v. Revill* (1836), 4 Ad. & El. 675; 1 Har. & W. 756; 5 L.J.K.B. 129; 111 E.R. 941; sub nom. *Nicolson v. Revell*, 6 Nev. & M.K.B. 192; 26 Digest (Repl.) 210, 1609.
- (3) *Re Semple*, 3 Jo. & Lat. 488.
- (4) *Underhill v. Horwood* (1804), 10 Ves. 209; 32 E.R. 824, L.C.; 26 Digest (Repl.) 143, 1046.

Also referred to in argument:

Bonser v. Cox (1841), 4 Beav. 379; 10 L.J.Ch. 395; 5 Jur. 164; 49 E.R. 385, L.C.; subsequent proceedings (1844), 13 L.J.Ch. 260; 2 L.T.O.S. 493; 8 Jur. 387, L.C.; 26 Digest (Repl.) 73, 519.

Leaf v. Gibbs (1830), 4 C. & P. 466, N.P.; 26 Digest (Repl.) 73, 518.

Pidcock v. Bishop (1825), 3 B. & C. 605; 5 Dow. & Ry.K.B. 505; 3 L.J.O.S.K.B. 109; 107 E.R. 857; 26 Digest (Repl.) 221, 1712.

Whitcher v. Hall (1826), 5 B. & C. 269; 8 Dow. & Ry.K.B. 22; 4 L.J.O.S.K.B. 167; 108 E.R. 101; 26 Digest (Repl.) 163, 1220.

- A** *Mines Royal Societies v. Magnay* (1854), 10 Exch. 489; 3 C.L.R. 171; 24 L.J.Ex. 7; 24 L.T.O.S. 203; 18 Jur. 1028; 3 W.R. 75; 156 E.R. 531; subsequent proceedings sub nom. *Magnay v. Mines Royal Co.* (1855), 3 Drew. 130; 24 L.J.Ch. 413; 24 L.T.O.S. 287; 1 Jur.N.S. 153; 3 W.R. 258; 3 Eq. Rep. 377; 31 Digest (Repl.) 570, 6908.
- Elliot v. Davis* (1800), 2 Bos. & P. 338; 126 E.R. 1314; 7 Digest (Repl.) 187, 198.
- B** *Rice v. Gordon* (1848), 11 Beav. 265; 50 E.R. 818; 26 Digest (Repl.) 75, 533.
- Austen v. Howard* (1816), 7 Taunt. 28; 2 Marsh. 352; 129 E.R. 11; subsequent proceedings (1817), 7 Taunt. 327; 1 Moore, C.P. 68; 129 E.R. 131; 26 Digest (Repl.) 73, 517.
- Harrison v. Nettleship* (1833), 2 My. & K. 423; 3 L.J.Ch. 86; 39 E.R. 1005; 26 Digest (Repl.) 112, 778.
- C** *Jones v. Geddes* (1845), 14 Sim. 606; 1 Ph. 724; 60 E.R. 493, L.C.; 11 Digest (Repl.) 550, 1570.
- Wodehouse v. Farebrother* (1855), 5 E. & B. 277; 3 C.L.R. 1353; 25 L.J.Q.B. 18; 25 L.T.O.S. 197; 1 Jur.N.S. 998; 119 E.R. 485; 26 Digest (Repl.) 114, 796.
- Phelps v. Prothero, Prothero v. Phelps* (1855), 7 De G.M. & G. 722; 25 L.J.Ch. 105; 26 L.T.O.S. 231; 2 Jur.N.S. 173; 4 W.R. 189; 44 E.R. 280, L.J.J.; 21 Digest (Repl.) 252, 344.
- D** *Carron Iron Co. v. Maclaren* (1855), 5 H.L.Cas. 416; 24 L.J.Ch. 620; 26 L.T.O.S. 42; 3 W.R. 597; 10 E.R. 961, H.L.; 11 Digest (Repl.) 547, 1543.
- Stirling v. Forrester* (1821), 3 Bli. 575; 4 E.R. 712; 26 Digest (Repl.) 143, 1048.
- Peto v. Peto* (1849), 16 Sim. 590; 13 L.T.O.S. 134; 13 Jur. 646; 60 E.R. 1003; 24 Digest (Repl.) 1121, 38.
- E** *Latch v. Wedlake* (1840), 11 Ad. & El. 959; 3 Per. & Dav. 499; 9 L.J.Q.B. 201; 113 E.R. 678; 12 Digest (Repl.) 36, 120.
- Dering v. Earl of Winchelsea* (1787), 1 Cox, Eq. Cas. 318; 29 E.R. 1184; sub nom. *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270; 26 Digest (Repl.) 145, 1065.
- F** **Appeal** from a decision of PAGE-WOOD, V.-C., *infra*, in an action by the plaintiff, Evans, for an injunction to restrain all further proceedings in an action at law against him, and for the delivery up of an indenture in order that it might be cancelled; or, for a declaration that he in equity was not liable thereunder, or that he was liable for a moiety only of the amount intended to be thereby secured.
- In 1849 the Rev. George Elton applied to the Anchor Life Assurance Co. for the loan of £210, which sum they agreed to advance upon Elton's insuring his life with them for £400 and procuring two responsible sureties for the repayment of the principal and interest on the £210. The policy was duly effected with the company, and an indenture executed, expressed to be made between the Rev. George Elton of the first part; the plaintiff and one William Bradley of the second part; and the defendants Brembridge, Wertheimer and Wilson, on behalf of the assurance company, of the third part. By that indenture Elton covenanted with the defendants to pay the principal and interest on the £210 by instalments as therein mentioned, and the premiums on the policy of assurance; and in case of any default on the part of Elton in the aforesaid payments, the indenture purported to contain a covenant by the plaintiff and Bradley, that they, or one of them, would be responsible for, and would pay, any moneys due from Elton, under that indenture, to the company, and unpaid by him. The indenture was executed by Elton, by the plaintiff, and by the company, and retained in the possession of the company.
- G** The £210 was duly advanced to, and received by, Elton. Default was made in payment of the first instalment of the principal and interest; when the defendants wrote to the plaintiff and called upon him for payment thereof "as one of the two co-sureties" of the said George Elton under the aforesaid indenture. The plaintiff then applied to his co-surety Bradley, and discovered that he had never executed the indenture. The plaintiff had executed it, on the faith that Bradley would also execute it. The assurance company did not inform the plaintiff, when they
- H**
- I**

advanced the money to Elton, that Bradley had not then executed the indenture; A
nor did they afterwards disclose that fact to the plaintiff; but applied to him in
the manner above stated.

In 1855 the assurance company brought an action against the plaintiff, to recover
the whole amount then due to them for principal and interest on the £210. To
that action the plaintiff pleaded an equitable plea, to the effect that he had never
executed the indenture as sole surety for Elton, but as intending to be co-surety B
with Bradley, and he had instituted this suit, filing his bill for an injunction as
stated above.

Rolt, Q.C. (Southgate with him), for the plaintiff.
Shapter for the defendants.

Cur. adv. vult. C

Dec. 11, 1855. **PAGE-WOOD, V.-C.**—The material point which I have to
determine in this case is, whether the plaintiff, who executed an indenture, as
one of two intended co-sureties to the Anchor Life Assurance Co. for the repay-
ment of a sum of £210 and interest, advanced by them to Elton, is entitled to the
relief in this court which he prays by his bill. That relief, so far as this part of D
the consideration is involved, is, that he may have the indenture delivered up to
be cancelled, or be declared liable to a moiety only, and not to the whole amount
thereby intended to be secured to the office.

As to the form of the indenture, there was no sort of question made; it was
prepared by the assurance company, in the ordinary form always adopted by them;
and the evident intention of all parties to it—I say of all parties, because, though E
Bradley did not execute it, the intention that he should do so is sufficiently
apparent on the face of the instrument—the intention was, that the plaintiff and
Bradley should be jointly and severally bound to the insurance office for the money
advanced by them to Elton. The plaintiff executed the deed, but Bradley did not.
The company retained possession of the deed, and advanced Elton the money upon
it; but, although they themselves knew that Bradley had never executed it, they F
not only never communicated that fact to the plaintiff when they advanced the
money, but they allowed him to remain in ignorance of it until they called upon
him “as one of two co-sureties” to repay the whole sum advanced by them to Elton.

Upon this state of things, it is of course impossible to hold the plaintiff liable
for the whole amount; but is he liable for the moiety? or has he any relief in equity
as to that? That depends upon the state of the authorities in reference to G
the subject-matter of this case so far as they can be brought to bear upon it. *Ex parte*
Gifford (1) appeared to me at first to have considerable bearing upon the present
case. There LORD ELDON seems to have intimated an opinion that, if, the moment
after a joint and several security has been entered into between a creditor and
two or more co-sureties for a debtor, the creditor releases one of the co-sureties, he
may do so without discharging the others or the other of them from his or their H
liability. If that be so, assuming the intention to have been apparent on the
instrument, as it is here; it is obvious that the co-surety or co-sureties who executed
the instrument must be in a much worse position than the parties originally meant
should be the result of their acts. I find, however, that be the weight of that
authority what it may, it was cited and commented upon with great care and
deliberation in *Nicholson v. Revill* (2), and ultimately in effect overruled. I

The inference I draw from that decision and from others is that it is now settled
law that a release to one of two co-sureties by a creditor is a release to the other.
Counsel for the defendants, however, contended that this was not a case of contract;
that you must treat this as the case of creditors' deeds, where, although some
creditors do not sign the deed, they may be held capable of taking advantage of its
provisions. The real point in *Re Semple* (3) to which he referred as an authority
for that proposition was, that the deed was delivered as an escrow, in which case
it would be good at law to take effect as a deed on a given condition. But here the

A question is, what is the effect of this instrument in equity, not at law? It being conceded that the plaintiff here cannot be made liable for the whole amount, the only real question is, as to the moiety? How far is he liable for that? That depends upon the effect of the intention of the parties.

In *Underhill v. Horwood* (4), LORD ELTON, L.C., said (10 Ves. at pp. 225, 226):

B "I had a notion which, I think, was not correct, that where a man executes a bond, meaning that it should be the joint bond of himself and another, and not his several bond, it would not be his several bond. But the cases go further. In such a case, however, unless there is something special, the man who has become so severally bound has a right to have that bond delivered up; for his intention was not to become a mere several obligee, but to be a joint and several obligee, and the rights are different both at law and equity; for if he is only a several obligee, he has no remedies over against any one; but if he is a joint and several obligee, or only a joint obligee, there is a right of contribution against the other sureties in equity from the earliest times, and of exoneration from the principal."

D When once any doubt as to the legal effect of the instrument is got rid of, it becomes a question of the intention of the parties. What was that intention here? Clearly, as I have said, that there should be a joint and several covenant by the two co-sureties; the deed was prepared by the assurance company, and retained by them and executed by the plaintiff and themselves on that footing. It appears to me also, that the party who procured that execution of the deed—I mean Elton—to be made, must have done so on the understanding that the creditors would tell the plaintiff all the facts connected with the execution of the deed; and that not having been done, I must hold that the original intention of the parties to this indenture ceased to continue when Bradley did not execute it. It is, therefore, impossible for me to hold the plaintiff bound by the deed, even as to a moiety; and, looking at the position of the creditors and the plaintiff, and what has passed between them, I am of opinion that he is entitled to have the deed delivered up to be cancelled, so far as he is concerned; and the decree must be made accordingly, and with costs.

The defendants appealed.

Rolt, Q.C., and Southgate for the plaintiff.

Willcock, Q.C., and Shapter for the defendants.

G **KNIGHT-BRUCE, L.J.**—The defendants seek to charge the plaintiff with a contract, into which he did not enter. They claim a right to judge and decide for him, that the execution by Mr. Bradley of the instrument in question was a matter of indifference to the plaintiff, except possibly as to a moiety of the debt or demand professed to be constituted by it. The plaintiff, however, was and is entitled to judge and decide upon that for himself and to say effectually (without H proving) that independently of the mere title to contribution as between sureties, he had reasonable grounds for thinking it important to him, and desiring that Mr. Bradley should be associated with him. There has been no judgment at law, and the pendency of the action is, as well as the pleadings in it, at least in a case circumstanced as is the present, immaterial, unless, perhaps, with regard to costs, notwithstanding the stage at which the action was when the bill was filed. But I conceive that in the circumstances of the matter there ought to be no costs at law on either side, that all proceedings in the action should be stayed, that there should be an injunction against suing the plaintiff under the deed, and that the defendants should pay the costs here, including those of the appeal.

TURNER, L.J.—There are two points raised in this case: First, whether having regard to the Common Law Procedure Act the court, supposing the plaintiff to be right on the merits, ought to interfere in his favour; secondly, whether on the merits, the plaintiff ought to be wholly discharged from liability or to be held liable

for half the sum secured. With respect to the former of these points, I do not mean to say that in every case in which an equitable defence has been pleaded at law this court will interfere by injunction to restrain proceedings in the action on the ground which has been pleaded at law, but in this case I feel no doubt as to it being the duty of this court to interfere. For really the point to be decided at law on the pleadings, as they stand, is one of common law pleading, and the merits raised by the equitable plea may never be reached. There may be a judgment upon the demurrer at law for the plaintiff at law, on the formal ground that the defendant at law has not pleaded, that he would not have executed the bond had he been aware that it would not be executed by the co-surety. I cannot think that the equitable rights of the plaintiff in equity ought to be disposed of by the result of these pleadings at law.

On the second point, I agree with KNIGHT-BRUCE, L.J. Several cases were cited in the argument. I do not think it necessary to discuss them, for I concur in thinking that as the plaintiff entered into the obligation upon the understanding and faith that another person would also enter it, he has a right in equity to be relieved, on the ground that the instrument has not been executed by the intended co-surety.

Appeal dismissed.

CAIRNCROSS AND OTHERS v. LORIMER AND OTHERS

[HOUSE OF LORDS (Lord Campbell, L.C., Lord Wensleydale and Lord Kingsdown), July 17, August 9, 1860]

[Reported 3 L.T. 190; 7 Jur.N.S. 149; 3 Macq. 827]

Estoppel—Estoppel by conduct—Acquiescence in course of conduct—Later claim to revert to former position.

In 1827 members of a dissenting congregation as trustees acquired some land and built a chapel and buildings thereon which were used by them for the congregation until 1852, when a majority of the congregation, including the minister, resolved to join another dissenting religious body. The union of the two congregations was completed, the minister was admitted a member of the church of the second dissenting body, and the first congregation was declared to belong to it. In 1856 members of the first congregation, who had formed part of the minority, instituted the present suit, declaring themselves to be the only surviving and continuing trustees and asking for a declaration that the chapel and buildings belonged to them and were held for their use and that of such others as adhered to the original doctrine of the first dissenting congregation. They claimed to be entitled to recover the chapel and buildings and to hold them in trust for those purposes.

Held: the members of this minority had, by their conduct in 1852 when they offered no opposition to what was proposed, intimated that they consented to what was done, which could not lawfully have been done without their consent, and, therefore, they were now estopped from maintaining their claim.

Notes. Considered: *Sarat Chunder Dey v. Gopal Chunder Lala* (1892), 8 T.L.R. 732; *J. C. Houghton & Co. v. Nothard, Lowe and Wills, Ltd.*, [1927] All E.R. Rep. 97. Referred to: *Lang v. Purves* (1862), 15 Moo.P.C.C. 389; *Re William Porter & Co.*, [1937] 2 All E.R. 361; *Re Eaves, Eaves v. Eaves*, [1939] 4 All E.R. 260; *Ledingham v. Bermejo Estancia Co.*, *Agar v. Bermejo Estancia Co.*, [1947] 1 All E.R. 749; *Hopgood v. Brown*. [1955] 1 All E.R. 550.

A As to estoppel in cases where persons stand by so that their consent is implied, see 15 HALSBURY'S LAWS (3rd Edn.) 241; and for cases see 21 DIGEST (Repl.) 411.

Case referred to:

(1) *Pickard v. Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest (Repl.) 869, 1103.

B Also referred to in argument:

Clarke and Chapman v. Hart (1858), 6 H.L.Cas. 633; 27 L.J.Ch. 615; 32 L.T.O.S. 380; 5 Jur.N.S. 447; 10 E.R. 1443, H.L.; 20 Digest (Repl.) 556, 2608.

Appeal by the plaintiffs from a decision of the Court of Session in an action brought by the appellants praying that it should be found and declared that the appellants, as the "Congregation of United Original Seceders in Carnoustie" had, for themselves and such others as might join them, the sole right to certain property which consisted of land with a place of worship and a dwelling-house thereon.

A dissenting congregation had existed for many years in Carnoustie, called the United Original Seceders. Some of the members, as trustees and managers, in 1827 acquired a piece of ground and built thereon a chapel and buildings, the conveyance being made to the said parties in the following terms:

D "That the said lot of ground and others hereby conveyed, is conveyed to, and shall be held by the said trustees in trust and for behoof of the Associate Congregation of Original Seceders at Carnoustie, to whom solely and those who shall in time coming accede to them, and continue in adherence to the aforesaid original principles of the secession, the said subjects shall belong; and if in future any question at any time shall arise among the members of the said congregation respecting their adherence to the said principles, it shall be determined in favour of those members for the time being who shall be ready to subscribe an affirmative answer to the five first questions of the formula framed and enacted by the Associate Synod of Original Seceders at Edinburgh, May 18, 1827, to be put at the ordination of ministers and elders."

F The congregation continued to use the chapel and ground for the purpose of their form of worship until 1852, when a large majority of the congregation, including the minister, resolved to join another dissenting body, called the Free Church, which was considered to hold substantially the same doctrines. The union was thereafter consummated, and the minister was admitted a member of the Free Church, and the congregation declared to belong to that body of dissenters.

G In 1856 certain persons, members of the original congregation, and who formed part of the minority, instituted the present suit, declaring themselves the only surviving and continuing trustees, and praying to have it declared that the chapel and grounds belonged to and were held for the use of them and such others as adhered to the original doctrine, that the appellants were entitled to recover the buildings, and hold them in trust for these purposes. The respondents pleaded that it was competent for the congregation to join the Free Church, and that the appellants had acquiesced in the proceeding, and were now estopped from complaining. The Court of Session held that the appellants had not objected in due time to the proposed amalgamation with the Free Church, and dismissed the suit, and the appellants brought the present appeal.

Roundell Palmer, Q.C., and Neish for the appellants.

I *The Lord Advocate (James Moncrieff) and Anderson, Q.C.,* for the respondents. Their Lordships took time for consideration.

Aug. 9, 1860. **LORD CAMPBELL, L.C.,** read the following opinion.—In this case I am of opinion that the judgment of the Court of Session ought to be affirmed.

Counsel for the appellants at your Lordships' Bar contended that this suit was to be treated like an information in the Court of Chancery in England in the name of the Attorney-General for the misapplication of the funds of an endowed charity, arguing that neither consent nor lapse of time could be any bar. Upon this principle,

if all the appellants had actually concurred in the union of the Associate Congregation of Carnoustie with the Free Church, and Mr. Meek, the incumbent, having died, they had joined in the election of a successor, according to the rules and discipline of the Free Church, and had applied to the Free Church Presbytery of Arbroath that the object of their choice should be instituted as the new Free Church minister at Carnoustie, they might many years afterwards have commenced a suit to eject him on the ground that he did not belong to the Associate Synod of Original Seceders. We need not now inquire how far this is to be considered an endowed charity (if we had to decide that question I should certainly consider that it is an endowed charity), or what may be the rights under the deed of Oct. 8, 1829, of the Associate Synod of Original Seceders, or of members of that religious persuasion who may hereafter become inhabitants of Carnoustie.

It is enough to observe that the appellants bring this action as individuals for a personal wrong which they individually suffer from the wrongful intrusion of others. Therefore, in this case, first, the maxim will apply, *volenti non fit injuria*; and secondly, the doctrine will apply which is to be found, I believe, in the laws of all civilised nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct.

Both these defences are set up to the present action. There is strong evidence to support the first, and to show that, according to the rules that govern the proceedings of deliberative assemblies, the union of the Associate Congregation of Seceders at Carnoustie with the Free Church, the appellants being present, was carried *nemine dissentiente*. But on this point there is some conflicting evidence, and there may be a difference of opinion; and, therefore, I do not make it the reason of my decision. I agree with the Lord Justice Clerk (JOHN INGLIS) and the other judges who thought that

"it is not necessary to prove concurrence on the part of the plaintiffs in the proceedings now challenged, and that proof of positive assent or concurrence is not necessary."

I am of opinion that, generally speaking, if a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice, than he would have had if it had been done by his previous licence.

We are asked what these Scottish judges mean by *tempestive* or *in debito temporis*, and, in analogy to the rules of negative or positive prescription, how many years, months, or days constitute *debitum temporis*. I answer, that it is not to be measured by any cycle of the heavenly bodies, and it must depend upon the circumstances of each particular case. The objection must be made before there has been such acquiescence with knowledge as to induce a reasonable belief that the act will not afterwards be challenged. The owner of a mill to which all the lands in a manor are compelled to do suit, if he sees an occupier of land within the manor erecting a grist mill, must not placidly look on till the new mill has been completed and the miller has established a thriving business by laying out all his capital upon it, and then bring an action for damages, praying for an injunction, and that the mill be prostrated as having been illegally erected.

In the present case it was known to the appellants and to all Carnoustie, that on June 3, 1852, there was said to be a vote of the Kirk session for the union, and that on July 6, 1852, the Rev. Mr. Meek had presented himself to the Free Presbytery of Arbroath, and that he had been solemnly admitted as the Free Church

- A** minister of the Carnoustie congregation, formerly attached to the Associate Synod of Original Seceders. The present action was not commenced till July, 1856, and for above three years there had not been the slightest complaint by the appellants. On the contrary, one of them had officiated occasionally as leader of the psalmody in the meeting-house at Carnoustie, under the Rev. Mr. Meek, who had become a member of the Free Church Presbytery of Arbroath, and qualified to be moderator of the general assembly of the Free Church of Scotland. If the objection is now made tempestive, so it might be made twenty years hence, and a similar action might then be maintained by one individual who, although he did not actively promote the union, had all along acquiesced in it and professed that he approved of it, while the whole of the Free Church and the whole of the Associate Synod of Original Seceders, except himself, rejoice in the amalgamation.
- C** It would be little creditable to the law of Scotland if the confusion and hardship and injustice which must necessarily be the effect of such a proceeding were to meet with judicial sanction. But various authorities were cited (and they might be greatly multiplied) to prove that in Scotland, according to well-recognised principles and unquestioned decisions, such an attempt must fail. I do not consider it at all necessary to refer more particularly to these authorities or to review the
- D** analogous class of cases in England, at the head of which stands *Pickard v. Sears* (1). I confess I should have been sorry if we had been obliged to pronounce a judgment which would have given such facility to the stirring up and the revival of disputes between the different dissenting religious persuasions into which Scotland is unhappily divided; and I feel great satisfaction in being able, according to the well-established principles of Scottish law, to advise your Lordships that this
- E** appeal be dismissed with costs.

I ought to mention that my noble and learned friend LORD WENSLEYDALE, who heard this case, dissents from the judgment that I have proposed to your Lordships.

- LORD KINGSDOWN.**—Having had an opportunity of seeing and considering the opinion which has just been expressed by my noble and learned friend on the Woolsack, it is unnecessary for me to say more than that I concur both in the conclusion at which he has arrived, and in the principles upon which that conclusion is founded. The question is not what would be the result if the information had been filed in this country by the Attorney-General, or if a similar proceeding had been taken by the Lord Advocate (I do not know whether it is so or not) I regard this as simply a suit instituted by these parties in respect of their own individual interests, and in respect of those interests I think that they are precluded by their own conduct from maintaining this action.
- F**

Appeal dismissed.

LYON v. REED AND OTHERS

[COURT OF EXCHEQUER (Parke, B., and others), April 24, July 6, 1844]

[Reported 13 M. & W. 285; 13 L.J.Ex. 377; 3 L.T.O.S. 302;
8 Jur. 762; 153 E.R. 118]

Landlord and Tenant—Lease—Surrender—Operation of law—Act by lessee which he is estopped from disputing—Acceptance of new lease from landlord before old lease surrendered.

The surrender of a lease by operation of law occurs where the owner of an estate has been a party to some act the validity of which he is by law afterwards estopped from disputing and which would not be valid if his estate had continued to exist. The law then treats the doing of such an act as amounting to a surrender. Thus, if a lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease. As the lessor could not grant a new lease until the prior lease had been surrendered, the law says that the acceptance of the new lease constitutes a surrender of the earlier lease. Such a surrender is not the result of intention. It takes place independently, and even in spite, of intention.

Estoppel—Estoppel in pais—Acts in pais—Acts of notoriety, formal and solemn.

Per PARKE, B.: Acts in pais which bind parties by way of estoppel are but few and are all acts which anciently were, and in contemplation of law have continued to be, acts of notoriety, not less formal or solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like.

Notes. Followed: *Creagh v. Blood* (1845), 3 Jo. & Lat. 133; *Nickells v. Atherstone* (1847), 10 Q.B. 944. Considered: *Phillips v. Miller* (1875), L.R. 10 C.P. 420. Followed: *Oastler v. Henderson* (1877), 2 Q.B.D. 575. Explained: *Wallis v. Hands*, [1891-4] All E.R.Rep. 719. Considered: *Foster v. Robinson*, [1950] 2 All E.R. 342. Referred to: *Doe d. Hill v. Fry* (1845), 6 L.T.O.S. 83; *Cannan v. Hartley* (1850), 9 C.B. 634; *Mines Royal Societies v. Magnay* (1854), 10 Exch. 489; *Davison v. Gent* (1857), 1 H. & N. 744; *Ward v. Lumley* (1860), 29 L.J.Ex. 322; *Grimwood v. Moss* (1872), L.R. 7 C.P. 360; *Fenner v. Blake*, [1900] 1 Q.B. 426; *Serjeant v. Nash, Field & Co.*, [1900-3] All E.R.Rep. 525; *Re Bruce, Brudenell v. Brudenell*, [1931] All E.R.Rep. 638; *Wirral Estates Ltd. v. Shaw*, [1932] All E.R.Rep. 43; *Re Arkwright's Settlement, Phoenix Assurance Co. v. Arkwright*, [1945] 1 All E.R. 404; *Buttery v. Pickard* (1945), 174 L.T. 144.

As to surrender by operation of law, see 23 HALSBURY'S LAWS (3rd Edn.) 685 et seq.; and for cases see 31 DIGEST (Repl.) 569 et seq.

Cases referred to:

- (1) *Thomas v. Cook* (1818), 2 B. & Ald. 119; 2 Stark. 408; 106 E.R. 310; 31 Digest (Repl.) 577, 6978.
- (2) *Walker v. Richardson* (1837), 2 M. & W. 882; Murp. & H. 251; 6 L.J.Ex. 229; 150 E.R. 1016; 31 Digest (Repl.) 577, 6975.
- (3) *Swift v. Heath* (1686), Carth. 109.
- (4) *Stone v. Whiting* (1817), 2 Stark. 235, N.P.; 31 Digest (Repl.) 577, 6984.

Also referred to in argument:

- Bonzi v. Stewart* (1842), 4 Man. & G. 295; 5 Scott, N.R. 1; 11 L.J.C.P. 228; 3 L.T.O.S. 301; 134 E.R. 121; 1 Digest (Repl.) 394, 556.
- Cowlishaw v. Cheslyn* (1830), 1 Cr. & J. 48; 19 Digest (Repl.) 85, 495.
- Doe d. Courtail v. Thomas* (1829), 9 B. & C. 288; 4 Man. & Ry.K.B. 218; 7 L.J.O.S.K.B. 214; 109 E.R. 107; 31 Digest (Repl.) 568, 6893.
- Whitley v. Gough* (1557), 2 Dyer, 140b; 73 E.R. 306; 31 Digest (Repl.) 575, 6955.
- Doe d. Bishop of Rochester v. Bridges* (1831), 1 B. & Ad. 847; 9 L.J.O.S.K.B. 113; 109 E.R. 1001; 31 Digest (Repl.) 569, 6897.

- A *Thorn v. Woollcombe* (1832), 3 B. & Ad. 586; 110 E.R. 213; 31 Digest (Repl.) 593, 7118.
Day v. Williams (1832), 2 Cr. & J. 460.
Magennis v. Mac-Culloch (1714-27), Gilb. Ch. 235; 25 E.R. 163; 31 Digest (Repl.) 568, *2292.
- B **Action** of debt by the plaintiff, as assignee of the reversion of houses and rope-walks at Shadwell, London, held under a lease from the Dean of St. Paul's, against the defendants, executors of Shakespeare Reed, deceased, in which the plaintiff claimed from the defendants nineteen years' rent, accrued due between Christmas, 1820, and Christmas, 1839, partly in the lifetime of Shakespeare Reed, who held the premises during his life, and partly since his decease, while the premises were in the possession of the defendants, his executors.
- C The premises in question were part of the property of the Dean of St. Paul's, who, on Dec. 26, 1803, demised a large estate at Shadwell, including the houses and premises in question, to two persons named Ord and Planta (who were trustees for the Bowes family) for a term of forty years commencing at Christmas, 1803, which would, therefore, expire at Christmas, 1843. On Mar. 24, 1808, Ord and
- D Planta granted an underlease of the houses and rope-walks in question to Shakespeare Reed for thirty-four years, commencing from Christmas, 1807, so that the term created by this underlease would expire at Christmas, 1841, leaving a reversion of two years in Ord and Planta. The rent sought to be recovered was the rent which accrued due on the underlease between Christmas, 1820, and Christmas, 1839. Previously to the month of October, 1811, Robert Hartshorn Barber and
- E Francis Charles Parry were appointed by the Court of Chancery trustees for the Bowes family in the place of Ord and Planta, and by an indenture dated Oct. 3, 1811, endorsed on the lease of 1803, all the property at Shadwell demised by that lease was assigned by Ord and Planta to Barber and Parry, the new trustees. Soon after this assignment, the Bowes family negotiated with the dean for a renewal of the lease of 1803, and, accordingly, a new lease was executed by the
- F dean, dated April 7, 1812, for a term of forty years from Christmas, 1811, which term would, therefore, endure till Christmas, 1851. In error this lease, instead of being made to Barber and Parry (the new trustees) in whom the old term (subject to the underlease to Reed) was vested, was made to Ord and Planta, the old trustees, the fact of the change of trustees, and the assignment of Oct. 3, 1811, having at the time escaped observation. On July, 1812, a private Act of Parlia-
- G ment was passed, enabling the dean and his successor for the time being, on a surrender of the existing lease, to grant leases of the Shadwell estate to the trustees of the Bowes family for successive terms of ninety-nine years, renewable for ever. In pursuance of this Act (which recited that Ord and Planta wished to be discharged from their trust and that John Osborn and John Burt had agreed to act as trustees in their place), by an indenture dated Aug. 31, 1812, and made between the dean,
- H of the first part, Thomas Bowes (the life tenant), of the second part, and Osborn and Burt, of the third part, the dean demised the Shadwell property to Osborn and Burt for a term of ninety-nine years. The demise was expressed to be made as well in consideration of the surrender of the lease of April 7, 1812, "being the lease last existing," as also of the rents and covenants, etc.
- I At some time before January, 1814, Mr. Bowes, and Osborn and Burt, his trustees, discovered the mistake, mentioned in the recital, into which they had fallen, and two further deeds were executed to cure the defect. By the former of these deeds, dated Jan. 6, 1814, and made between Barber and Parry, of the one part, and the dean, of the other part, reciting that, at the time of the granting of the lease of April 7, 1812, the estate and interest created by the original demise of Dec. 20, 1803, was vested in Barber and Parry, and also reciting that the fact of the assignment to them by the deed of Oct. 3, 1811, was not known to the parties by whom the private Act was solicited, it was witnessed that Barber and Parry did bargain, sell, and surrender to the dean the whole of the Shadwell estate to the intent that

the term of forty years, created by the lease of Dec. 26, 1803, might be merged in the freehold, and that the dean might execute a new lease to Osborn and Burt according to the private Act. By the other deed, dated Jan. 29, 1814, and made between the dean, of the first part, Thomas Bowes, of the second part, and Osborn and Burt, of the third part, the dean, in consideration of the effectual surrender of the two prior leases of Dec. 26, 1803, and April 7, 1812, and for the other considerations therein mentioned, demised the Shadwell estate to Osborn and Burt, their executors, administrators, and assigns, for a term of ninety-nine years. The interest of Osborn and Burt, under these two leases to them, by various assignments dated before Christmas, 1820, became vested in the plaintiff who, therefore, was entitled to recover the rent in question in this action if Osborn and Burt would have been so entitled.

Watson for the plaintiff.

Erle for the defendants.

Cur. adv. vult.

July 6, 1844. **PARKE, B.**, delivered the following judgment of the court. Such being the principal facts, we must consider how they bear on the several issues raised by the pleadings. The declaration, after stating the demise from the dean to Ord and Planta in 1803, and the underlease from them to Reed in 1808, goes on to state, that, by the deed of Oct. 3, 1811, Ord and Planta assigned all their interest in the premises to Barber and Parry, and that the dean, being seised of the reversion expectant on the term of forty years so assigned to Barber and Parry, by the indenture of Aug. 31, 1812, demised the premises to Osborn and Burt for a term of ninety-nine years, by virtue whereof they became entitled to the reversion for that term. The declaration then goes on to state that, by the indenture of Jan. 6, 1814, Barber and Parry assigned their interest to the dean, to the intent that he might grant a new lease to Osborn and Burt, and that afterwards, on Jan. 29, 1814, the dean, by the indenture of that date, made a new demise of the premises to Osborn and Burt for a fresh term of ninety-nine years, they by the same indenture surrendering the former term created by the demise of Aug. 31, 1812. The declaration then traces the title in the present plaintiff by assignment from Osborn and Burt previously to Christmas, 1820, and so claims title to the rent accrued due after that date.

To this declaration the defendants pleaded six pleas: First, a plea traversing the averment that, at the time of the demise to Osborn and Burt of Aug. 31, 1812, the dean was seised in fee of the reversion. Secondly, a plea traversing that demise. Thirdly, a plea traversing the assignment by Barber and Parry to the dean, to the intent that he might grant a new lease to Osborn and Burt. Fourthly, a plea traversing the surrender by Osborn and Burt of the first term of ninety-nine years. Fifthly, a special plea stating the indenture of April 7, 1812, whereby Ord and Planta became entitled to the reversion for forty years from Christmas, 1811, and so continued until, up to, and after the execution of the indenture of Jan. 29, 1814. Sixthly, a plea traversing the demise to Osborn and Burt by the indenture of Jan. 29, 1814.

Issue was joined on all the pleas except the fifth, and to that the plaintiff replied, that, after the making of the lease of April 7, 1812, and before the lease of Aug. 31, 1812, the private Act of Parliament was passed, authorising the dean, on the surrender of the existing lease, to grant a lease for ninety-nine years to Osborn and Burt, and the replication then averred that the lease of Aug. 31, 1812, was duly made in pursuance of the Act, and that, at the time when it was made, the lease of April 7, 1812, was duly surrendered. To this the defendants rejoined, traversing the surrender of the lease of April 7, 1812, and on this issue was joined.

The second, third, and sixth issues, it will be observed, are mere traverses of the execution of deeds which have been found to have been duly executed, and, as the traverse merely puts in issue the fact of the execution, and not the validity of the deeds or the competency of the parties to make them, the verdict on those

- A issues must certainly be entered for the plaintiff. So must that on the fourth issue, whereby the defendant traverses the surrender by Osborn and Burt of the first term of ninety-nine years, when the demise of the second term was made to them. It is quite clear that the acceptance of the second demise was of itself a surrender in law of the first, even if no surrender in fact was made. For whom, then, is the verdict on the remaining issues, the first and fifth, to be entered? The issue on
- B the fifth plea is, it will be observed, whether the lease of April 7, 1812, was duly surrendered at the time of the making of the indenture of Aug. 31, 1812. And the issue on the first plea is substantially the same, for if the plaintiff succeeds in showing that the indenture of April 7, 1812, was duly surrendered as set forth in his declaration, then it follows that the dean was at that time seised of the reversion, and so the plaintiff must succeed on the first issue; if, on the other hand, he
- C fail on the fifth issue, he must also fail on the first.

The real question for our consideration is whether the plaintiff has succeeded in showing that the term of April 7, 1812, was surrendered previously to the execution of the indenture of Aug. 31, 1812. It was argued by counsel for the plaintiff, first, that the circumstances of the case warranted the conclusion that there was an actual surrender in fact, and, if that be not so, then, secondly, that they prove

D conclusively a surrender in point of law.

- We will consider each of these propositions separately. First, as to a surrender in fact. The subject-matter of the lease of April 7, 1812, was, it must be observed, a reversion; a matter, therefore, lying in grant, and not in livery, and of which, therefore, there could be no valid surrender in fact otherwise than by deed; and what the plaintiff must make out, therefore, on this part of his case is, that,
- E before the execution of the first lease for ninety-nine years, Ord and Planta, by some deed not now forthcoming, assigned or surrendered to the dean the interest which they had acquired under the lease of April 7. But what is there to warrant us in holding that any such deed was ever executed? Prima facie a person setting up a deed in support of his title is bound to produce it. But undoubtedly this general obligation admits of many exceptions. Where there has been long enjoyment of any right, which could have had no lawful origin except by deed, then, in
- F favour of such enjoyment, all necessary deeds may be presumed, if there is nothing to negative such presumption. Has there, then, in this case, been any such enjoyment as may render it unnecessary to show the deed on which it has been founded? The only fact as to enjoyment stated in this case has precisely an opposite tendency; it is stated, so far as relates to the property, the rent of which
- G forms the subject of this action, namely the houses, etc., underlet to Reed, that no rent has ever been paid; and, therefore, as to that portion of the property included in the lease of April, 1812, there has certainly been no enjoyment inconsistent with the hypothesis that that lease was not surrendered.

- The circumstances on which the plaintiff mainly relies as establishing the fact of a surrender by deed, are the statements in the two leases to Osborn and Burt,
- H that they were made in consideration, inter alia, of the surrender of the lease of April 7, and the fact of that lease being found among the dean's instruments of title. These circumstances, however, appear to us to be entitled to very little weight. The ordinary course pursued on the renewal of a lease is for the lessee to deliver up the old lease on receiving the new one, and the new lease usually states that it is made in consideration of the surrender of the old one. No surrender by deed is necessary, where, as is commonly the case, the former lessee takes
- I the new lease, and all which is ordinarily done to warrant the statement of the surrender of the old lease as part of the consideration for granting the new one is that the old lease itself, the parchment on which it is engrossed, is delivered up. Such surrender affords strong evidence that the new lease has been accepted by the old tenant, and such acceptance undoubtedly operates as a surrender by operation of law, and so both parties get all which they require. We collect from the documents that this was the course pursued on occasion of making the lease of Dec. 26, 1803, and the lease of April 7, 1812; and we see nothing whatever

to warrant the conclusion that anything else was done on occasion of making the lease to Osborn and Burt. A

Where a surrender by deed was understood by the parties to be necessary, as it was with reference to the term assigned to Barber and Parry, there it was regularly made, and the deed of surrender was endorsed on the lease itself. There is no reason for supposing that the same course would not have been pursued as to the lease of April, 1812, if the parties had considered it necessary. If any surrender had been made, no doubt the deed would have been found with the other muniments of title. No such deed of surrender is forthcoming, and we see nothing to justify us in presuming that any such deed ever existed. We may add, that the statement in the new lease, that the old one had been surrendered, cannot certainly of itself afford any evidence against the present defendants, who are altogether strangers to the deed in which those statements occur. B

It remains to consider whether, although there may have been no surrender in fact, the circumstances of the case will warrant us in holding that there was a surrender by act and operation of law. On the part of the plaintiff it is contended that there is sufficient to justify us in coming to such a conclusion, for, it is said, the fact of the lease of April 7, 1812, being found in the possession of the dean, even if it does not go the length of establishing a surrender by deed, yet furnishes very strong evidence to show that the new lease granted to Osborn and Burt was made with the consent of Ord and Planta, the lessees under the deed of April 7, 1812. This, it is contended, on the authority of *Thomas v. Cook* (1), and *Walker v. Richardson* (2), is sufficient to cause a surrender by operation of law. C

To ascertain how far those two cases can be relied on as authorities we must consider what is meant by a surrender by operation of law. This term is applied to cases where the owner of a particular estate has been a party to some act the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of the new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman, and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent, and as this could not be done during his term, therefore, he is deemed in law to have surrendered his term to the lessor. D

It is needless to multiply examples. All the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says that the act itself amounts to a surrender. In such case it will be observed there can be no question of intention. The surrender is not the result of intention. It takes place independently, and even in spite, of intention. Thus, in the case which we have adverted to of a lessee taking a second lease from the lessor, or a tenant for life accepting a feoffment from the party in remainder, or a lessee accepting a rent-charge from his lessor, it would not at all alter the case to show that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsurrendered. In all these cases the surrender would be the act of the law, and would prevail in spite of the intention of the parties. These principles are all clearly deducible from the cases and doctrine laid down in *ROLLE* and collected in *VINER'S ABRIDGMENT*, tit. "Surrender," F. and G., and in *COMYNS' DIGEST*, tit. "Surrender," T. and I. 2, and E

A the authorities there referred to. But in all these cases, it is to be observed, the owner of the particular estate, by granting or accepting an estate or interest, is a party to the act which operates as a surrender. That he agrees to an act done by the reversioner is not sufficient. BROOKE, in his ABRIDGMENT, tit. "Surrender," pl. 48, questions the doctrine of FROWYK, C.J., who says: "If a termor agrees that the reversioner shall make a feoffment to a stranger, this is a surrender," and B he says he believes it is not law; and the contrary was expressly decided in *Swift v. Heath* (3), where it was held, that the consent of the tenant for life to the remainderman making a feoffment to a stranger did not amount to a surrender of the estate for life, and to the same effect are the authorities in VINER'S ABRIDGEMENT, "Surrender," F. 3 and 4.

C If we apply these principles to the case now before us, it will be seen that they do not at all warrant the conclusion, that there was a surrender of the lease of April 7, 1812, by act and operation of law. Even adopting, as we do, the argument of the plaintiff that the delivery up by Ord and Planta of the lease in question affords cogent evidence of their having consented to the making of the new lease, still there is no estoppel in such a case. It is an act which, like any other ordinary act in pais, is capable of being explained, and its effect must, therefore, depend, not D on any legal consequence necessarily attaching on and arising out of the act itself, but on the intention of the parties. Before the Statute of Frauds the tenant in possession of a corporeal hereditament might surrender his term by parol, and, therefore, the circumstance of his delivering up his lease to the lessor might afford strong evidence of a surrender in fact, but it certainly could not, on the principles E which does not depend on intention at all. On all these grounds, we are of opinion that there was in this case no surrender by operation of law, and we should have considered the case as quite clear had it not been for some modern cases, to which we must now advert.

The first case, we believe, in which any intimation is given that there could be a surrender by act and operation of law by a demise from the reversioner to a stranger with the consent of the lessee is that of *Stone v. Whiting* (4), in which F HOLROYD, J., intimates his opinion that there could, but there was no decision and he reserved the point. This was followed soon afterwards by *Thomas v. Cook* (1). That was an action of debt by a landlord against his tenant from year to year under a parol demise. The defence was that the defendant Cook, the tenant, had put another person (Parkes) in possession, and that Thomas, the plaintiff, had, with the assent of Cook, the defendant, accepted Parkes as his tenant, and that G so the tenancy of Cook had been determined. The Court of King's Bench held that the tenancy was determined by act and operation of law. It is matter of great regret that a case involving a question of so much importance and nicety, should have been decided by refusing a motion for a new trial. Had the case been put into a train for more solemn argument, we cannot but think that many considerations might have been suggested which would have led the court to pause H before they came to the decision at which they arrived. BAYLEY, J., in his judgment says that the jury were right in finding that the original tenant assented, because, he says, it was clearly for his benefit, an observation which forcibly shows the uncertainty which the doctrine is calculated to create.

I The acts in pais which bind parties by way of estoppel are but few, and are pointed out by LORD COKE (Co. Litt. 352 a). They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. But in what uncertainty and peril will titles be placed if they are liable to be affected by such accidents as those alluded to by BAYLEY, J. If the doctrine of *Thomas v. Cook* (1) should be extended, it may very much affect titles to long terms of years--mortgage terms, for

instance, in which it frequently happens that there is a consent, express or implied, by the legal termor to a demise from the mortgagor to a third person. To hold that such a transaction could, under any circumstances, amount to a surrender by operation of law, would be attended with most serious consequences. A

Thomas v. Cook (1) has been followed by other cases, and acted upon to a considerable extent. Whatever doubt, therefore, we might feel as to the propriety of the decision that in such a case there was a surrender by act and operation of law we should probably not have felt ourselves justified in overruling it. Perhaps the case itself and others of the same description might be supported upon the ground of the actual occupation by the landlord's new tenants, which would have the effect of eviction by the landlord himself in superseding the rent or compensation for use and occupation during the continuance of that occupation. But we feel fully warranted in not extending the doctrine of that case, which is open to so much doubt, especially as such a course might be attended with very mischievous consequences to the security of titles. B C

If, in compliance with these cases, we hold that there is a surrender by act and operation of law where the estates dealt with are corporeal and in possession, of which demises may, therefore, be made by parol or writing, and where there is an open and notorious shifting of the actual possession, it does not follow that we should adopt the same doctrine where reversions or incorporeal hereditaments are disposed of which pass only by deed. With respect to these, we think we ought to abide by the ancient rules of the common law, which have not been broken in upon by any modern decision, for that of *Walker v. Richardson* (2), which has been much relied on in argument, is not to be considered as any authority in this respect, inasmuch as the distinction that the right to tolls lay in grant was never urged, and probably could not have been with success, as the leases, perhaps, passed the interest in the soil itself. Moreover, according to the report of that case, it would seem that the new lessees had, before they accepted their lease, become entitled to the old lease by an actual assignment from the old lessee. If this were so, then there could, of course, be no doubt but that the old lease was destroyed by the grant and acceptance of the new one. It is, however, right to say, that we believe this statement to have crept into the report inadvertently, and that there was not, in fact, any such assignment. D E F

The result of our anxious consideration of this case is that the verdict on the issues on the first plea and on the rejoinder to the replication to the fifth plea, must be entered for the defendants, and as those pleas go to the whole cause of action, the judgment must be for them. G

Judgment for defendants.

A

FREEMAN AND ANOTHER v. COOKE

[COURT OF EXCHEQUER (Parke, Alderson, Rolfe and Platt, BB.), June 22, 26, July 11, 1848]

B

[Reported 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114;
12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652]

Estoppel—Estoppel by representation—False representation that goods belonged to another—Seizure of goods under writ of fi. fa. against that other—True owner not estopped from complaining of wrongful seizure.

C

Prior to his bankruptcy and in anticipation of a distress W. removed his goods first to the house of his brother J. and later to that of his brother B. When the sheriff's officers entered B.'s house, W. told them that the goods belonged to B., then that they belonged to J., and finally that they were his own. The goods were seized under a writ of fi. fa. against B. and were sold in the name of B. In an action of trover by the assignees of the bankrupt W. against the sheriff for conversion of the goods, the jury found that the goods belonged to W. and that W. represented to the officers that the goods were those of B., so inducing them, by that false representation, to seize the goods.

D

Held: the finding of the jury did not estop the bankrupt W. and the plaintiffs, his assignees, from complaining of the seizure of the goods as their own.

Estoppel—Pleading—Estoppel by record and deed—Estoppel in pais.

E

Per Curiam: (i) Estoppels by record and by deed must, in order to make them binding, be pleaded, if there is an opportunity, otherwise the party omitting to plead waives the estoppel and leaves the cause at large, on which the jury may find according to the truth; (ii) with respect to estoppels in pais, in certain cases they need not be pleaded in order to make them obligatory: e.g., where a man represents another as his agent in order to procure a person to contract with him as such, and he does contract, the contract binds the principal in the same manner as if he had made it himself; it is his contract in point of law, and no form of pleading could leave such a matter at large and enable the jury to treat it as no contract. The same rule appears to apply to all similar estoppels in pais.

F

G

Estoppel—Estoppel by representation—Wilfully causing another to believe certain fact—Negligently or culpably standing by—"Wilfully"—Intention that representation be acted on.

H

Per Curiam: Where one, by his words or conduct, "wilfully" causes another to believe in the existence of a certain state of things and induces him to act on that belief or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. More broadly, a party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. The term "wilfully" in the rule must be understood to mean that, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon and that it is acted upon accordingly.

I

Estoppel—Estoppel by conduct—Inference by reasonable man that representation be true—Belief that he was meant to act thereon.

Estoppel—Estoppel by conduct—Negligence or omission where duty to disclose truth.

Whatever a man's real intention may be, if he so conducts himself that a reasonable person would take a representation made by the man to be true and believe that it was meant that he should act on it, and he does act on it as

true, the party making the representation is precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast on a person, by usage or trade or otherwise, to disclose the truth, may often have the same effect. A

Notes: Applied: *Howard v. Hudson* (1853), 2 E. & B. 1. Considered: *Jordon v. Money* (1854), post p. 350. Applied: *A.-G. v. Stephens* (1855), 1 K. & J. 724. Considered: *Clarke and Chapman v. Hart* (1858), 6 H.L.Cas. 633; *Cornish v. Abington* (1859), 4 H. & N. 549; *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175. Applied: *Re Bahia and San Francisco Rail. Co.* (1868), L.R. 3 Q.B. 584; *Webb v. Herne Bay Comrs.* (1870), L.R. 5 Q.B. 642; *Smith v. Hughes*, [1861-73] All E.R.Rep. 632; *McKenzie v. British Linen Co.* (1881), 6 App. Cas. 82. Considered: *Scarf v. Jardine*, [1881-5] All E.R.Rep. 651. Applied: *Hall v. West-End Advance Co.* (1883), Cab. & El. 161; *Manchester and Oldham Bank v. Cook* (1883), 49 L.T. 674; *Miles v. McIlwraith* (1883), 8 App. Cas. 120. Considered: *Low v. Bouverie*, [1891-4] All E.R.Rep. 348. Applied: *Re Bentley and Yorkshire Breweries, Ex parte Harrison* (1893), 69 L.T. 204; *Henderson v. Williams*, [1895] 1 Q.B. 521; *Pierson v. Altrincham U.D.C.* (1917), 86 L.J.K.B. 969; *London Joint Stock Bank, Ltd. v. Macmillan*, [1918-19] All E.R.Rep. 30; *Sullivan v. Constable* (1932), 48 T.L.R. 267. Referred to: *Halifax v. Lyle* (1849), 3 Exch. 446; *Foster v. Mentor Life Assurance* (1854), 3 E. & B. 48; *Kent v. Thomas* (1856), 1 H. & N. 473; *Bigg v. Strong* (1857), 3 Sm. & G. 592; *Bill v. Richards* (1857), 26 L.J.Ex. 409; *Dunston v. Paterson* (1857), 2 C.B.N.S. 495; *Simpson v. Accident Death Insurance Co.* (1857), 2 C.B.N.S. 257; *Richards v. Johnson* (1859), 5 Jur.N.S. 520; *Fletcher v. Fletcher* (1859), 1 E. & E. 420; *Ward v. South Eastern Rail. Co.* (1860), 2 E. & E. 812; *Cave v. Mills* (1861), 8 Jur.N.S. 363; *M'Cance v. London and North Western Rail. Co.* (1861), 7 Jur.N.S. 1304; *White v. Greenish* (1861), 11 C.B.N.S. 209; *Betts v. Menzies* (1862), 10 H.L.Cas. 118; *Ashpittel v. Bryan* (1863), 3 B. & S. 474; *Harding v. Hall* (1866), 14 L.T. 410; *Brook v. Hook* (1871), L.R. 6 Exch. 89; *Macted v. Paine* (1871), L.R. 6 Exch. 132; *Stimpson v. Farnham* (1871), L.R. 7 Q.B. 175; *Citizen's Bank of Louisiana v. First National Bank of New Orleans* (1873), L.R. 6 H.L. 352; *Wallis v. Biddick* (1873), 22 W.R. 76; *Arnold v. Cheque Bank, Same v. City Bank* (1876), 1 C.P.D. 578; *Harris v. Great Western Rail. Co.* (1876), 1 Q.B.D. 515; *Polak v. Everett*, [1874-80] All E.R.Rep. 991; *Roden v. London Small Arms Co.* (1876), 46 L.J.Q.B. 213; *Johnson v. Crédit Lyonnais Co.* (1877), 3 C.P.D. 32; *Burkinshaw v. Nicolls* (1878), 39 L.T. 308; *Joseph v. Webb*, *Joseph v. Lyons*, *Joseph v. Pidock*, *Joseph v. Jones* (1884), Cab. & El. 262; *Russell v. Watts* (1885), 10 App. Cas. 590; *Roe v. Mutual Loan Fund Association* (1887), 56 L.T. 631; *Bank of England v. Vagliano Bros.*, [1891-4] All E.R.Rep. 93; *Sarat Chunder Dey v. Gopal Chunder Lala* (1892), 56 J.P. 741; *Balkis Consolidated Co. v. Tomkinson*, [1891-4] All E.R.Rep. 982; *Scholfield v. Lord Londesborough*, [1895] 1 Q.B. 536; *Bloomenthal v. Ford*, [1897] A.C. 156; *Farquharson Bros. & Co. v. King & Co.*, [1901] 2 K.B. 697; *Bell v. Marsh*, [1903] 1 Ch. 528; *Sheffield Corpn. v. Barclay*, [1903] 2 K.B. 580; *Morison v. London County and Westminster Bank* (1913), 108 L.T. 379; *Bradford v. Price* (1923), 92 L.J.K.B. 871; *Jones (Holloway) v. Woodhouse*, [1923] 2 K.B. 117; *Farrow v. Orttewell*, [1933] All E.R.Rep. 132; *Square v. Square (otherwise Bewicke)* (*Cowan Intervening*), *Cowan (otherwise Youell) v. Cowan*, [1935] All E.R.Rep. 781; *Official Trustee of Charity Lands v. Ferriman Trust, Ltd.*, [1937] 3 All E.R. 85; *Re Swanson's Agreement*, *Hill v. Swanson*, [1946] 2 All E.R. 628; *Wilson and Meeson (a Firm) v. Pickering*, [1946] 1 All E.R. 394; *Fung Kai Sun v. Chan Fui Hing*, [1951] A.C. 489; *Re Webb, Sandom v. Webb*, [1951] 2 All E.R. 131; *Marquess of Bute v. Barclays Bank, Ltd.*, [1954] 3 All E.R. 365. B C D E F G H I

As to estoppel in pais by representation, see 15 HALSBURY'S LAWS (8rd Edn.) 169 et seq.; and for cases see 21 DIGEST (Rep.) 366 et seq.

As to wrongful and irregular execution, see 16 HALSBURY'S LAWS (8rd Edn.) 36 et seq.; and for cases see 21 DIGEST (Repl.) 636 et seq.

A Cases referred to :

(1) *Trevilian v. Lawrence* (1704), Holt, K.B. 282; 2 Ld. Raym. 1086, 1048; 6 Mod. Rep. 256; 1 Salk. 276; 3 Salk. 151; 87 E.R. 1003; 21 Digest (Repl.) 256, 370.

B

(2) *Magrath v. Hardy* (1838), 4 Bing.N.C. 782; 6 Scott, 627; 1 Arn. 352; 7 L.J.C.P. 299; 2 Jur. 594; 132 E.R. 990; sub nom. *McGrath v. Hardy*, 6 Dowl. 749; 21 Digest (Repl.) 312, 715.

(3) *Pickard v. Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest (Repl.) 369, 1103.

(4) *Graves v. Key* (1832), 3 B. & Ad. 313; 110 E.R. 117; 12 Digest (Repl.) 559, 4236.

C

(5) *Heane v. Rogers* (1829), 9 B. & C. 577; 4 Man. & Ry.K.B. 486; 7 L.J.O.S.K.B. 285; 109 E.R. 215; 21 Digest (Repl.) 384, 1178.

(6) *Gregg v. Wells* (1839), 10 Ad. & El. 90; 2 Per. & Dav. 296; 8 L.J.Q.B. 193; 3 Jur. 555; 113 E.R. 35; 21 Digest (Repl.) 457, 1575.

Also referred to in argument :

Coote v. Lightworth (1596), Moore, K.B. 457; 72 E.R. 692; 43 Digest 452, 802.

Thurbane's Case (1663), Hard. 323; 145 E.R. 479; 43 Digest 452, 801.

Price v. Harwood (1811), 3 Camp. 108, N.P.; 21 Digest (Repl.) 504, 29.

Coles v. Bank of England (1839), 10 Ad. & El. 437; 2 Per. & Dav. 521; 9 L.J.Q.B. 36; 4 Jur. 266; 113 E.R. 166; 3 Digest (Repl.) 133, 30.

Doe v. Wellsman (1848), 2 Exch. 368; 6 Dow. & L. 179; 18 L.J.Ex. 277.

Armstrong v. Norton, 2 I.L.R. 96.

E

Sanderson v. Collman (1842), 4 Man. & G. 209; 4 Scott, N.R. 638; 11 L.J.C.P. 270; 134 E.R. 86; 6 Digest (Repl.) 284, 2077.

Doe v. Huddart (1835), 2 Cr.M. & R. 316; 4 Dowl. 487; 1 Gale, 260; 5 Tyr. 846; 4 L.J.Ex. 316; 150 E.R. 137; 21 Digest (Repl.) 312, 714.

Doe v. Wright (1839), 10 Ad. & El. 763; 2 Per. & Dav. 672; 113 E.R. 289; 21 Digest (Repl.) 215, 141.

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Doe d. Christmas v. Oliver (1829), 10 B. & C. 181; 5 Man. & Ry.K.B. 202; 8 L.J.O.S.K.B. 137; 109 E.R. 418; 21 Digest (Repl.) 363, 1068.

Hooper v. Smith (1763), 1 Wm. Bl. 441; 96 E.R. 252; 4 Digest (Repl.) 11, 9.

Lyon v. Reed (1844), 13 M. & W. 285; 13 L.J.Ex. 377; 3 L.T.O.S. 302; 8 Jur. 762; 153 E.R. 118; 21 Digest (Repl.) 368, 1093.

Armani v. Castrigue (1844), 13 M. & W. 443; 2 Dow. & L. 432; 14 L.J.Ex. 36; 153 E.R. 185; 6 Digest (Repl.) 293, 2151.

G

Collins v. Evans (1844), 5 Q.B. 820; 21 Digest (Repl.) 675, 1644.

Clarke v. Clarke (1806), 6 Esp. 61; 4 Digest (Repl.) 211, 1891.

Like v. Howe (1806), 6 Esp. 20, N.P.; 21 Digest (Repl.) 422, 1382.

Watson v. Wace (1826), 5 B. & C. 153; 7 Dow. & Ry.K.B. 633; 108 E.R. 57; 21 Digest (Repl.) 221, 205.

H

Sheffield, Ashton-under-Lyne and Manchester Rail. Co. v. Woodcock (1841), 7 M. & W. 574; 2 Ry. & Can. Cas. 522; 11 L.J.Ex. 26; 151 E.R. 894; 10 Digest (Repl.) 1223, 8575.

Banks v. Newton (1847), 4 Dow. & L. 632; 2 New Pract. Cas. 156; 2 Saund. & C. 1; 16 L.J.Q.B. 142; 8 L.T.O.S. 370, 395; 11 Jur. 208; on appeal, 11 Q.B. 340; 21 Digest (Repl.) 396, 1244.

I

Wilson v. Stubs (1619), Hob. 330; 80 E.R. 472.

Rule Nisi to enter a verdict for the defendant in an action of trover against the defendant for conversion of a bankrupt's goods seized before the bankruptcy under a writ of fi. fa. against the bankrupt's two brothers. The defendant pleaded not guilty, not possessed and leave and license. The plaintiffs joined issue on the first two pleas and traversed the third and issue was joined on the traverse.

The plaintiffs were the assignees of the bankrupt, William Broadbent, and the defendant was the sheriff of Yorkshire. Prior to the bankruptcy, William Broadbent, in anticipation of a distress, had removed his goods to the house of his brother

Joseph and afterwards to the house of his brother Benjamin. When the sheriff's officers entered Benjamin's house, William told them that the goods belonged to his brother Benjamin, supposing that they had no writ against Benjamin and that the writ was against him. When the writ was produced and it was found to be against Benjamin, William told the officers that the goods belonged to another brother, Joseph. Finally, he said that the goods were his own. The goods were seized and sold as those of Benjamin. The defendant contended that the statements and conduct of William operated as conclusive evidence against him that the goods were not his at the time of the conversion and that the plaintiffs were also bound. A
B

At the trial before ALDERSON, B., at the Liverpool Assizes, the jury found that the goods were, in fact, William's and also "that William represented the goods to the sheriff's officers as the goods of Benjamin, so as to induce them, by that false representation to seize the goods." The judge directed a verdict for the plaintiffs, with leave reserved to the defendant to move to enter verdict in his favour on any of the issues. The defendant obtained the rule already mentioned. C

Watson, Atherton and H. Hill showed cause against the rule.

Knowles and Hall supported the rule.

Cur. adv. vult. D

July 11, 1848. **PARKE, B.**, delivered the following judgment of the court.—In this case, which was argued before ALDERSON, ROLFE and PLATT, BB., and myself, at the sittings after the last term, we are all of opinion that the rule ought to be discharged.

It was an action of trover by the assignees of William Broadbent against the sheriff of Yorkshire for goods of the bankrupt. There were pleas of not guilty, not possessed, and leave and license. The conversion was the seizure of the goods by the defendant's officers, under a fi. fa. against Joseph and Benjamin Broadbent. It appeared, that, when the officers entered, the bankrupt told them the goods seized were the property of Benjamin; he did so, supposing that they had no writ against Benjamin. Afterwards he contradicted that statement, and said they were the goods of his brother Joseph. It was contended, that this representation bound William, because it induced the officers to seize; and that he could not complain of that act, nor could the assignees who claimed under him. ALDERSON, B., left a question to the jury upon this part of the case, the finding on which he reserved for the consideration of the court, giving leave to enter a verdict for the defendants on the issue on the plea of Not Possessed. The jury found, that the goods were really William's; but they also found E
F
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"that William represented the goods to the sheriff's officer as the goods of Benjamin, so as to induce him, by that false representation, to seize them";

and the question is whether this finding is sufficient to estop the bankrupt and the plaintiffs as assignees, from complaining of the seizure of these goods as their own? H

The case was very fully argued before us, and many questions discussed on the law of estoppels, on which it is unnecessary to give an opinion. It is certain that estoppels by record and by deed must, in order to make them binding, be pleaded, if there be an opportunity, otherwise the party omitting to plead it waives the estoppel, and leaves the cause at large, on which the jury may find according to the truth: *Trevivian v. Lawrence* (1); *Magrath v. Hardy* (2). With respect to estoppels in pais, in certain cases there is no doubt they need not be pleaded in order to make them obligatory. For instance, where a man represents another as his agent in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he made it himself, and is his contract in point of law; and no form of pleading could leave such a matter at large, and enable the jury to treat it as no contract. The same rule appears to apply to all similar estoppels in pais, as the editor of *Wms. SAUND.*, Vol. 1, at p. 326, n. 2, expresses his opinion. The estoppel, therefore, if it be one created I

A by the conduct of the bankrupt in this case, is not opened by the omission to plead it, and the only question is whether it be an estoppel.

It is contended that it was, upon the authority of the rule laid down in *Pickard v. Sears* (3). That rule is (6 Ad. & El. at p. 474):

B "that, where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

C That was founded on previous authorities, in *Graves v. Key* (4) and *Heane v. Rogers* (5), and has been acted upon in some cases since. The principle is stated more broadly by LORD DENMAN, C.J., in *Gregg v. Wells* (6), where his Lordship says (10 Ad. & El. at p. 98):

"A party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

D Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied, is not now the question; but the proposition contained in the rule itself, as above laid down in *Pickard v. Sears* (3), must be considered as established.

E By the term "wilfully," however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As,

F for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised.

G But if we apply this rule, either in the terms in which it is enunciated in *Pickard v. Sears* (3), or as it is above expounded, the finding of the jury is insufficient to entitle the defendant to have a verdict entered for him on the plea of Not Possessed. It is not found that he intended to induce the officer to seize the goods as those of Benjamin; and, whatever intention he had on his first statement, was done away with by an opposite statement before the seizure took place. Nor can it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representation, taken altogether. In truth, in most cases to which the doctrine in

H *Pickard v. Sears* (3) is to be applied, the representation is such as to amount to the contract or licence of the party making it. Here there is no pretence for saying it amounted to a licence, and a contract is out of the question. We, therefore, think that the rule must be discharged.

Rule discharged.

WOOD v. LEADBITTER

[COURT OF EXCHEQUER (Pollock, C.B., Alderson and Rolfe, BB.), January 17, 18, 21, February 22, 1845]

[Reported 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433;
9 J.P. 312; 9 Jur. 187; 153 E.R. 351]

Real Property—Incorporeal hereditament—Affecting land—Easement—Grant—Transfer—Need to be by deed.

No incorporeal hereditament affecting land, e.g., a right of common or a right of way, can be created or transferred otherwise than by deed.

Licence—Revocation—Parol licence affecting use of land—Revocation without return of money paid for it—Effect of coupling with grant.

A parol licence affecting the use of land is revocable by one party at any time and without repayment of money which has been paid for it unless it is coupled with a grant of a nature capable of being made by parol. Where the licence is coupled with a grant of something incapable of being granted otherwise than by deed it is a mere licence and revocable.

Semble: A mere licence, though under seal, is revocable.

Notes. As to the revocation of a licence, see *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.*, [1947] 2 All E.R. 331.

Considered. *Roffey v. Henderson* (1851), 17 Q.B. 574; *Frogley v. Lovelace* (1859), John. 333; *Hurst v. Picture Theatres, Ltd.*, [1914-15] All E.R.Rep. 836; *Winter Garden Theatre (London) v. Millenium Productions, Ltd.*, [1947] 2 All E.R. 331. Referred to: *Langford v. Brighton, Lewes and Hastings Rail. Co.* (1845), 4 Ry. & Can. Cas. 69; *Mayfield v. Robinson* (1845), 7 Q.B. 486; *Thomas v. Fredericks* (1847), 11 Jur. 942; *Adams v. Andrews* (1850), 15 Q.B. 284; *Hewitt v. Isham* (1851), 7 Exch. 77; *Taplin v. Florence* (1851), 10 C.B. 744; *Electric Telegraph Co. v. Salford Overseers* (1855), 11 Exch. 181; *Evans v. Robins* (1862), 1 H. & C. 302; *Francis v. Cockrell* (1870), 22 L.T. 203; *Vaughan v. Hampson* (1875), 33 L.T. 15; *McManus v. Cooke* (1887), 35 Ch.D. 681; *Ward v. Livesey* (1887), 5 R.P.C. 102; *Aldin v. Latimer, Clark, Muirhead & Co.*, [1894] 2 Ch. 437; *Thomas v. Jennings* (1896), 66 L.J.Q.B. 5; *Kerrison v. Smith*, [1895-9] All E.R.Rep. 215; *Jones v. Tankerville*, [1909] 2 Ch. 440; *Minister of Health v. Bellotti*, [1944] 1 All E.R. 238; *Thompson v. Park*, [1944] 2 All E.R. 477; *Bendall v. WcWhirter*, [1952] 1 All E.R. 1307; *Errington v. Errington*, [1952] 1 All E.R. 149; *Martin-Baker Aircraft Co. v. Canadian Flight Equipment, Ltd.*, *Same v. Murison*, [1955] 2 All E.R. 722.

As to distinction between easement and licence and creation of easements, see 12 HALSBURY'S LAWS (3rd Edn.) 524, 529 et seq.; and for cases see 19 DIGEST (Repl.) 21 et seq.

Cases referred to:

- (1) *Webb v. Paternoster* (1619), Poph. 151; Godb. 282; Palm. 71; 2 Roll. Rep. 143, 152; 79 E.R. 1250; sub nom. *Plummer v. Webb*, Noy 98; 30 Digest (Repl.) 541, 1748.
- (2) *Wood v. Lake* (1751), Say. 3; 96 E.R. 783; 30 Digest (Repl.) 537, 1713.
- (3) *Tayler v. Waters* (1816), 7 Taunt. 374; 2 Marsh. 551; 129 E.R. 150; 19 Digest (Repl.) 21, 83.
- (4) *Wood v. Manley* (1839), 11 Ad. & El. 34; 3 Per. & Dav. 5; 9 L.J.Q.B. 27; 3 Jur. 1028; 113 E.R. 325; 18 Digest (Repl.) 342, 904.
- (5) *Thomas v. Sorrell* (1673), Vaugh. 330; 1 Lev. 217; 1 Freem.K.B. 85, 137; 3 Keb. 264; 124 E.R. 1098, Ex. Ch.; 19 Digest (Repl.) 214, 1571.
- (6) *Mallory's Case* (1601), 5 Co. Rep. 111b; 77 E.R. 228; sub nom. *Pain v. Malory*, Cro. Eliz. 832; 30 Digest (Repl.) 364, 31.
- (7) *R. v. Horndon-on-the-Hill (Inhabitants)* (1816), 4 M. & S. 562; 105 E.R. 942; 19 Digest (Repl.) 21, 81.

- A (8) *Hewlins v. Shippam* (1826), 5 B. & C. 221; 7 Dow. & Ry.K.B. 783; 4 L.J.O.S.K.B. 241; 108 E.R. 82; 19 Digest (Repl.) 6, 2.
- (9) *Fentiman v. Smith* (1803), 4 East, 107; 102 E.R. 770; 19 Digest (Repl.) 21, 80.
- (10) *Bryan v. Whistler* (1828), 8 B. & C. 288; 2 Man. & Ry.K.B. 318; 6 L.J.O.S.K.B. 302; 108 E.R. 1050; 19 Digest (Repl.) 26, 118.
- B (11) *Cocker v. Cowper* (1834), 1 Cr.M. & R. 418; 5 Tyr. 103; 149 E.R. 1143; 19 Digest (Repl.) 27, 120.
- (12) *Wallis v. Harrison* (1838), 4 M. & W. 538; 1 Horn & H. 405; 8 L.J.Ex. 44; 2 Jur. 1019; 150 E.R. 1543; 19 Digest (Repl.) 28, 130.
- (13) *Winter v. Brockwell* (1807), 8 East, 308; 103 E.R. 359; 19 Digest (Repl.) 28, 128.
- C (14) *Liggins v. Inge* (1831), 7 Bing. 682; 5 Moo. & P. 712; 9 L.J.O.S.C.P. 202; 131 E.R. 263; 19 Digest (Repl.) 27, 119.

Rule Nisi obtained by the plaintiff in an action brought by him against the defendant for assault and false imprisonment.

Kelly, Q.C., Wortley, Q.C., Martin, Q.C., and Peacock for the defendant, showed cause.

- D *Jervis, Q.C., Humphrey and Petersdorff* for the plaintiff, supported the rule.

Cur. adv. vult.

Feb. 22, 1845. **ALDERSON, B.**, delivered the following judgment of the Court.—This was an action for an assault and false imprisonment. The plea (upon which alone any question arose) was that at the time of the alleged trespass the plaintiff was in a certain close of Lord Eglinton's, and the defendant, as the servant of Lord Eglinton, and by his command, laid his hands upon the plaintiff in order to remove him from the said close, using no unnecessary violence. The replication was that at the time of such refusal the plaintiff was in the close by the leave and licence of Lord Eglinton. The leave and licence was traversed by the defendant, and issue was joined on that traverse.

- F On the trial, it appeared that the place from which the plaintiff was removed by the defendant was the inclosure attached to and surrounding the Great Stand on the Doncaster Racecourse; that Lord Eglinton was steward of the races there in the year 1843; and that tickets were sold in the town of Doncaster at one guinea each, which were understood to entitle the holders to come into the stand and the inclosure surrounding it, and to remain there every day during the races. These tickets were not sealed, nor were they signed by Lord Eglinton, but it must be assumed they were issued with his privity. It further appeared that the plaintiff, having purchased one of these tickets, came to the stand during the races of the year 1843, and was there or in the inclosure while the races were going on. While there, and during the races, the defendant, by the order of Lord Eglinton, desired him to depart, and gave him notice that if he did not go away force would be used to turn him out. It must be assumed that the plaintiff had in no respect misconducted himself, and that if he had not been requested to depart, his coming upon and remaining in the inclosure would have been an act justified by his purchase of the ticket. The plaintiff refused to go, and thereupon the defendant, by the order of Lord Eglinton, forced him out, using no unnecessary violence.

- I **ROLFE, B.**, who tried the case, in directing the jury, told them that, assuming the ticket to have been sold to the plaintiff under the sanction of Lord Eglinton, still it was lawful for Lord Eglinton, without returning the guinea and without assigning any reason for what he did, to order the plaintiff to quit the inclosure; and that if they, the jury, were satisfied that notice was given to the plaintiff requiring him to quit the ground, and that before he was forcibly removed by the defendant a reasonable time had elapsed during which he might have conveniently gone away, then the plaintiff was not, at the time of the removal, on the place in question by the leave and licence of Lord Eglinton. On this direction the jury found a verdict for the defendant. In last Michaelmas Term counsel for the plaintiff

obtained a rule nisi to set aside the verdict for misdirection, on the ground A
that, under the circumstances, Lord Eglinton must be taken to have given the
plaintiff leave to come into and remain in the inclosure during the races; that
such leave was not revocable, at all events, without returning the guinea; and so,
at the time of removal, the plaintiff was in the inclosure by the leave and licence
of Lord Eglinton. Cause was shown during last Term, and the question was
argued before my Lord Chief Baron, ROLFE, B., and myself, and on account of the B
conflicting authorities cited in the argument we took time to consider our judgment,
which we are now prepared to deliver.

That no incorporeal inheritance affecting land can either be created or transferred
otherwise than by deed is a proposition so well established that it would be
mere pedantry to cite authorities in its support. All such inheritances are said
emphatically to lie in grant, and not in livery, and not to pass by the mere delivering C
of the deed. In all the authorities and textbooks upon the subject a deed is
always stated or assumed to be indispensably requisite, and, though the older
textbooks speak of incorporeal inheritances, yet there is no doubt but that the
principle does not depend on the quantity of interest granted or transferred, but on
the nature of the subject-matter. A right of common, for instance, which is a
profit à prendre, or a right of way, which is an easement, a right in nature of an D
easement, can no more be granted or conveyed for life or for years without a deed
than in fee-simple.

In the present case, the right claimed by the plaintiff is a right during a portion
of each day, for a limited number of days, to pass into and through, and to remain
on, a certain close belonging to Lord Eglinton—to go and remain where, if he went,
he would, but for the ticket, be a trespasser. This is a right affecting land, at E
least as obviously and extensively as a right of way over the land; it is a right
of way, and something more, and if we had to decide this case on general principles
only, and independently of authority, it would appear to us perfectly clear that no
such right could be created otherwise than by deed. The plaintiff, however, in
this case, argues that he is not driven to claim the right in question strictly as
grantee. He contends that, without any grant from Lord Eglinton, he had licence F
from him to be in the close in question at the time when he was turned out, and
that such a licence was, under the circumstances, irrevocable. For this he relies
mainly upon four cases, which he considers to be expressly in point for him, viz.,
Webb v. Paternoster (1); *Wood v. Lake* (2); *Taylor v. Waters* (3); and *Wood v.*
Manley (4).

As the argument of the plaintiff rested almost entirely on the authority of these G
four cases, it is very important to look to them minutely, in order to see the exact
points they severally decided. Before, however, we proceed to this investigation,
it may be convenient to consider the nature of a licence, and what are its legal
incidents, and for this purpose we cannot do better than refer to the elaborate judgment
of VAUGHAN, C.J., in *Thomas v. Sorrell* (5), as it appears in his reports. The
question there was as to the right of the Crown to dispense with certain statutes H
regulating the sale of wine, and to license the Vintner's Company to do certain
acts, notwithstanding these statutes. In the course of his judgment the Chief
Justice says (Vaugh. at p. 351):

"A dispensation or licence properly passeth no interest, nor alters or transfers
property in any thing, but only makes an action lawful which, without it, had
been unlawful, as a licence to hunt in a man's park or to come into his house
are only actions which without licence had been unlawful, but a licence to hunt
in a man's park and carry away the deer killed to his own use, to cut down a
tree in a man's ground and to carry it away the next day after to his own use,
are licences as to the acts of hunting and cutting down the trees, but as to the
carrying away the deer killed and the tree cut down, they are grants. So to
license a man to eat my meat, or to fire the wood in my chimney to warm him
by, as to the actions of eating, firing my wood and warning him, they are I

A licences, but it is consequent necessarily to those actions that my property be destroyed in the meat eaten and in the wood burnt. So as in some cases by consequent, and not directly, and has its effect; a dispensation or licence may destroy and alter the property."

B Attending to this passage in conjunction with the title LICENCE in BROOK'S ABRIDGMENT, from which, and particularly from para. 15, it appears that a licence is in its nature revocable, we have before us the whole principle of the law on this subject. A mere licence is revocable, but that which is called a licence is often something more than a licence. It often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it so as to defeat his grant to which it was incident. It may further be observed, that a licence under seal (provided it be a mere licence) is as revocable as a licence by parol, and, on the other hand, a licence by parol coupled with a grant, is as irrevocable as a licence by deed, provided only that the grant is of a nature capable of being made by parol; but where there is a licence by parol coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the licence is a mere licence, it is not an incident to a valid grant, D and it is, therefore, revocable. Thus a licence by A. to hunt in his park, whether given by deed or by parol, is revocable. It merely renders the act of hunting lawful, which, without the licence, would have been unlawful. If the licence be, as put by VAUGHAN, C.J., a licence not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer with the licence annexed to come on the land; and supposing the grant of the deer to be good, E then the licence would be irrevocable by the party who had given it. He would be estopped from defeating his own grant or act in nature of a grant. But supposing the case of a parol licence to come on any land, and there to make a watercourse to flow on to the land of the licence; in such a case there is no valid grant of the watercourse, and the licence remains a mere licence, and, therefore, capable of being revoked. On the other hand, if such a licence were granted by deed, there F the question would be on the construction of the deed, whether it amounted to a grant of the watercourse, and, if it did, then the licence would be irrevocable.

G Having premised these remarks on the general doctrine, we will proceed to consider the four cases relied on by the plaintiff. The first was *Webb v. Paternoster* (1). That, as appears from the report in *ROLLE*, was an action in trespass, brought against the defendant for eating by the mouth of his cattle the plaintiff's hay. The defendant justified under Sir William Plummer, the owner of the fee of the close in which the hay was, averring that Sir William Plummer leased the close to him, and, therefore, as lessee, he turned his cattle into the close, and they ate the hay. The plaintiff replied that, before the making of the lease, Sir William Plummer had licensed him to place the hay on the close till he could conveniently sell it, and that before he could conveniently sell it, Sir William Plummer leased H the land to the defendant. The defendant demurred to the replication. From the arguments as given in *ROLLE*, it appears that the plaintiff's counsel, who was first heard, contended, first, that the plaintiff's licence being a licence for profit, and not merely for pleasure, and being also for a certain time only, namely, till he could sell his hay, was not revocable; and, secondly, if the licence was revocable, still that the lease to the defendant was an implied and not an express revocation, I and, therefore, was inoperative against him without notice. For this he referred to *Mallory's Case* (6). To this latter proposition the court appears to have assented; but DODERIDGE, J., suggested that, even if the licence was in force, still the licensor did not by such a licence preclude himself, nor consequently his tenant, from turning cattle on the land, and that the licensee ought to have taken care to protect the hay from the cattle. As to this, however, the Chief Justice expressed a doubt. The defendant's counsel was heard some days afterwards, and he alleged that it appeared by the record that the plaintiff had had two years to sell his hay before the defendant's cattle had eaten it, and he argued that the court would say,

as a matter of law, that this was more than a reasonable time, and to this the court assented. The plaintiff's counsel, in reply, adverted to the distinction between a licence for profit and a licence for pleasure, but DODERIDGE, J., denied it, and said, that a licence to dig gravel, though a licence for profit, is revocable. He said that the true distinction was between a mere licence and a licence coupled with an interest. HOUGHTON, J., said that a licence executed was irrevocable, but a licence executory was revocable. Judgment was eventually given for the defendant on the ground that the plaintiff had had more than reasonable time to sell the hay. It will be seen, therefore, that the only two points decided were, first that the question of reasonable time was for the court, and not for the jury; secondly, that two years was more than a reasonable time. The decision, therefore, itself has no bearing on the point for which it was cited, and the only support which the case affords to the doctrine contended for by the present plaintiff is from what is said in the report of the case in POPHAM to have been agreed by the court, namely, that a licence for profit for a time certain is not revocable—a proposition to which, with the qualification we have already pointed out, we entirely accede. It is, moreover, by no means certain that the licence in *Webb v. Paternoster* (1) was not a licence under seal.

The defendant's counsel appears, from the report in ROLLE, to speak of the plaintiff as grantee of the liberty to stack hay, etc., an expression not very appropriate, if used in respect of a party who had a mere parol licence, and the Chief Justice, according to the report in POPHAM and PALMER, says that the plaintiff had an interest which charged the land into whose hands soever it should come. DODERIDGE, J., according to the report in PALMER, arguing that the lessee certainly might turn his cattle into his own field, and was not bound to stop their mouths, says,

"It was the folly of the plaintiff that he did not, together with the licence, take a covenant that it should be lawful for him to fence the hay with a hedge."

From these expressions (and there are others to the various reports of the case, having a similar aspect), it certainly seems possible that the licence was under seal, and then the only point would be that which alone was in fact decided, namely, whether, supposing the plaintiff to have acquired by grant a right to stack his hay on the land for a limited time, that limited time had expired. Even supposing the licence to have been a mere parol licence, yet the strong probability is that Webb had purchased the hay in question of Sir William Plummer as a growing crop, with liberty to stack it on the land, and then the parol licence might be good, as a licence coupled with an interest. Be this; however, as it may, the decision, as we have already pointed out, has very little or rather no bearing on the case before us, and the judgment of DODERIDGE, J., as given both in ROLLE and PALMER, is in strict accordance with what was afterwards laid down by VAUGHAN, C.J., and which we consider to be consonant both to reason and authority.

The next decision in order of time is that of *Wood v. Lake* (2). There the defendant had, by a parol agreement, given liberty to the plaintiff to stack coals on the defendant's land for a term of seven years, and after the plaintiff had enjoyed this privilege for three years, the defendant locked up the gate of the close. No report is given in SAYER of the argument at the Bar, but, from a manuscript of the same case referred to by GIBBS, C.J., in *Taylor v. Waters* (3), which we have had an opportunity of consulting, through the kindness of the representatives of the late BULLOUGH, J. [see 13 M. & W. at pp. 848, 849], it appears that the argument turned only on the point whether the privilege of stacking the coals did or did not amount to a lease, for, if it did, then the defendant contended it was void after three years, under the Statute of Frauds, as not being in writing. LEE, C.J., and DENNISON, J., held it to be no lease nor uncertain interest in land; but FOSTER, J., doubted and desired time to consider. On the last day of Term the court gave judgment for the plaintiff (FOSTER, J., non dissentiente), thus establishing the licence to be irrevocable during the seven years. Supposing the court to have been right in deciding that this was not a lease (which, however, is doubted by SIR EDWARD

A SUGDEN : see 1 VENDORS AND PURCHASERS (10th Edn.), p. 139, yet no grounds are stated on which it could be held good as an easement originating merely by parol. Up to this case not a single decision is to be found giving countenance to any such proposition, and we are compelled to say that we do not think it can be supported.

The next case on which the plaintiff relies is *Taylor v. Waters* (3). It was an action by the plaintiff against the doorkeeper of the Opera House, for preventing
 B him from entering the house during the performance of an opera. It appeared that one William Taylor, being in possession of the Opera House, as lessee for a long term of years, by a deed dated Aug. 24, 1792, assigned his interest therein to trustees, on various trusts for creditors and other claimants, and ultimately in trust for himself. After the execution of this deed, Taylor continued in possession by permission of the trustees, and he carried on and managed the concerns of the
 C theatre. In March, 1799, he, by deed, granted to one Gourgas, for valuable consideration, six silver tickets, entitling the holders to admission to the theatre. One of these tickets was sold by Gourgas to the plaintiff, in July, 1799, but no deed of assignment to him was executed. In 1800 Taylor's trustees took possession of the theatre. The plaintiff, however, was allowed to attend the theatre by virtue of his ticket, until the year 1814, when the defendant Waters, as servant of the
 D trustees, prevented him from entering the theatre, and for this obstruction the action was brought. The cause was tried before GIBBS, C.J., and a verdict was found for the plaintiff, and that verdict was afterwards upheld by the Court of Common Pleas. The grounds of the judgment were that the right under the silver ticket was not an interest in land, but a licence irrevocable to permit the plaintiff to enjoy certain privileges therein; that it was not required by the Statute of
 E Frauds to be in writing, and, consequently, that it might be granted without a deed. The Chief Justice, in support of that doctrine, relied on *Webb v. Paternoster* (1), which, he said, showed that a beneficial licence to be exercised upon land might be granted without deed, and could not be countermanded, at least, after it had been acted upon. The same case, he added, showed that the interest was not such an interest in land as was required by the Statute of Frauds to be
 F in writing, as to which last point all doubt, if there remained any, had been removed by *Wood v. Lake* (2). This judgment is stated by the learned reporter to have comprised the substance of the argument on both sides, and, therefore, he does not give it in his report.

We must infer from this that the attention of the court was not called in the argument to the principles and earlier authorities to which we have adverted.
 G BROOK, in his ABRIDGMENT, DODERIDGE, J., in *Webb v. Paternoster* (1), and LORD ELLENBOROUGH, in *R. v. Horndon-on-the-Hill (Inhabitants)* (7), all state, in the most distinct manner, that every licence is, and must be in its nature, revocable, so long as it is a mere licence. Where, indeed, it is connected with a grant, there it may, by ceasing to be a naked licence, become irrevocable but then it is obvious that the grant must exist independently of the licence, unless, indeed, it be a grant
 H capable of being made by parol.

In *Taylor v. Waters* (3) there was no grant of any right at all, unless such right was conferred by the licence itself. GIBBS, C.J., gives no reason for saying the licence was a licence irrevocable, and we cannot but think he would have paused before he sanctioned a doctrine so entirely repugnant to principle and to the earlier authorities, if they had been brought before the court. Again, the Chief Justice
 I is represented as saying that the interest of the plaintiff was not an interest in land within the Statute of Frauds, and that consequently it might be granted without deed. How the circumstance that the interest was not an interest in land within the Statute of Frauds showed it to be grantable without deed, we cannot discover. The precise point decided in *Webb v. Paternoster* (1) is not adverted to, and it is assumed without discussion, that the licence there must have been a parol licence, and a naked licence, unconnected with an interest capable of being created by parol. With all deference to the high authority from which the judgment in *Taylor v. Waters* (3) proceeded, we feel warranted in saying that it is to

the last degree unsatisfactory, an observation which we have the less hesitation in making in consequence of its having obviously been doubted by the Court of Queen's Bench and BAYLEY, J., in *Hewlins v. Shippam* (8). A

The fourth and last case relied on by counsel for the plaintiff was *Wood v. Manley* (4), in the Queen's Bench. That was an action of trespass quare clausum fregit. The plea was that the defendant was possessed of a large quantity of hay, being on the plaintiff's close, and that by the leave of the plaintiff he entered on the close in question to remove it. The replication de injuria. It was proved at the trial that the hay in question was sold in January, 1838, by the plaintiff's landlord, who had seized it on a distress for rent. The conditions of the sale were that the purchaser of the hay might leave it on the close until Lady-day, and might, in the meantime, come on the close from time to time as often as he should see fit to remove it. These conditions were assented to by the plaintiff. The defendant became purchaser, and afterwards and before Lady-day the plaintiff locked up the close. The defendant broke open the gate in order to remove the hay. A verdict was found for the defendant, ERSKINE, J., telling the jury that the licence to come from time to time to remove the hay was irrevocable. MR. CROWDER moved to set aside this verdict on the ground that the licence was necessarily revocable and was in fact revoked, but the Court of Queen's Bench refused to grant a rule, and we think quite rightly. This was a case not of a mere licence, but of a licence coupled with an interest. The hay, by the sale, became the property of the defendant, and the licence to remove it, therefore, became, as in the case of the tree and the deer put by VAUGHAN, C.J., irrevocable by the plaintiff, and the rule was properly refused. B C D

It appears, therefore, that the authorities really supporting the present plaintiff in the proposition for which he is contending are confined to the two cases of *Wood v. Lake* (2) and *Tayler v. Waters* (3), in neither of which was the real difficulty discussed or even stated. It was in both cases taken for granted that if the Statute of Frauds did not apply, a parol licence was sufficient, and the necessity of an instrument under seal, by reason of the interest in question being a right in nature of an easement, was by some means kept entirely out of sight. For these reasons, even if there had been no conflicting decisions, we should have thought these cases to be very unsafe guides in leading us to a decision on an occasion where we are called on to lose sight of the ancient land-marks of the common law. E F

We are not, however, driven to say that we shall disregard these cases merely on principle, giving to them the full weight of judicial decision. They are met by several others which we must entirely disregard before we can adopt the arguments of the plaintiff. In *Fentiman v. Smith* (9) and *R. v. Horndon-on-the-Hill (Inhabitants)* (7), which were before *Tayler v. Waters* (3), LORD ELLENBOROUGH and the Court of Queen's Bench expressly recognised the doctrine that a licence is no grant, and that it is in its nature necessarily revocable; and they further declare that, in order to confer an incorporeal right, an instrument under seal is essential. In the elaborate judgment of the Court of Queen's Bench, given by BAYLEY, J., in *Hewlins v. Shippam* (8), the necessity of a deed for creating an incorporeal right was expressly recognised, and formed the ground for the decision. It is true that the interest in question in that case was a freehold interest, and on that ground BAYLEY, J., suggests that it might be distinguished from *Wood v. Lake* (2) and *Tayler v. Waters* (3), but in an earlier part of that judgment he states, conformably to what is clear law, that, in his opinion, the quantity of interest made no difference. The distinction is evidently adverted to by him, not because he entertained the opinion that it really was of importance, but only to enable him to decide that case without in terms saying that he did not consider *Tayler v. Waters* (3) to be law. The doctrine of *Hewlins v. Shippam* (8) has since been recognised and acted upon in *Bryan v. Whistler* (10), *Cocker v. Cowper* (11), and *Wallis v. Harrison* (12); and it would be impossible for us to adopt the plaintiff's view of the law without holding all those cases to have been ill decided. It was suggested G H I

A that in the present case a distinction might exist by reason of the plaintiff having paid a valuable consideration for the privilege of going on the stand, but this can make no difference. Whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorised its being issued and sold to the plaintiff, is a point not necessary to be discussed. Any such action would be founded on a breach of contract, and would not be the result of his having

B acquired by the ticket a right of going upon the stand in spite of the owner of the soil; and it is sufficient on this point to say that in several of the cases which we have cited (*Hewlins v. Shippam* (8), for instance, and *Bryan v. Whistler* (10)), the alleged licence had been granted for a valuable consideration, but this was not held to make any difference. We do not advert to *Winter v. Brockwell* (13) and *Liggins v. Inge* (14), or other cases ranging themselves in the same category, as they were

C decided on grounds inapplicable to the case now before us, and were, in fact, admitted not to bear upon it. In conclusion, we have only to say that, acting on the doctrine relative to licences as we find it laid down by BROOKE, by DODERIDGE, J., and by VAUGHAN, C.J., and sanctioned by *Hewlins v. Shippam* (8), and the other modern cases proceeding on the same principle, we have come to the conclusion that the direction given to the jury at the trial was correct, and conse-

D quently that this rule must be discharged.

Rule discharged.

E

MARSHALL v. YORK, NEWCASTLE AND BERWICK RAIL. CO.

[COURT OF COMMON PLEAS (Jervis, C.J., and Williams, J.), November 15, 1851]

F

[Reported 11 C.B. 655; 21 L.J.C.P. 34; 18 L.T.O.S. 94;
16 Jur. 124; 138 E.R. 632]

Carriage of Goods—Railway—Passenger's luggage—Loss due to negligence of railway—Passenger's ticket paid for by his employer—Right of passenger to sue railway company in tort.

G

A railway company is liable for the loss of the luggage of a servant whose ticket has been paid for by his master.

H

Notes. Explained: *Tattan v. Great Western Rail. Co.* (1860), 2 E. & E. 844. Approved: *Austin v. Great Western Rail. Co.*, [1861-73] All E.R.Rep. 463. Considered: *Shrimpton v. Hertfordshire County Council* (1910), 74 J.P. 305; *Foulkes v. Metropolitan District Rail. Co.* (1879), 4 C.P.D. 267. Referred to: *Dalyell v. Tyrer* (1858), E.B. & E. 899; *R. v. Robson* (1861), 9 Cox, C.C. 29; *Hayn, Roman & Co. v. Culliford and Clark* (1879), 40 L.T. 536; *Foulkes v. Metropolitan District Rail. Co.* (1880), 5 C.P.D. 157; *Taylor v. Manchester, Sheffield and Lincolnshire Rail. Co.*, [1891-4] All E.R.Rep. 857; *Meux v. Great Eastern Rail. Co.*, [1895-9] All E.R.Rep. 710; *East Indian Rail. Co. v. Kalidas Mukerjee* (1901), 84 L.T. 210; *Harris v. Perry*, [1903] 2 K.B. 219; *Lyles v. Southend-on-Sea Corp.*, [1905] 2 K.B. 1; *Pratt v. Patrick*, [1923] All E.R.Rep. 512; *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] All E.R.Rep. 135; *Halliwell v. Venables*, [1930] All E.R.Rep. 284; *Haseldine v. Daw & Son, Ltd.*, [1941] 1 All E.R. 525.

I

As to the liability of a railway company and the British Transport Commission for luggage carried by railway, see 31 HALSBURY'S LAWS (3rd Edn.) 776-779; and for cases see 8 DIGEST (Repl.) 128 et seq.

Cases referred to:

- (1) *Govett v. Radnidge, Pulman and Gimblett* (1802), 3 East, 62; 102 E.R. 520;
1 Digest (Repl.) 21, 155.

- (2) *Pozzi v. Shipton* (1838), 8 Ad. & El. 963; 1 Per. & Dav. 4; 1 Will. Woll. & H. 624; 8 L.J.Q.B. 1; 112 E.R. 1106; 8 Digest (Repl.) 19, 104. A
- (3) *Pippin v. Sheppard* (1822), 11 Price, 400; 147 E.R. 512; 33 Digest (Repl.) 530, 87.

Also referred to in argument:

- Newberry v. Colvin* (1830), 7 Bing. 190, Ex. Ch.; affirmed sub nom. *Colvin v. Newberry and Benson* (1832), 1 Cl. & Fin. 283; 6 Bli.N.S. 167; 6 E.R. 923, H.L.; 41 Digest 353, 2036. B
- Powell v. Layton* (1806), 2 Bos. & P.N.R. 365; 127 E.R. 669; 41 Digest 208, 474.
- Gladwell v. Steggall* (1839), 5 Bing.N.C. 733; 8 Scott, 60; 8 L.J.C.P. 361; 3 Jur. 535; 132 E.R. 1283; 33 Digest (Repl.) 530, 92
- Ross v. Hill* (1846), 2 C.B. 877; 3 Dow. & L. 788; 15 L.J.C.P. 182; 7 L.T.O.S. 112; 10 Jur. 435; 135 E.R. 1190; 8 Digest (Repl.) 130, 839. C
- Wylid v. Pickford* (1841), 8 M. & W. 443; 10 L.J.Ex. 382; 151 E.R. 1113; 8 Digest (Repl.) 15, 73.

Rule Nisi obtained by the plaintiff to set aside a nonsuit and enter a verdict for him in an action on the case brought by the plaintiff to recover damages from the defendants for the loss of luggage. D

The declaration stated that the defendants were the owners of the Newcastle and Berwick Railway, and of divers carriages for the conveyance of passengers, goods and chattels, along the railway from Darlington to London, for hire and reward to them, the defendants; that thereupon the plaintiff, at the request of the defendants, became and was a passenger in one of their carriages, to be by them safely and securely conveyed and carried, together with his luggage, along the railway from Darlington to London, for reward to the defendants; that the defendants then received the plaintiff as such passenger, together with his luggage, to wit, a certain portmanteau, containing divers goods of the plaintiff; and that it was the duty of the defendants to use due and proper care that the plaintiff and his luggage should be safely and securely carried and conveyed, but that, by their carelessness, negligence and default, the luggage became wholly lost to the plaintiff. E
The defendants pleaded that the plaintiff did not become, nor was he, a passenger in one of their carriages, to be by them safely and securely carried and conveyed thereby, together with his luggage, on the journey, and alleged that they did not receive the luggage of the plaintiff for the purpose in the declaration mentioned modo et forma. F

At the trial before JERVIS, C.J., it appeared that the plaintiff, a servant of Lord Adolphus Vane, was, in company with his master, a passenger on the defendants' railway, having with him his own portmanteau; that his master paid his fare; and that during the journey the plaintiff's portmanteau was lost. JERVIS, C.J., nonsuited the plaintiff on its being objected that the action should have been in the name of the plaintiff's master, leave being reserved to the plaintiff to move to set aside the nonsuit and enter a verdict for him with £30 damages. A rule nisi was obtained. G H

Knowles and *H. Hill* showed cause against the rule.

Humfrey and *Willes* supported the rule.

JERVIS, C.J.—I am of opinion that this rule must be made absolute to enter I
a verdict for the plaintiff for £30 damages. First, it was said that, under the circumstances of this case, no action would lie; but the admission in the argument, and the authorities on which it was made, put the defendants in considerable difficulty, because it was admitted that, if the plaintiff had had his arm broken, an action would lie at the suit of the servant, the master having no remedy for the personal sufferings of his servant, though he might possibly sustain an action for the loss of his services. But on what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the

A defendants, but by reason of the breach of duty implied by law to carry him safely, irrespective of any contract. If the plaintiff could have recovered in respect of a personal injury suffered by him, there is no reason why he should not also recover in respect of the loss of his luggage.

Then it is said that the declaration so tied up the plaintiff to a case of contract, and restricted the liability of the defendants that this action cannot be maintained; because the declaration alleges that the defendants received the plaintiff and his luggage to be carried for reward to them, which the cases show to mean hire to be paid by the plaintiff to the defendants. There are two answers to this. First, the averment is not traversed on the record, the words "modo et forma" only being a denial of the allegation in the declaration that the goods were to be carried; and, secondly, these words are to be construed with reference to the rest of the declaration. If the declaration states a duty on the part of the defendants to carry, and that whether the hire is to be paid by the plaintiff or a stranger, the averment is perfectly unimportant. But how does it follow that the hire was not paid here by the plaintiff? The payment was made on his behalf; his master purchased for him a ticket and a seat which was not transferable; in short, the payment was on the plaintiff's account. The rule must, therefore, be made absolute.

D **WILLIAMS, J.**—I agree that this case was put on a right footing, when it was said that the question turned on whether or not it was necessary to show that there was a contract by the plaintiff with the defendants. There is a series of cases from *Govett v. Radnidge*, *Pulman and Gimblett* (1) to *Pozzi v. Shipton* (2), which shows that an action like this is to be regarded as, in substance, an action of tort founded on the defendants' neglect of duty as common carriers. In *FITZ-HERBERT'S NATURA BREVIVM*, Writ de Trespass sur le case, p. 94 D, it is laid down:

"If a smith prick my horse with a nail, etc., I shall have my action upon the case against him without any warranty by the smith to do it well. . . . For it is the duty of every artificer to exercise his art rightly and truly as he ought."

F There is no reference to any contract between the parties. It seems to follow from this that the averment of hire and reward is not a necessary allegation in the declaration, and, not being material, it is not involved in the traverse modo et forma. But I think that it was, in fact, proved that the money was paid on the plaintiff's behalf, for he became the proprietor of the ticket. It is not necessary, however, to decide that, for the averment only means that the hire and reward was to be paid by someone: *Pippin v. Sheppard* (3).

Rule absolute.

DONALDSON v. DONALDSON

[VICE-CHANCELLOR'S COURT (Page-Wood, V.-C.), July 28, August 1, 1854]

[Reported Kay, 711; 23 L.J.Ch. 788; 23 L.T.O.S. 306;
1 Jur.N.S. 10; 2 W.R. 691; 69 E.R. 303]*Trust—Declaration of trust—Voluntary assignment of trust property—Notice to original trustees.*

Stock was held under a marriage settlement in trust for the settlor absolutely. By a voluntary deed the settlor assigned personalty, including £29,400 of stock, to two named persons as trustees upon the trusts therein declared, and he further declared that he would hold all such property until it was vested in the trustees on the trusts aforesaid. No notice of the assignment was given to the trustees of the settlement, and no transfer of the stock was executed. The settlor died two days after the assignment.

Held: (i) the voluntary deed was a sufficient declaration of trust which the court would execute in favour of the assignees so as to pass the property in the stock; (ii) the omission to give notice to the trustees did not affect the assignees' title as the assignment had completely passed the interest of the settlor to them, and all that they had to do was to give notice to the trustees thereof and their title was complete.

Notes. Distinguished: *Lambe v. Orton* (1860), 1 Drew. & Sm. 125. Applied: *Re Way's Trusts* (1864), 2 De G.J. & Sm. 365. Considered: *Re Lucan, Hardinge v. Cobden* (1890), 45 Ch.D. 470. Referred to: *Re Walhampton Estate* (1884), 26 Ch.D. 391; *Re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82; *Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408; *Garland v. Archer-Shee* (1930), 142 L.T. 443; *Westminster Bank, Ltd. v. Wilson*, [1938] 3 All E.R. 652; *Re Fry, Chase National Executors and Trustees Corpn., Ltd. v. Fry*, [1946] 2 All E.R. 106.

As to whether a trust is complete, see 38 HALSBURY'S LAWS (3rd Edn.) 836 et seq.; and for cases see 43 DIGEST 627. As to a beneficiary's powers of alienation, see 38 HALSBURY'S LAWS (3rd Edn.) 877, 878; and for cases see 43 DIGEST 626.

Cases referred to:

- (1) *Kekewich v. Manning* (1851), 1 De G.M. & G. 176; 21 L.J.Ch. 577; 18 L.T.O.S. 263; 16 Jur. 625; 42 E.R. 519, L.J.J.; 43 Digest 568, 172.
- (2) *Edwards v. Jones* (1836), 1 My. & Cr. 226; 5 L.J.Ch. 194; 40 E.R. 361, L.C.; 25 Digest (Repl.) 587, 265.
- (3) *Beatson v. Beatson* (1841), 12 Sim. 281.
- (4) *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140; 34 E.R. 271, L.C.; 25 Digest (Repl.) 585, 251.
- (5) *Dillon v. Coppin* (1839), 4 My. & Cr. 647; 9 L.J.Ch. 87; 4 Jur. 427; 41 E.R. 249, L.C.; 25 Digest (Repl.) 581, 218.
- (6) *Ellison v. Ellison* (1802), 6 Ves. 656; 31 E.R. 1243, L.C.; 25 Digest (Repl.) 585, 250.
- (7) *Sloane v. Cadogan* (1808), cited in 12 Sim. at p. 291; 8 Digest (Repl.) 630, 667.

Also referred to in argument:

Pulvertoft v. Pulvertoft (1811), 18 Ves. 84; 34 E.R. 249, L.C.; 25 Digest (Repl.) 268, 760.

Rycroft v. Christy (1840), 3 Beav. 238; 4 Jur. 599; 49 E.R. 93; 43 Digest 566, 148.

Tufnell v. Constable (1838), 7 Ad. & El. 798; 3 Nev. & P.K.B. 47; 1 Will. Woll. & H. 113; 7 L.J.Q.B. 106; 2 Jur. 79; 112 E.R. 670; 8 Digest (Repl.) 501, 2220.

Fletcher v. Fletcher (1844), 4 Hare, 67; 14 L.J.Ch. 66; 8 Jur. 1040; 67 E.R. 564; 43 Digest 799, 2364.

Wheatley v. Purr (1837), 1 Keen, 551; 6 L.J.Ch. 195; 1 Jur. 133; 48 E.R. 419; 3 Digest (Repl.) 197, 396.

- A** *Bentley v. Mackay* (1851), 15 Beav. 12; 51 E.R. 440; 43 Digest 560, 112.
Bridge v. Bridge (1852), 16 Beav. 315; 22 L.J.Ch. 189; 20 L.T.O.S. 75; 16 Jur. 1031; 1 W.R. 4; 51 E.R. 800; 8 Digest (Repl.) 630, 671.
Ward v. Audland (1845), 8 Beav. 201; 14 L.J.Ch. 145; 9 Jur. 384; 50 E.R. 79; 8 Digest (Repl.) 629, 662.

B **Suit to determine the validity of a voluntary assignment.**

- By a voluntary settlement, dated April 12, 1852, between Thomas Hudson (the testator in the cause) of the one part, and Blamire and the defendants John Donaldson and R. N. Bennett of the other part, reciting, among other things, that Thomas Hudson intended to make the settlement thereafter made, and that in order to carry into effect such intention he had previously thereto duly assigned or transferred unto or into the names of Blamire, Donaldson, and Bennett, or had otherwise well and effectually vested in them, or intended forthwith to transfer unto or otherwise well and effectually vest in them, as such trustees, the several particulars mentioned or comprised in the schedule thereto, Thomas Hudson granted, assigned, and transferred to the trustees all such and so many and such parts and part of the several bonds, debentures, moneys, shares, stocks, securities, and other particulars mentioned or comprised in the schedule thereto as had not been or were not then effectually vested in the trustees, and which he, Thomas Hudson, could or might grant or assign by that indenture, and all the real estates subject to the several mortgage securities mentioned in the schedule, together with all sums of money due and owing, or recoverable or receivable, or otherwise secured upon or by virtue of the same securities and premises respectively, and all interest, dividends, etc., to hold upon the trusts thereafter declared.

- E** Hudson then covenanted with the trustees forthwith to transfer or otherwise well and effectually vest in, or cause to be transferred or otherwise well and effectually vested in, the trustees all or such parts of the said particulars as had not been already vested or transferred, or did not fully and completely pass by the assignment thereinbefore contained. The deed then proceeded to declare the trusts, being the usual trusts of a voluntary settlement of personalty; and then it was declared, that in the meantime, and until all and singular the premises and particulars mentioned in the said schedule should be transferred or otherwise effectually vested in the said trustees, on the trusts therein declared, he, the said Thomas Hudson, his heirs, executors, etc., should stand possessed of and interested in the said particulars and trust premises, or so much thereof as should for the time being not be effectually vested in the said trustees, upon the said trusts thereinbefore declared, or such of them as were for the time being in force.

- G** The property in the schedule was valued at between £300,000 and £400,000, and the probate and legacy duty, the bulk being given to grand nephews and nieces, would exceed £14,000 if the deed failed to pass the property. The particulars enumerated comprised—first, large sums of stock in the public funds, East India stock, etc., in the testator's own name; secondly, a sum of £29,400, £3 5s. per cent. bank annuities, in the names of the trustees of Mr. Hudson's marriage settlement, under the trusts of which, Mrs. Hudson being dead without issue, Mr. Hudson was absolutely entitled to that sum; thirdly, moneys secured by mortgage of lands in fee, and a leasehold house in Park Crescent; fourthly, foreign and other securities passing from hand to hand, without any deed or instrument of transfer being necessary; and fifthly, railway shares, debentures, etc., for the transfer of which some special instrument was necessary to be executed.

I Mr. Hudson had formerly entertained the intention of executing such a voluntary settlement, and a draft deed had been prepared in 1849, but not definitely approved. In 1850 he made his will. In February, 1852, his wife died, and finding it proper to alter some of the gifts in the will, he gave directions to carry out those alterations by a voluntary settlement, which, on April 12, 1852, was finally approved and settled, but not engrossed, in consequence of the great number and variety of particulars in the schedule. In the meantime, Mr. Hudson having unexpectedly

become dangerously ill, a codicil, making the necessary alterations in the will, and also the draft settlement, was executed as a testamentary disposition on April 12. On the 13th the testator re-executed the codicil and the settlement. On April 14 the testator died. Previously to the execution of the settlement, the Spanish and other foreign and colonial securities which passed by delivery were delivered by, or by the authority and direction of, Mr. Hudson to the defendant Bennett, who was one of the trustees, on account of and on behalf of the trustees, and were presumed to be well and effectually vested in the said trustees. The shares, debentures, and certificates of stock and title deeds of the real property mentioned in the schedule were also all delivered to Bennett, and so remained up to the death of the testator, on account and behalf of the said trustees. On the morning of the 14th Mr. Hudson executed a power of attorney to effect a transfer of the stock, etc.; but his handwriting being much altered, a special messenger was sent by the bank to make inquiries, who found that Mr. Hudson had just died. Nothing further, therefore, could be done than above stated.

The bill was filed by one of the infant grand-nephews against the trustees and his brothers and sisters, and others interested under the will and settlement; and it prayed that the will and codicil might be established, and the trusts thereof and of the said indenture of settlement carried out, and the usual administration accounts, etc. Immediately after the institution of the suit a petition was presented by the trustees, asking the direction of the court as to the probate or stamp duty to be paid, which question involving the point as to what passed by the settlement, the petition was directed to come on for hearing with the cause. A copy was served on the Attorney-General, who appeared accordingly.

Daniel, Q.C., and Bateman for the plaintiff.

Willcock and Green for cestuis que trust in the same interest.

Rolt and Druce for the trustees.

Humphery and Bathurst for other parties in the same interest.

James and Wickens for the Attorney-General.

Cur. adv. vult.

Aug. 1, 1854. **PAGE-WOOD, V.-C.**—In this case a question has been raised how far a deed of assignment, executed by Thomas Hudson, and dated June 29, 1850, by which he voluntarily assigned a large amount of property, consisting of various securities, to trustees upon certain trusts for the benefit of his donees, has been available to pass certain portions of the property included in the deed. The question has arisen between some of the parties claiming under the deed and the Crown, because the property which did not pass by the deed would be liable to probate and legacy duty, as passing by the settlor's will. With respect to the great bulk of the property comprised in the deed, the counsel for the Crown has conceded, that, as it stood in the funds and other securities in the name of the settlor, and as he has executed a declaration of trust contained in this deed, the relation of trustee and cestui que trust has been created, so that this court will give effect to it.

The real question arises with respect to the sum of £29,400 stock, which was standing in the names of the trustees of the settlor's marriage settlement in trust for himself. I do not think that the declaration of trust annexed to the description of this stock in the schedule is material. What I have to consider is, how far an assignment of this kind, of which no notice was given to the trustees in whose names this stock was standing, was effectual to pass the property therein to the trustees of the voluntary deed, so that this court would hold, as between the donees under that deed and the representatives of the assignor, that the title was complete.

For the purposes of this question, it is necessary to consider *Kekewich v. Manning* (1), in which the other decisions are reviewed and commented on by KNIGHT-BRUCE, L.J., and which seem to me, if I may use the expression, to stem the current of authority which had begun to set in adversely to these trusts, more

A especially since the decision in *Edwards v. Jones* (2). Ever since that case there has been considerably more difficulty as to how far a voluntary assignment of a chose in action does or does not confer a title on the donee. Looking through the cases, the principle which I gather from them is the same as that on which the lords justices seem to have proceeded in *Kekewich v. Manning* (1), and though that case does not go so far as the present, I still think that this is concluded by it.

B In all the cases, except *Beatson v. Beatson* (3), and particularly in *Ex parte Pye* (4), it is laid down, that, when there is a complete declaration of trust by a party concerning stock or choses in action vested in himself, this court will enforce it. On the other hand, where there is a contract only, or an imperfect gift, which requires some other act to complete it on the part of the assignor or donor, the court will not interfere to require anything else to be done by him. The intermediate cases alone are difficult of solution. The question in every case is whether there has been a complete declaration of trust, or whether the assignor performed such acts that the donee can take advantage of them without requiring any further act to be done by the assignor; and, if the title is so far complete that this court is not called upon to act against the assignor, it will assist the donee in obtaining the property from any person who would be treated as a trustee for him.

D In *Beatson v. Beatson* (3), alone, there was an assignment of an equitable interest in stock, which was vested not in the donor but in a third party, and it was held that the court would not assist the volunteer. In *Dillon v. Coppin* (5), stock standing in the donor's own name was assigned, and there this distinction was taken, which was somewhat nice, but still consistent with *Ellison v. Ellison* (6) and the other cases, namely, that, the stock being in the name of the donor himself, and there being no declaration of trust but a mere assignment, which would not pass the stock at all, and the deed showing an evident intention on the part of the assignor to do some further act, and containing a covenant to perfect the gift, the court said, we cannot call upon the donor to transfer the stock or complete the gift. But in the case of an assignment of the equitable interest in stock standing in the names of trustees, the deed of assignment passes the whole equitable interest of the donor, and the donee may go with that deed to the trustees, and say, transfer to me the interest in this sum of stock; and I think that in such a case it would not even be necessary to make the donor a party to a suit to enforce the gift.

Then the question is, whether, notice not having been given to the trustees, the gift can be enforced. As to that it has been said in some cases, that the gift is complete when no further act is required to be done by the donor or the donee: and that seems to imply a doubt, whether, if there were any act to be done by the donee, the gift could be treated as complete. But the assignment has completely passed the interest of the donor. It is true, that, if no notice of it were given to the trustees, they would be justified in transferring the stock to the original cestui que trust for whom they held it; and, if they did so, there would be no remedy against them; and it is possible that the donee might not be able to recover the stock; but all that the donee has to do is, at any time he thinks fit, to give notice to the trustees before the stock is transferred; and when he has given such notice his title is complete: and, unless the donor or his executors actually obtain possession of the fund, the donee does not require the aid of this court against them. The fact, that the trustees are themselves the executors of the donor in this case, I think does not make any difference. As the donor has not obtained possession of the fund, the donees have a right to go to the trustees and require them to transfer the stock, or come to the court to have that done. The donees require no assistance from the court against the original assignor, and therefore the assignment is such as the court will support.

That is the principle upon which cases like *Sloane v. Cadogan* (7) proceed, and which LORD COTTENHAM seems to recognise in *Edwards v. Jones* (2), where he says (1 My. & Cr. at pp. 238, 239):

"In *Sloane v. Cadogan* (7), the claim was not against the donor or his representatives, for the purpose of making that complete which had been left imperfect, but against the persons who had the legal custody of the fund; and the question was, whether the transaction constituted them trustees for the fund for the cestui que trusts. SIR WILLIAM GRANT came to the conclusion that it did; and the consequence was, that they were bound to account. That case has been considered by SIR EDWARD SUGDEN as going a great way; but, upon the principle stated by SIR WILLIAM GRANT, it is free from all possible question, for there was no attempt in that case to call in aid the jurisdiction of the Court."

In the present case there is no need whatever for the donees to call in aid the jurisdiction of this court against the original assignor or his representatives. All that they have to do is, to require the trustees who hold the fund to transfer it to them. This decision goes somewhat beyond all the authorities, except *Sloane v. Cadogan* (7); but I cannot hold that the owner of an equitable interest in a chose in action is not entitled to assign it; and I think, that, upon the principle recognised in *Ellison v. Ellison* (6), and like cases, I must decide that the equitable interest in this stock was effectually assigned by this deed.

Order accordingly.

CHRIST'S HOSPITAL v. GRAINGER AND ANOTHER

[LORD CHANCELLOR'S COURT (Lord Cottenham, L.C.), July 22, 28, 29, 1848, November 14, 1849]

[Reported 1 Mac. & G. 460; 1 H. & Tw. 533; 19 L.J.Ch. 33;
15 L.T.O.S. 497; 13 J.P. 778; 14 Jur. 339; 41 E.R. 1343]

Charity—Limitation of action—Property held in trust for one or other of rival claimants.

Charity—Perpetuities—Gift over of property from one charity to another.

The corporation of L., as trustees of Christ's Hospital, claimed property bequeathed by a testator to the corporation of R. for charitable purposes under a limitation in his will that, if the corporation of R. should for one year neglect to perform the directions contained in his will, the legacy to R. corporation should be void and of no effect and be transferred forthwith to the corporation of L. for the benefit of Christ's Hospital. The trusts had remained unperformed, and the corporation of L. had been aware of the non-performance for more than twenty years before the institution of the present suit. The Attorney-General, who was a party to the suit, had taken no part in the proceedings in the court below, but he sought to appeal from the decree made there and to raise further questions on the hearing of the appeal.

Held: (i) the contingent limitation was not void as an infringement of the rule against perpetuities which was intended to prevent property being inalienable beyond certain periods, and this property was no more or less alienable on account of the transfer from R. corporation to L. corporation; (ii) the claim was not barred by the lapse of more than twenty years during which the corporation of L. had been aware of the facts, since the question was not whether time was a bar to any claim adverse to the title of the original donee, but whether that title was to be superseded in favour of those to whom the testator had directed his property to be transferred on the non-performance of the trusts by the original donee; (iii) to hold that this cesser and transfer could not apply on

- A the ground that the object of a testator should not be defeated by the acts of trustees would be to defeat, not to forward, the object of the testator, whose directions in this respect were themselves dependent on the acts of the trustees; (iv) the Attorney-General would not be prevented from raising such case as he now sought to do, but the court did not approve of his action in re-opening a matter which he had not opposed in the court below, where he ought to have raised his whole case.

B **Quære** whether such an allowance would be made for a private individual.

Notes. Considered: *Chamberlayne v. Brockett* (1872), 8 Ch. App. 206; *Re Tyler, Tyler v. Tyler*, [1891] 3 Ch. 252; *Re Bowen, Lloyd Phillips v. Davis*, [1891-4] All E.R.Rep. 238. Distinguished: *Re Da Costa, Clarke v. Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337. Applied: *Re Hanbey's Will Trusts, Cutlers Co. (Sheffield) v. London Corpn.*, [1955] 3 All E.R. 874. Referred to: *A.-G. v. Grainger* (1859), 7 W.R. 684; *Worthing Corpn. v. Heather*, [1904-7] All E.R.Rep. 530; *Re Bland-Sutton's Will Trusts, National Provincial Bank, Ltd. v. Middlesex Hospital Medical School Council*, [1951] 1 All E.R. 494; *Royal College of Surgeons of England v. National Provincial Bank, Ltd.*, [1952] 1 All E.R. 984.

- D As to the transfer of property from one charity to another, see 4 HALSBURY'S LAWS (3rd Edn.) 299-301; and as to the effect of conditions subsequent in a gift to charity, see *ibid.*, p. 296; for cases see 8 DIGEST (Repl.) 434-436.

Cases referred to:

- (1) *Brown v. Higgs* (1803), 8 Ves. 561; 32 E.R. 473, L.C.; on appeal (1813), 18 Ves. 192, H.L.; 43 Digest 552, 11.
- E (2) *Marquis of Cholmondeley v. Lord Clinton* (1820), 2 Jac. & W. 1; 37 E.R. 527; on appeal (1821), 4 Bli. 1, H.L.; 35 Digest (Repl.) 399, 953.

Appeal by the Attorney-General, a defendant, from a decision of SHADWELL, V.-C., reported 16 Sim. 83, in an action brought by the corporation of London for a declaration that they were entitled to have a conveyance and transfer made to them of certain trust property and funds for the benefit of Christ's Hospital.

- F The facts of the case appear sufficiently in judgment.

The Solicitor-General and *Blunt* for the Attorney-General.

Stuart, Jas. Parker and *Freeling* for the plaintiffs.

Bethell, Bacon and *Selwyn* for the corporation of Reading.

- G **LORD COTTENHAM, L.C.**—This is an appeal by the Attorney-General, who is a defendant in the cause, and the first question to be considered is the position which the Attorney-General has assumed by this re-hearing.

The corporation of London, as governors of Christ's Hospital, by the bill, claimed certain property which had been left by the testator, John Hendricke, in 1624, to the corporation of Reading, for certain charitable purposes in that town, with a direction that if the donees should for a year neglect, omit, or fail to perform the directions of his will, such gift should be utterly void, and should forthwith be paid and transferred to the corporation of London, for the benefit of Christ's Hospital. The strict execution of the directions of the will having been found inconvenient, an information was filed by the Attorney-General, in the Court of Exchequer, against the corporations of London and Reading, which led to a decree in 1639, varying the purposes and application of the charity, but still confined to Reading, and providing, as in the will, that if the corporation of Reading should neglect to perform the directions of the decree, or should misemploy the trust property, and such neglect and misemployment should continue for a year, the legacy should be void and have no effect as to Reading, and that the property should be forthwith paid and transferred to the corporation of London, for the benefit of Christ's Hospital. That the directions of this decree, as well as those of the will, have been neglected and unperformed for the period of far more than one year, is a fact clearly established and not in dispute on this re-hearing. Upon this fact,

the corporation of London, by their bill, sought to recover the property for the benefit of Christ's Hospital, and this the decree of SHADWELL, V.-C., directed. A

The Attorney-General was properly a party to this suit, but, as it appears, took no part in the discussion. To this there can be no objection, there being before the court parties, the trustees for the town of Reading, immediately interested in resisting the claim of the plaintiffs; but that course could only be unobjectionable upon the Attorney-General's having considered that he might properly not only leave the discussion to the other defendants, but abide by the decision upon it. I cannot approve of any party after a decree which he did not oppose, re-opening the discussion by a re-hearing. As to such a party, the proceeding is in effect an original hearing. What might be the result of such an attempt by an ordinary party I need not now decide, because in case of charities the court is less strict in enforcing its rules of proceeding, and will not, upon such an objection, refuse to hear such case as the Attorney-General may have to make. The only case that the Attorney-General can make upon this re-hearing, and what he has attempted, is to show that the bill ought to have been dismissed; that so far as this cause is concerned, the court ought to have decided that although the directions of the will and of the decree of the Exchequer have been wholly neglected, and the charity property therefore misapplied, the town of Reading is nevertheless to continue in the enjoyment of the property. Such, in point of form, must be the contention of the Attorney-General, but such is not and cannot be his real object. Finding that the decree shuts out the case which he had thought it right to present to the court upon an information, he takes this step to remove that impediment out of his way. This again shows how unfortunate it is he did not raise the whole case in the court below, which might and ought to have been done by the cause and the information being heard together. B C D E

This court is well justified in regretting and possibly in complaining that this was not done; but I do not think it right upon these grounds to decline giving my opinion upon the points now raised for the first time by the Attorney-General, and I proceed, therefore, to consider them, bearing in mind that this is a gift to a corporation upon certain charitable trusts, with a proviso that in a certain event such gift shall cease, and the property be transferred to another corporation for certain other charitable trusts; and that the event upon which such cesser and transfer were directed to take place has happened. F

Brown v. Higgs (1) (8 Ves. at p. 574), was cited as proving that the gift over could not take effect from the act of the trustees. That case not only does not support that proposition, but proceeds upon a principle inconsistent with it, for it only upon this point decided that the object of a testator should not be disappointed by the neglect of a trustee; but in this case the testator has made the gift over to depend upon the act of the trustees; and to hold that the act of the trustee was inoperative for that purpose, would be to defeat, and not forward his object. The Attorney-General, however, further contends, that this provision for cesser and transfer was void, as repugnant to the original gift. This is so if the original gift was indefeasible, but not otherwise, and that is the question; the proposition, therefore, is only a consequence of the point in dispute if decided one way, and not an argument for the decision. G H

It was then argued that it was void, as contrary to the rules against perpetuities. These rules are to prevent, in the cases to which they apply, property from being alienable beyond certain periods. Is this effect produced, and are these rules invaded by the transfer, in a certain event, of property from one charity to another? If the corporation of Reading might hold the property for certain charities in Reading, why may not the corporation of London hold it for the charity of Christ's Hospital in London? The property is neither more nor less alienable on that account. I

The next argument was, that the forfeiture created by the will was destroyed by the decree, or that the forfeiture created by the decree was inoperative, being beyond the jurisdiction of the court. These arguments are not very consistent.

A If the court exceeded its jurisdiction in the provision for the transfer, the provisions of the will were not affected by it; but, in fact, the decree only varied the first trusts prescribed by the will, substituting others, but preserved the forfeiture; and, whether the forfeiture under the will or under the decree be the operative provision is not material, it being established that the event has happened, which, under either, was to create the cesser and transfer. To meet this answer, it was
B contended that the bill sought relief only under the provisions of the will; but that is not so, for the bill alleges that

"the plaintiffs are advised that under the circumstances before stated, the limitation over in favour of the plaintiffs, contained in the will, has taken effect, and that the plaintiffs are now entitled, under the provisions of the will and of the decree, to have the estates and property transferred to them."

C Lastly, it was contended that the plaintiffs' claim was barred by time, more than twenty years having elapsed since the facts which are said to have created the forfeiture, and since the plaintiffs knew of these facts. Time is permitted to create a bar in order to quiet titles. Is, then, the Attorney-General contending that time has sanctioned the breaches of trust committed by the corporation of Reading, and that the purposes to which they applied the trust property are not to be disturbed? This cannot be, and is not, the object of the Attorney-General.
D His object is to let in the jurisdiction of the court for the purpose of having the property applied to purposes distinct from any provisions of the will or decree. He repudiates the purposes to which the corporation of Reading were directed to apply the property as much as he does those to which the corporation of London were directed to apply it. Is this quieting the title of the corporation or of those
E who now claim in their place? The question is not, whether time is a bar to any claim adverse to the title of the original donee, but whether such a title is to be superseded in favour of those to whom, upon failure of such title, the testator has given the property, or in favour of general charity, unconnected with any expressed object of the testator.

F If, indeed, there were adverse claims between cestuis que trust, time might create a bar as between them, though it could not as between cestuis que trust and a trustee upon the principle ultimately established in *Marquis of Cholmondeley v. Clinton* (2), but that is not the case here. Both the contending parties, the Attorney-General and the plaintiffs, under the same facts claim the property which, up to the present time, has remained in the hands of the forfeiting party, who no longer disputes the forfeiture. As between the Attorney-General and the plaintiffs
G there has not been any adverse title or possession.

Some confusion may have arisen from the use of the word forfeiture. In one sense, the cesser of one set of trusts and the commencement of the other may be considered as a forfeiture, but the form and substance of the provisions is rather a substitution of one trust for another. The property was vested in the corporation of Reading, but in a certain event they were to become trustees of it for Christ's Hospital. If the effect of these provisions was to constitute the corporation of Reading in the event which happened trustees for Christ's Hospital until they transferred the property as directed (and such it would seem was the only interest they had, and the only duty they had to perform), there could not have arisen as between them and the plaintiffs any question of time or adverse possession, but that is not the question I have to consider. It appears to me that the Attorney-General cannot maintain the points he has attempted to establish upon this re-hearing, and that the decree of SHADWELL, V.-C., must be affirmed.
I

Appeal dismissed.

A

LUMLEY v. GYE

[COURT OF QUEEN'S BENCH (Coleridge, Erle, Wightman and Crompton, JJ.), February 4, 5, June 3, 1853]

[Reported 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827;
1 W.R. 432; 118 E.R. 749]

B

*Tort—Contract—Procurement of breach—Contract to render personal service—
Executory contract—Contract by singer to perform at plaintiff's theatre.*

A person who, during the continuance of a contract of personal service, whether it be executory or not, wrongfully interrupts the relation subsisting between the parties to the contract by procuring one of them to commit a breach of the contract whereby the other party to the contract suffers damage commits a tort for which he is liable to the injured party in damages.

C

So held by WIGHTMAN, J., ERLE, J., and CROMPTON, J., COLERIDGE, J., dissenting.

Notes. Distinguished: *Cattle v. Stockton Waterworks Co.*, [1874-80] All E.R.Rep. 220. Followed: *Bowen v. Hall* (1881), 6 Q.B.D. 333. Distinguished: *Mogul Steamship Co. v. McGregor, Low & Co.* (1889), 23 Q.B.D. 598. Applied: *De Francesco v. Barnum* (1890), 63 L.T. 514; *Exchange Telegraph Co. v. Gregory* (1895), 73 L.T. 120. Considered and Explained: *Allen v. Flood*, [1895-9] All E.R.Rep. 52. Approved: *Quinn v. Leatham*, [1900-3] All E.R.Rep. 1. Considered: *Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K.B. 732. Applied: *South Wales Miners' Federation v. Glamorgan Coal Co., Ltd.*, [1904-7] All E.R.Rep. 211. Considered: *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.*, [1904-7] All E.R.Rep. 116. Applied: *Larkin v. Long*, [1914-15] All E.R.Rep. 469. Considered: *Long v. Smithson* (1918), 88 L.J.K.B. 223; *Pratt v. British Medical Association*, [1918-19] All E.R.Rep. 104. Distinguished: *Said v. Butt*, [1920] All E.R.Rep. 232. Considered: *Ware and De Freville, Ltd. v. Motor Trade Association*, [1920] All E.R.Rep. 387. Applied: *Jasperson v. Dominion Tobacco Co.*, [1923] A.C. 709. Considered: *Black v. Admiralty Comrs.* (1924), 93 L.J.K.B. 341; *Sorrell v. Smith*, [1925] All E.R.Rep. 1; *Place v. Searle* (1932), 101 L.J.K.B. 465; *Re Simms, Ex parte The Trustee v. William Simms, Ltd. and S. H. Gillett*, [1933] All E.R.Rep. 302. Distinguished: *Best v. Samuel Fox & Co.*, [1950] 2 All E.R. 798; *Jones Bros. (Hunstanton), Ltd. v. Stevens*, [1954] 3 All E.R. 677. Considered: *A.-G. for New South Wales v. Perpetual Trustee Co.*, [1955] 1 All E.R. 846. Referred to: *Rogers v. Rajendro Dutt* (1860), 13 Moo.P.C.C. 209; *Lynch v. Knight* (1861), 5 L.T. 291; *Evans v. Walton* (1867), 36 L.J.C.P. 307; *Temperton v. Russell*, [1893] 1 Q.B. 715; *Charnock v. Court* (1899), 69 L.J.Ch. 550; *Lyons v. Wilkins*, [1899] 1 Ch. 255; *Conway v. Wade*, [1908-10] All E.R.Rep. 344; *Stott v. Gamble*, [1916-17] All E.R.Rep. 724; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Davies v. Thomas*, [1920] All E.R.Rep. 438; *Weld-Blundell v. Stephens*, [1920] All E.R.Rep. 32; *Wolstenholme v. Ariss*, [1920] 2 Ch. 403; *White v. Riley*, [1920] All E.R.Rep. 371; *G.W.K. v. Dunlop Rubber Co.* (1926), 42 T.L.R. 376; *Rely-A-Bell Burglar and Fire Alarm Co. v. Eisler*, [1926] Ch. 609; *Scammell v. Attlee* (1928), 45 T.L.R. 75; *G. Scammell and Nephew v. Hurley*, [1929] 1 K.B. 419; *De Jetley Marks v. Greenwood*, [1936] 1 All E.R. 863; *McManus v. Bowes*, [1937] 3 All E.R. 227; *British Industrial Plastics, Ltd. v. Ferguson*, [1938] 4 All E.R. 504; *Camden Nominees, Ltd. v. Slack*, [1940] 2 All E.R. 1; *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] 1 All E.R. 142; *British Motor Trade Association v. Salvadori*, [1949] 1 All E.R. 208; *D.C. Thomson & Co. v. Deakin*, [1952] 2 All E.R. 361; *Rookes v. Barnard*, [1962] 2 All E.R. 579.

H

As to procuring a breach of contract, see 37 HALSBURY'S LAWS (3rd Edn.) 124-127; and for cases see 42 DIGEST 986-990.

A Cases referred to:

(1) *Blake v. Lanyon* (1795), 6 Term Rep. 221; 101 E.R. 521; 34 Digest (Repl.) 213, 1501.

(2) *Adams and Bafealds Case* (1591), 1 Leon 240; 74 E.R. 219; 34 Digest (Repl.) 210, 1473.

B

(3) *Ashley v. Harrison* (1793), 1 Esp. 48; Peake, 194, N.P.; 32 Digest (Repl.) 210, 2280.

(4) *Tarleton v. M'Gawley* (1794), Peake, 205; 170 E.R. 153, N.P.; 43 Digest 9, 39.

(5) *Taylor v. Neri* (1795), 1 Esp. 385, N.P.; 34 Digest (Repl.) 224, 1626.

(6) *Fores v. Wilson* (1791), Peake, 77, N.P.; 34 Digest (Repl.) 217, 1541.

C

(7) *Sykes v. Dixon* (1839), 9 Ad. & El. 693; 1 Per. & Dav. 463; 2 Will. Woll. & H. 120; 8 L.J.Q.B. 102; 112 E.R. 1374; 34 Digest (Repl.) 212, 1496.

(8) *Pilkingon v. Scott* (1846), 15 M. & W. 657; 15 L.J.Ex. 329; 7 L.T.O.S. 340; 153 E.R. 1014; 34 Digest (Repl.) 212, 1492.

(9) *Hartley v. Cummings* (1847), 5 C.B. 247; 17 L.J.C.P. 84; 10 L.T.O.S. 247; 12 Jur. 57; 136 E.R. 871; 34 Digest (Repl.) 53, 265.

D

(10) *Keeble v. Hickeringill* (1706), 11 East, 574, n.; Holt, K.B. 14; 3 Salk. 9; 11 Mod. Rep. 73, 130; 103 E.R. 1127; 43 Digest 8, 30.

(11) *Skinner v. Gunton* (1669), 1 Saund. 228; 2 Keb. 473; 1 Vent. 18; T.Raym. 176; 85 E.R. 249; 42 Digest 986, 159.

(12) *Winsmore v. Greenbank* (1745), Willes, 577; 125 E.R. 1330; 1 Digest (Repl.) 26, 202.

E

(13) *Green v. Button* (1835), 2 Cr.M. & R. 707; 1 Gale, 349; Tyr. & Gr. 118; 5 L.J.Ex. 81; 150 E.R. 299; 32 Digest (Repl.) 246, 2748.

(14) *Shepherd v. Wakeman* (1662), 1 Keb. 459; 1 Lev. 53; 1 Sid. 79; 83 E.R. 1052; 32 Digest (Repl.) 209, 2260.

(15) *Bird v. Randall* (1762), 3 Burr. 1345; 1 Wm. Bl. 387; 97 E.R. 866; 34 Digest (Repl.) 214, 1508.

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(16) *Vicars v. Wilcocks* (1806), 8 East, 1; 103 E.R. 244; 32 Digest (Repl.) 206, 2227.

(17) *Ward v. Weeks* (1830), 7 Bing. 211; 4 Moo. & P. 796; 9 L.J.O.S.C.P. 9; 13 E.R. 81; 32 Digest (Repl.) 210, 2273.

(18) *Morris v. Langdale* (1800), 2 Bos. & P. 284; 126 E.R. 1284; 32 Digest (Repl.) 207, 2242.

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(19) *Newman v. Zachary* (1646), Aley, 3; 82 E.R. 883; 32 Digest (Repl.) 241, 2685.

(20) *Anon.* (1774), Lofft. 493; 98 E.R. 764; sub nom. *Hart v. Aldridge*, 1 Cowp. 54; 34 Digest (Repl.) 211, 1478.

(21) *Winterbottom v. Wright* (1842), 10 M. & W. 109; 11 L.J.Ex. 415; 152 E.R. 402; 34 Digest (Repl.) 237, 1744.

(22) *Forbes v. King* (1833), 1 Dowl. 672; 2 L.J.Ex. 109; 32 Digest (Repl.) 19, 99.

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(23) *Hoare v. Silverlock* (1848), 12 Q.B. 624; 17 L.J.Q.B. 306; 11 L.T.O.S. 328; 12 Jur. 695; 116 E.R. 1004; 32 Digest (Repl.) 20, 112.

Also referred to in argument:

Langridge v. Levy (1837), 2 M. & W. 519; 6 L.J.Ex. 137; affirmed sub nom.

Levy v. Langridge (1838), 4 M. & W. 337; 150 E.R. 1458; sub nom. *Levi v.*

Langridge, 1 Horn & H. 325; 7 L.J.Ex. 387, Ex. Ch.; 35 Digest (Repl.) 53, 472.

I

Demurrer to a declaration in an action in which the plaintiff, the lessee and manager of the Queen's Theatre, London, claimed damages from the defendant who, he alleged, had caused one Johanna Wagner to break a contract by which she had undertaken to perform at the plaintiff's theatre for a specified time.

The declaration, by its first and second counts, stated that the plaintiff managed the theatre for performing operas for gain to him, and that he had contracted and agreed with Johanna Wagner to perform in the theatre for a certain time, with a

condition, among others, that she should not sing or use her talents elsewhere during the term without the plaintiff's consent in writing, yet the defendant, knowing the premises and maliciously intending to injure the plaintiff as lessee and manager of the theatre, while the agreement with Wagner was in force and before the expiration of the term, enticed and procured Wagner to refuse to perform, by means of which enticement and procurement of the defendant, Wagner wrongfully refused to perform, and did not perform during the term. Count 3 stated that Johanna Wagner had been and was hired by the plaintiff to sing and perform at his theatre for a certain time as the dramatic artiste of the plaintiff for reward to her, and had become and was such dramatic artiste of the plaintiff at his theatre, yet the defendant, well knowing, etc., maliciously enticed and procured her to depart from the said employment. In each count special damage was alleged. To the declaration the defendant demurred, and issue was joined.

Willes for the defendant.

Cowling for the plaintiff.

Cur. adv. vult.

June 3, 1853. The following judgments were read.

CROMPTON, J.—The declaration in this case consisted of three counts. The two first stated a contract between the plaintiff, the proprietor of the Queen's Theatre, and Miss Wagner, for the performance by her for a period of three months at the plaintiff's theatre; and it then stated that the defendant, knowing the premises and with a malicious intention, while the agreement was in full force and before the expiration of the period for which Miss Wagner was engaged, wrongfully and maliciously enticed and procured Miss Wagner to refuse to sing or perform at the theatre and to depart from and abandon her contract with the plaintiff and all service thereunder, whereby Miss Wagner wrongfully, during the full period of the engagement, refused and made default in performing at the theatre. Special damage arising from the breach of Miss Wagner's engagement was then stated. The third count stated that Miss Wagner had been hired and engaged by the plaintiff, then being the owner of the Queen's Theatre, to perform at the theatre for a specified period as the dramatic artiste of the plaintiff for reward to her in that behalf, and had become and was such dramatic artiste for the plaintiff at his theatre for profit to the plaintiff in that behalf, and that the defendant, well knowing the premises and with a malicious intention, while Miss Wagner was such artiste of the plaintiff, wrongfully and maliciously enticed and procured her, so being such artiste of the plaintiff, to depart from and out of the employment of the plaintiff, whereby she wrongfully departed from and out of the service and employment of the plaintiff, and remained and continued absent from such service and employment until the expiration of her said hiring and engagement to the plaintiff by effluxion of time. Special damage arising from the breach of Miss Wagner's engagement was then stated. To this declaration the defendant demurred, and the question for our decision is whether all or any of the counts are good in substance.

The effect of the two first counts is that a person under a binding contract to perform at a theatre is induced by the malicious act of the defendant to refuse to perform and entirely abandon her contract, whereby damage arises to the plaintiff, the proprietor of the theatre. The third count differs in stating expressly that the performer had agreed to perform as the dramatic artiste of the plaintiff, and had become and was the dramatic artiste of the plaintiff for reward to her, and that the defendant maliciously procured her to depart out of the employment of the plaintiff as such dramatic artiste, whereby she did depart out of the employment and service of the plaintiff, whereby damage was suffered by the plaintiff. It was said, in support of the demurrer, that it did not appear in the declaration that the relation of master and servant ever subsisted between the plaintiff and Miss Wagner; that Miss Wagner was not averred, especially in the two first counts, to have entered upon the service of the plaintiff; and that the engagement of a theatrical performer, even if the performer has entered upon the duties, is not of such a

A nature as to make the performer a servant within the rule of law which gives an action to the master for the wrongful enticing away of his servant. It was laid down broadly, as a general proposition of law, that no action will lie for procuring a person to break a contract, although such procuring is with a malicious intention and causes great and immediate injury. The law as to enticing servants was said to be contrary to the general rule and principle of law, to be anomalous, and

B probably to have had its origin from the state of society when serfdom existed and to be founded upon, or upon the equity of, the Statute of Labourers. It was said that it would be dangerous to hold that an action was maintainable for persuading a third party to break a contract unless some boundary or limits could be pointed out; that the remedy for enticing away servants was confined to cases where the relation of master and servant, in a strict sense, subsisted between the parties; and that, in all other cases of contract, the only remedy was against the party breaking the contract.

Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear

D law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. I think that the rule applies wherever the wrongful interruption

E operates to prevent the service during the time for which the parties have contracted that the service shall continue, and I think that the relation of master and servant subsists, sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties. I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that the service is not actually

F continuing, can make any difference. The wrong and injury are surely the same whether the wrongdoer entices away the gardener, who has hired himself for a year, the night before he is to go to his work, or after he has planted the first cabbage on the first morning of his service. I should be sorry to support a distinction so unjust, and so repugnant to common sense, unless bound to do so by some rule or authority of law plainly showing that such distinction exists.

G The proposition of the defendant, that there must be a service actually subsisting, seems to be inconsistent with the authorities that show these actions to be maintainable for receiving or harbouring servants after they have left the actual service of the master. In *Blake v. Lanyon* (1) it was held by the Court of King's Bench, in accordance with the opinion of GAWDY, J., in *Adams and Bafealds Case* (2), and against the opinion of the two other judges who delivered their opinions in that

H case, that an action will lie for continuing to employ the servant of another after notice, without having enticed him away and although the defendant had received the servant innocently. It is there said (6 Term Rep. at p. 222):

I "A person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master; the very act of giving him employment is affording him the means of keeping him out of his former service."

This appears to me to show that we are to look to the time during which the contract of service exists, and not to the question whether an actual service subsists at the time. In *Blake v. Lanyon* (1) the party, so far from being in the actual service of the plaintiff, had abandoned that service, and entered into the service of the defendant in which he actually was, but, inasmuch as there was a binding contract of service with the plaintiffs, and the defendant kept the party after notice he was held liable to an action. Since this decision actions for wrongfully hiring

or harbouring servants after the first actual service had been put an end to have been frequent: see *Pilkington v. Scott* (8) and *Hartley v. Cummings* (9). In *Sykes v. Dixon* (7), where the distinction as to the actual service having been put an end to was relied upon for another purpose, it does not seem to have occurred to the Bar or the court that the action would fail on account of there having been no actual service at the time of the second hiring or the harbouring; but the question as to there being, or not being, a binding contract of service in existence at the time seems to have been regarded as the real question. A

The objection as to the actual employment not having commenced would not apply in the present case to the third count, which states that Miss Wagner had become the artiste of the plaintiff and that the defendant had induced her to depart from the employment. But it was further said that the engagement, employment, or service, in the present case was not of such a nature as to constitute the relation of master and servant, so as to warrant the application of the usual rule of law giving a remedy in case of enticing away servants. The nature of the injury and of the damage being the same, and the supposed right of action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts for services of any particular description; and I think that the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labour or service for a given time under the direction of a master or employer who is injured by the wrongful act, more especially when the party is bound to give such personal services exclusively to the master or employer though I by no means say that the service need be exclusive. B C D E

Two *nisi prius* decisions were cited by the counsel for the defendant in support of this part of the argument. One of these cases, *Ashley v. Harrison* (3), was an action against the defendant for having published a libel against a performer, whereby she was deterred from appearing on the stage, and LORD KENYON held the action not maintainable. This decision appears, especially from the report of the case in *ESPINASSE*, to have proceeded on the ground that the damage was too remote to be connected with the defendant's act. This was pointed out as the real reason of the decision by MR. ERSKINE in *Tarleton v. M'Gawley* (4), tried at the same sittings as *Ashley v. Harrison* (3). The other case, *Taylor v. Neri* (5), was an action for an assault on a performer, whereby the plaintiff lost the benefit of his services, and EYRE, C.J., said that he did not think that the court had ever gone further than the case of a menial servant, for that, if a daughter had left the service of her father, no action *per quod servitium amisit* would lie. He afterwards observed that, if such action would lie, every man whose servant, whether domestic or not, was kept away a day from his business could maintain an action, and he said that the record stated that Breda was a servant hired to sing, and, in his judgment, he was not a servant at all, and he nonsuited the plaintiff. F G

Whatever may be the law as to the class of actions referred to, for assaulting or debauching daughters or servants *per quod servitium amisit*, which differ from actions of the present nature for the wrongful enticing or harbouring with notice, as pointed out by LORD KENYON in *Fores v. Wilson* (6), it is clear from *Blake v. Lanyon* (1) and other subsequent cases, *Sykes v. Dixon* (7), *Pilkington v. Scott* (8) and *Hartley v. Cummings* (9), that the action for maliciously interfering with persons in the employment of another is not confined to menial servants, as suggested in *Taylor v. Neri* (5). In *Blake v. Lanyon* (1) a journeyman who was to work by the piece, and had left his work unfinished, was held to be a servant for the purposes of such an action, and I think that it was most properly laid down by the court in that case that a person who contracts to do certain work for another is the servant of that other (of course with reference to such an action) until the work be finished. It appears to me that Miss Wagner had contracted to do work for the plaintiff within the meaning of this rule, and I think that, where a party has contracted to give his personal services for a certain time to another, the parties are H I

- A** in the relation of employer and employed, or master and servant, within the meaning of this rule. I see no reason for narrowing such a rule, but I should rather, if necessary, apply such a remedy to a case "new in its instance, but" "not new in the reason and principle of it": Per *HOLT, C.J.*, in *Keeble v. Hickeringill* (10); that is, to a case where the wrong and the damage are strictly analogous to the wrong and the damage in a well recognised class of cases.
- B** In deciding this case on the narrower ground, I wish by no means to be considered as deciding that the larger ground taken by counsel for the plaintiff is not tenable, or as saying that in no case except that of master and servant is an action maintainable for maliciously inducing another to break a contract to the injury of the person with whom such contract has been made. It does not appear to me to be a sound answer to say that the [actionable] act in such cases is the act of the
- C** party who breaks the contract, for that reason would apply in the acknowledged case of master and servant. Nor is it an answer to say that there is a remedy against the contractor and that the party relies on the contract, for, besides that reason also applying to the case of master and servant, the action on the contract and the action against the malicious wrongdoer may be for a different matter, and the damages payable for such malicious injury might be calculated on a very different
- D** principle from the amount of the debt which might be the only sum recoverable on the contract. Suppose a trader, with a malicious intent to ruin a rival trader, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party. I am by no means prepared to say that an action could not be maintained, and that damages, beyond the amount of the debt if the injury were great, or much less than such amount if the injury were less serious, might not be recovered. Where two or more parties were concerned in inflicting such injury, an indictment, or a writ of conspiracy at common law, might, perhaps, have been maintainable. Where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie, and in such an action on the case the plaintiff is entitled to recover against one defendant without
- F** proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action: see note (4) to *Skinner v. Gunton* (11), 1 Wms. Saund. at p. 280. In this class of cases it must be assumed that it is the malicious act of the defendant, and that malicious act only, which causes the servant or contractor not to perform the work or contract which he would otherwise have done. The servant or contractor may be utterly unable to pay for anything like the amount of the damage
- G** sustained entirely from the wrongful act of the defendant, and it would seem unjust, and contrary to the general principles of law, if such a wrongdoer were not responsible for the damage caused by his wrongful and malicious act.

Without, however, deciding any such more general question, I think that we are justified in applying the principle of the action for enticing away servants to a case where the defendant maliciously procures a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services during the period for which she had so contracted, whereby the plaintiff was injured. I think, therefore, that our judgment should be for the plaintiff.

- ERLE, J.**—The question raised upon this demurrer is whether an action will lie
- I** by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time, whereby damage was sustained? It seems to me that it will. The authorities are numerous and uniform that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present, for, there, the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed, and the present case is the same.

If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle and ought not to be extended beyond the cases heretofore decided, and that, as those have related to contracts respecting trade, manufactures, or household service, and not to performance at a theatre, therefore, they are no authority for an action in respect of a contract for such performance, the answer appears to me to be that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security. He who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party. If he is made to indemnify for such breach, no further recourse is allowed, and, as in case of the procurement of a breach of contract the action is for a wrong and cannot be joined with the action on the contract, and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore, the action for this wrong, in respect of other contracts than those of hiring, are not numerous, but still they seem to me sufficient to show that the principle has been recognised.

In *Winsmore v. Greenbank* (12) it was decided that the procuring of a breach of the contract of a wife is a cause of action [the action was for enticement]. The only distinction in principle between this case and other cases of contracts is that the wife is not liable to be sued, but the judgment rests on no such grounds. The procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong. In *Green v. Button* (13) it was decided that the procuring a breach of a contract of sale of goods by a false claim of lien is an actionable wrong. *Shepherd v. Wakeman* (14) is to the same effect, where the defendant procured a breach of a contract of marriage by asserting that the woman was already married. In *Ashley v. Harrison* (3) and in *Taylor v. Neri* (5) it was properly decided that the action did not lie because the battery, in the first case, and the libel, in the second case, upon the contracting parties were not shown to be with intent to cause those persons to break their contracts, and so the defendants by their wrongful acts did not procure the breaches of contract which were complained of. If they had so acted for the purpose of procuring those breaches, it seems to me they would have been liable to the plaintiffs. To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added. At least LORD MANSFIELD's judgment in *Bird v. Randall* (15) is to that effect.

This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify, and that whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery, and both ought on the same ground to be made responsible. The remedy on the contract may be inadequate, as where the measures of damages is restricted; or in the case of non-payment of a debt where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or, in the case of the non-delivery of the goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection that the contracting party had not begun the

A performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and, in my judgment, ought to be equally actionable as the relation of employer and employed is constituted by the contract alone and no act of service is necessary thereto. The result is that there ought to be, in my opinion, judgment for the plaintiff.

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WIGHTMAN, J. (read by LORD CAMPBELL, C.J.).—This was a demurrer to a declaration in an action against the defendant for, maliciously, and with intent to injure the plaintiff, causing, procuring and enticing Miss Wagner, who had contracted with the plaintiff to sing at his theatre, to break her contract and refuse to sing, by which he sustained damage.

C

It was contended for the defendant that an action is not maintainable for inducing another to break a contract although the inducement is malicious and with intent to injure; and that the breach of contract complained of is, in contemplation of law, the wrongful act of the contracting party and not the consequence of the malicious persuasion of the party charged which ought not to have had any effect or influence; and that the damage is not the legal consequence of the acts of the defendant. It was further urged that the cases in which actions have been held maintainable for seducing servants and apprentices from the employ of their masters are exceptions to the general rule and are not to be extended, and that the present case, as it appears upon the declaration, is not within any of the excepted cases.

D

With respect to the first and second counts of the declaration, it was contended for the plaintiff that an action on the case is maintainable for maliciously procuring a person to refuse to perform a contract into which he has entered, by which refusal the plaintiff has sustained an injury; and though no case was cited upon the argument in which such an action had been brought, or directly held to be maintainable, it was said that on principle such an action was maintainable. The authority of *COMYNS, C.B.*, was cited, that in all cases where a man has a temporal loss or damage by the wrong of another he may have an action on the case. In the present case there is the malicious procurement of Miss Wagner to break her contract, and the consequent loss to the plaintiff. Why then may not the plaintiff maintain an action on the case? Because, as it is said, the loss or damage is not the natural or legal consequence of the acts of the defendant. There is the injuria, and the damnum, but it is contended that the damnum is neither the natural nor legal consequence of the injuria, and that, consequently, the action is not maintainable as the breaking her contract was the spontaneous act of Miss Wagner herself, who was under no obligation to yield to the persuasion or procurement of the defendant.

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Vicars v. Wilcocks (16), which although it has been much brought into question has never been directly overruled, was relied upon as an authority upon this point for the defendant. That case, however, is clearly distinguishable from the present upon the ground, suggested by *TINDAL, C.J.*, in *Ward v. Weeks* (17), that the damage in that case, as well as in *Vicars v. Wilcocks* (16), was not the necessary consequence of the original slander uttered by the defendants, but the result of spontaneous and unauthorised communications made by those to whom the words were uttered by the defendants. The distinction is taken in *Green v. Button* (13), in which it was held that an action was maintainable against the defendant for maliciously and wrongfully causing certain persons to refuse to deliver goods to the plaintiff by asserting that he had a lien upon them and ordering these persons to retain the goods until further orders from him. It was urged for the defendant in that case that, as the persons in whose custody the goods were were under no legal obligation to obey the orders of the defendant, it was the mere spontaneous act of these persons which occasioned the damage to the plaintiff, but the court held the action to be maintainable though the defendant did make the claim as of right, he having done so maliciously and without any reasonable cause and the damage accruing thereby.

I

In *Winsmore v. Greenbank* (12) the plaintiff in his first count alleged that, his wife having unlawfully left him and lived apart from him during which time a considerable fortune was left for her separate use, and she being willing to return to the plaintiff whereby he would have had the benefit of her fortune, the defendant, in order to prevent the plaintiff from receiving any benefit from the wife's fortune and the wife from being reconciled to him, unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent from the plaintiff, and she did by means thereof continue absent from him, whereby he lost the comfort and society of the wife and her aid in his domestic affairs and the profit and advantage he would have had from her fortune. Upon motion in arrest of judgment this count was held good and that it sufficiently appeared that there was both *damnum* and *injuria*: it was *prima facie* an unlawful act of the wife to live apart from her husband, and it was unlawful, and, therefore, tortious, in the defendant to procure and persuade her to do an unlawful act: and, as the damage to the plaintiff was occasioned thereby, an action on the case was maintainable. This case appears to me to be an exceedingly strong authority in the plaintiff's favour in the present case. It was undoubtedly *prima facie* an unlawful act on the part of Miss Wagner to break her contract, and, therefore, a tortious act of the defendant maliciously to procure her to do so, and, if damage to the plaintiff followed in consequence of that tortious act of the defendant, it would seem, upon the authority of *Green v. Button* (13) and *Winsmore v. Greenbank* (12), as well as upon general principle, that an action on the case is maintainable.

A doubt was expressed by LORD ELDON, in *Morris v. Langdale* (18) whether in an action on the case for slander the plaintiff could succeed upon an allegation of special damage that, by reason of the speaking of the words, other persons refused to perform their contracts with him, LORD ELDON observing that that was a damage which might be compensated in actions by the plaintiff against such persons. It has, however, been remarked with much force by MR. STARKIE, in his *TREATISE ON THE LAW OF LIBEL* (2nd Edn.), vol. 1, p. 205, that such a doctrine would be productive of much hardship in many cases, as a mere right of action for damages for non-performance of a contract can hardly be considered a full compensation to a person who has lost the immediate benefit of the performance of it. The doubt, indeed, is hardly sustainable on principle, and there are many cases in which actions have been maintained for slanderous words, not in themselves actionable, on the ground of the speaking of the words having induced other persons to act wrongfully towards the plaintiffs, as in *Newman v. Zachary* (19), where an action on the case was held to be maintainable for wrongfully representing to the bailiff of a manor that a sheep was an estray, in consequence of which it was wrongfully seized. On the whole, therefore, I am of opinion that, on the general principles on which actions on the case are founded, as well as on authority, the present action is maintainable.

It is not, however, necessary, for the maintenance of the third count of the declaration at least, to rely upon so general a principle, for the case, at all events, appears to me to fall within the cases, which the defendant considers are exceptions to a general rule and in which actions have been held maintainable, for procuring persons to quit the service in which they had been retained and employed. The defendant contends that the exception is limited to the cases of apprentices and menial servants and others to whom the provisions of the Statutes of Labourers would be applicable. It appears to me, however, upon consideration of the cases cited upon the argument, that the right of an employer to maintain an action on the case for procuring or inducing persons in his service to abandon their employment is not so limited, but that it extends to the case of persons who have contracted for personal service for a time, and who during the period have been wrongfully procured and incited to abandon such service, to the loss of the persons whom they had contracted to serve. The right to maintain such an action is by the common law, and not by the Statute of Labourers, which, however, gives a remedy, which the common law did not, in cases where persons within the purview of the statute

A have voluntarily left the service in which they were engaged and have been retained by another who knew of their previous employment. In BROOKE'S ABRIDGEMENT, tit. LABORERS, pl. 21, it is said :

"In trespass it was agreed that at common law, if a man had taken my servant from me, trespass lay *vi et armis*; but if he had procured the servant to depart and he retained him, action lay not at common law *vi et armis*, but it lay upon the case upon the departure by procurement."

In *Adams and Bafelds Case* (2), where the plaintiff declared that his servant departed his service without cause and the defendant knowing him to be his servant retained him, two judges out of three held that the action did not lie at common law unless the defendant procured him to leave the service. In all these cases

C the words "servant" and "service" are used, but there is nothing to indicate the kind of servant or of service in respect of which the dicta and decisions occurred. There is a case in the YEAR BOOK Mich. 10 Hen. 6, fol. 8 B., pl. 30, in which it is said that an action does not lie against a chaplain upon the Statute of Labourers for not chaunting the mass, for it is said he may not be always disposed to sing and can no more be coerced by force of the statute than a knight, esquire or gentleman.

D There is no doubt but that the Statute of Labourers only applied to persons whose only means of living was by the labour of their hands. It was passed in the twenty-third year of Edward III [1349], and it recited that so many of the people, especially workmen and servants, had died of the plague that those that remained required excessive wages so that there was lack of ploughmen and such labourers, and it then obliged every person within the age of sixty, not living in merchandise,

E nor exercising any craft, nor having of his own whereof he might live, nor proper land which he might till himself, to serve whoever might require him at such wages as were paid in the twentieth year of the King's reign or some three years before. The remedies and penalties given by this and the next subsequent Statute of Labourers [25 Edw. 3, St. 2: 1350] were limited to the persons described in them, but the remedies given by the common law are not in terms limited to any description

F of servant or service.

The more modern cases give instances and contain dicta of judges which appear to warrant a more extended application of the right of action for procuring a servant to leave his employment than that contended for by the defendant. In *Hart v. Aldridge* (20) the plaintiff brought an action for enticing away the plaintiff's servants who worked for him as journeymen shoemakers. It appeared that they worked for the plaintiff for no determinate time, but only by the piece, and had, at the time of the enticing away, each a pair of shoes of the plaintiff unfinished. It was contended that a journeyman hired not for time but by the piece was not a servant, but LORD MANSFIELD said that by being found to be the plaintiff's "journeymen" they were found to be the plaintiff's servants (1 Cowp. at p. 56):

H "The point turns upon the jury finding that the persons enticed away were employed by the plaintiff as his journeymen. It might, perhaps, have been different if the men had taken work for everybody."

In the present case, Miss Wagner was, as stated in the third count and admitted by the demurrer, employed by the plaintiff as his dramatic artiste. Can it make any real difference that in *Hart v. Aldridge* (20) the persons enticed were employed

I by the plaintiff as his journeymen shoemakers, and that in the present case Miss Wagner was employed by the plaintiff as his dramatic artiste? In both cases the services were the personal services of the persons engaged, and, though the description of the services was very different, the personal service being in the one case to make shoes and in the other to sing songs, it seems to me difficult to distinguish the cases upon any principle. It is the exclusive personal service that gives the right. In *Blake v. Lanyon* (1), which was a case very similar in respect to the nature of the service to that of *Hart v. Aldridge* (20), it was stated by the court, as a general proposition, that

“a person who contracts with another to do certain work for him is the servant of that other till the work is finished.” A

These cases appear to me to be very strong authorities in favour of the plaintiff, as far at least as regards the third count. Two cases, however, were cited for the defendant, as direct authorities against the maintenance of the present action. The first was that of *Ashley v. Harrison* (3), in which the plaintiff declared that he had retained Madam Mara to sing publicly for him in certain musical performances which he exhibited for profit at Covent Garden Theatre, but that the defendant, contriving to lessen his profits and to deter Madam Mara from singing, published a libel concerning her which deterred her from singing as she could not sing without danger of being assaulted and ill treated in consequence of the libel. LORD KENYON held, at nisi prius, that the action was not maintainable as the injury was too remote. The case does not appear to have undergone much discussion. It was only a decision at nisi prius, but it is clearly distinguishable from the present, as Madam Mara was deterred from singing, not directly in consequence of anything done by the defendant, but in consequence of her fear that what he did might induce somebody else to assault and ill treat her. The injury in that case may have been well held to be too remote, but it does not at all resemble this, where the loss is the direct consequence of the defendant's act. B C D

The other case was *Taylor v. Neri* (5), which certainly bears more directly upon the present. The declaration stated that the plaintiff, being manager of the Opera House, had engaged Breda to sing, and that the defendant beat him, whereby the plaintiff lost his service. EYRE, C.J., expressed a doubt whether the action was maintainable, observing that, if such an action could be supported, every person whose servant, whether domestic or not, was kept away a day from his business could maintain an action. He was of opinion that Breda was not a servant at all. The case was very little discussed, was a decision at nisi prius, and does not appear to have undergone much consideration; and, without adverting to some distinctions between that and the present case, it can hardly be considered as an authority of much weight for the defendant. I am, therefore, of opinion that upon the whole case, as it appears upon these pleadings, the plaintiff is entitled to our judgment. E F

COLERIDGE, J.—The plaintiff in this case, by the first count of his declaration, shapes his case in substance as follows. He alleges a contract made between himself and Johanna Wagner for her to perform in his theatre in operas for a specified time, i.e., from April 15 to July 15 on certain terms, and, among these, one that she was not during the time to sing or use her talents elsewhere than in his theatre without his written authority. He then complains that the defendant, knowing the premises, and maliciously intending to injure him and to prevent Johanna Wagner from performing according to her contract, while the agreement was in full force, but before the commencement of the term, on April 8, enticed and procured her to make default in singing or performing at the theatre, and to depart from and abandon her contract, against his will and without his written authority, by means of which enticement and procurement she unlawfully and wrongfully wholly refused to perform her contract, and he sustained special damage. The second count applies to an enticement, after certain proceedings in equity, to Johanna Wagner to continue her default for the residue of the term. The third count states that Johanna Wagner was hired and engaged by the plaintiff to sing and perform at his theatre, for a certain time, as his dramatic artiste for reward, and had become and was such dramatic artiste, and complains that the defendant, maliciously intending to injure him, enticed and procured her to depart from and out of his employment. These counts are demurred to, and the demurrers raise the questions whether an action will lie against a third party for maliciously and injuriously enticing and procuring another to break a contract for exclusive service as a singer and theatrical performer, in the first place, while the contract is merely executory, and, in the second, after it is in course of execution? I make no distinction between the counts, and am of opinion that the defendant is entitled to our judgment generally. G H I

A To maintain this action, one of two propositions must be maintained—either that an action will lie against any one by whose persuasions one party to a contract is induced to break it to the damage of the other party, or that the action for seducing a servant from the master or persuading one who has contracted for service from entering into the employ, is of so wide application as to embrace the case of one in the position and profession of Johanna Wagner. After much consideration
B and enquiry I am of opinion that neither of these propositions is true, and they are both of them so important, and, if established by judicial decision, will lead to consequences so general, that, though I regret the necessity, I must not abstain from entering into remarks of some length in support of my view of the law.

It may simplify what I have to say, if I first state what are the conclusions which I seek to establish. They are that in respect of breach of contract the general
C rule of our law is to confine its remedies by action to the contracting parties and to damages directly and proximately consequential on the act of him who is sued; that, as between master and servant, there is an admitted exception; that this exception dates from the Statute of Labourers, 1849, and both on principle and according to authority is limited by it. If I am right in these propositions, the conclusion will be for the defendant, because enough appears on this record to show, as to the
D first, that he, and, as to the second, that Johanna Wagner, is not within the limits so drawn.

First then, that the remedy for breach of contract is by the general rule of our law confined to the contracting parties. I need not argue that, if there be any remedy by action against a stranger, it must be by action on the case. To found this, there must be both injury in the strict sense of the word (that is a wrong done).
E and loss resulting from that injury; the injury or wrong done must be the act of the defendant; and the loss must be a direct and natural, not a remote and indirect, consequence of the defendant's act. Unless there be a loss thus directly and proximately connected with the act, the mere intention, or even the endeavour, to produce it will not found the action. The existence of the intention, that is the malice, will in some cases be an essential ingredient in order to constitute the
F wrongfulness or injurious nature of the act, but it will neither supply the want of the act itself, or its hurtful consequence; however complete the injuria, and whether with malice or without, if the act be after all sine damno, no action on the case will lie. The distinction between civil and criminal proceedings in this respect is clear and material, and a recollection of the different objects of the two will dispose of any argument founded merely on the allegation of malice in this declaration if I
G shall be found right in thinking that the defendant's act has not been the direct or proximate cause of the damage which the plaintiff alleges he has sustained. If a contract has been made between A. and B. that the latter should go supercargo for the former on a voyage to China, and C., however maliciously, persuades B. to break his contract, but in vain, no one, I suppose, would contend that any action would lie against C. On the other hand, suppose a contract of the same kind made
H between the same parties to go to Sierra Leone, and C. urgently and bona fide advises B. to abandon his contract, which on consideration B. does, whereby loss results to A. I think no one will be found bold enough to maintain that an action would lie against C. In the first case no loss has resulted—the malice has been ineffectual; in the second, though a loss has resulted from the act, that act was not C.'s, but entirely and exclusively B.'s own. If so, let malice be added, and
I let C. have persuaded, not bona fide but mala fide and maliciously, still, all other circumstances remaining the same, the same reason applies, for it is *malitia sine damno*, if the hurtful act is entirely and exclusively B.'s, which last circumstance cannot be affected by the presence or absence of malice in C.

Thus far I do not apprehend much difference of opinion. There would be such a manifest absurdity in attempting to trace up the act of a free agent breaking a contract to all the advisers who may have influenced his mind, more or less honestly, more or less powerfully, and to make them responsible civilly for the consequences of what after all is his own act, and for the whole of the hurtful consequences of

which the law makes him directly and fully responsible, that I believe it will never be contended for seriously. This was the principle on which LORD KENYON proceeded in *Ashley v. Harrison* (3). There the defendant libelled Madame Mara, and the plaintiff alleged that, in consequence, she, from apprehension of being hissed and ill-treated, forbore to sing for him, though engaged, whereby he lost great profits. LORD KENYON nonsuited the plaintiff: he thought the defendant's act too remote from the damage assigned. But it will be said that this declaration charges more than is stated in the case last supposed, because it alleges, not merely a persuasion or enticement, but a procuring. In *Winsmore v. Greenbank* (12) the same word was used in the first count of the declaration, which alone is material to the present case. The Chief Justice, who relied on it and distinguished it from enticing, defined it to mean "persuading with effect"; and he held that the husband might sue a stranger for persuading with effect his wife to do a wrongful act directly hurtful to himself.

Although I should hesitate to be bound by every word of the judgment, yet I am not called on to question this definition or the decision of the case. Persuading with effect, or effectually or successfully persuading, may, no doubt, sometimes be actionable—as in trespass—even where it is used towards a free agent. The maxims, *qui facit per alium facit per se*, and *respondeat superior*, are unquestionable, but where they apply the wrongful act done is properly charged to be the act of him who has procured it to be done. He is sued as a principal trespasser, and the damage, if proved, flows directly and immediately from his act, though it was the hand of another, and he a free agent, that was employed. But, when you apply the term of effectual persuasion to the breach of a contract, it has obviously a different meaning. The persuader has not broken and could not break the contract, for he had never entered into any; he cannot be sued upon the contract; and yet it is the breach of the contract only that is the cause of damage. Neither can it be said that in breaking the contract the contractor is the agent of him who procures him to do so; it is still his own act; he is principal in so doing, and is the only principal. This answer may seem technical, but it really goes to the root of the matter. It shows that the procurer has not done the hurtful act; what he has done is too remote from the damage to make him answerable for it.

Winsmore v. Greenbank (12) seems to me to have little or no bearing on the present case. A wife is not, as regards her husband, a free agent or separate person [but see now Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1, and Married Women (Restraint upon Anticipation) Act, 1949, s. 1]. If to be considered so for the present purpose, she is rather in the character of a servant, with this important peculiarity, that, if she be induced to withdraw from his society and cohabit with another or do him any wrong, no action is maintainable by him against her. In the case of criminal conversation [abolished by Matrimonial Causes Act, 1857], trespass lies against the adulterer as for an assault on her, however she may in fact have been a willing party to all that the defendant had done. No doubt, therefore, effectual persuasion to the wife to withdraw and conceal herself from her husband is in the eye of the law an actual withdrawing and concealing her, and so, in other counts of the declaration, was it charged in this very case of *Winsmore v. Greenbank* (12). A case explainable and explained on the same principle is that of ravishment of ward. The writ for this lay against one who procured a man's ward to depart from him, and, where this was urged in a case hereafter to be cited (YEAR BOOK, Mich. 11 Hen. 4, fol. 23 A, pl. 46), HANKFORD, J., gives the answer. The reason is, he says, because the ward is a chattel, and vests in him who has the right.

None of this reasoning applies to the case of a breach of contract: if it does, I should be glad to know how any treatise on the law of contract could be complete without a chapter on this head, or how it happens that we have no decisions upon it. Certainly no subject could well be more fruitful or important; important contracts are more commonly broken with than without persuaders or procurers, and these often responsible persons when the principals may not be so. I am aware that

A with respect to an action on the case the argument *primæ impressionis* is sometimes of no weight. If the circumstances under which the action would be brought have not before arisen, or are of rare occurrence, it will be of none, or only of inconsiderable weight, but if the circumstances have been common, if there has been frequently occasion for the action, I apprehend it is important to find that the action has yet never been tried.

B We find a plentiful supply both of text and decision in the case of seduction of servants, and what inference does this lead to, contrasted with the silence of the books and the absence of decisions on the case of breach of ordinary contracts? Let this too be considered—that, if by the common law it was actionable effectually to persuade another to break his contract to the damage of the contractor, it would seem on principle to be equally so to uphold him, after the breach, in continuing it.

C Upon this the two conflicting cases of *Adams and Bafealds Case* (2) and *Blake v. Lanyon* (1) are worth considering. In the first, two judges against one decided that an action does not lie for retaining the servant of another unless the defendant has first procured the servant to leave his master; in the second, this was overruled; and, although it was taken as a fact that the defendant had hired the servant in ignorance, and, as soon as he knew that he had left his former master with work unfinished, requested him to return, which we must understand to have been a real, earnest request, and only continued him after his refusal, which we must take to have been his independent refusal, it was held that the action lay, and this reason is given: “The very act of giving him employment is affording him the means of keeping out of his former service.” Would the judges who laid this down have held it actionable to give a stray servant food or clothing or lodging out of charity? Yet

E these would have been equally means of keeping him out of his former service.

The true ground on which this action was maintainable, if at all, was the Statute of Labourers, to which no reference was made. But I mention this case now as showing how far courts of justice may be led if they allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on

F itself, of redressing only the proximate and direct consequences of wrongful acts. To draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice. Who shall say how much of a free agents’ resolution flows from the interference of other minds or the independent resolution of his own? This is a matter for the casuist rather than the jurist; still less is it for the juryman. Again, why draw the line between bad and good faith? If advice

G given *mala fide* and loss sustained entitle me to damages, why, though the advice be given honestly, but under wrong information, with a loss sustained, am I not entitled to them. According to all legal analogies, the *bona fides* of him who, by a conscious wilful act, directly injures me will not relieve him from the obligation to compensate me in damages for my loss. Again, where several persons happen to persuade to the same effect, and in the result the party persuaded acts upon the

H advice, how is it to be determined against whom the action may be brought, whether they are to be sued jointly or severally, in what proportions damages are to be recovered? Again, if, instead of limiting our recourse to the agent, actual or constructive, we will go back to the person who immediately persuades or procures him one step, why are we to stop there? The first mover, and the malicious mover too, may be removed several steps backward from the party actually induced to

I break the contract: why are we not to trace him out? Morally he may be the most guilty. I adopt the arguments of LORD ABINGER and ALDERSON, B., in *Winterbottom v. Wright* (21); if we go the first step, we can show no good reason for not going fifty. And, again, I ask how is it that, if the law really be as the plaintiff contends, we have no discussions upon such questions as these in our books, no decisions in our reports? Surely such cases would not have been of rare occurrence: they are not of slight importance, and could hardly have been decided without reference to the courts in banc. Not one was cited in the argument bearing closely enough upon this point to warrant me in any further detailed examination of them.

I conclude, therefore, what occurs to me on the first proposition on which the plaintiff's case rests. A

I come now to the second proposition, that the decisions in respect of master and servant, and the seducing of the latter from the employ of the former, are exceptions grafted on the general law traceable up to the Statute of Labourers. This is, of course, distinct from the question of the extent of the exception, that is, to what classes of servants it applies, but the enquiries are so connected together in fact, and the latter has so obvious a bearing in support of the former, that it will be better to take them both together. B

In the first place, I cannot find any instance of this action having been brought before the statute passed, the weight of which fact is much increased by finding that it was of common occurrence very soon after. The evidence for it is not merely negative, for the mischief and the cause of action appear to have been well known before and the want of the remedy felt. The common law did give a remedy in certain cases, and judges are found pointing out what that remedy was, and to what cases it applied. From the cases collected in FITZHERBERT'S ABRIDGEMENT, tit. LABORERS, it appears that the distinction between the action at common law and the action upon the statute was well known. Wherever the former action lay it was in trespass, and not on the case, in saying which I do not rely merely on the words, writ of trespass, which might be applicable to trespass on the case, but I rely on the operative words of the writ which stated a taking vi et armis. It might be joined with trespass quare clausum fregit or trespass for the asportation of chattels or false imprisonment. The count necessarily charged the taking of the servant out of the service of the plaintiff, whereas the writ upon the statute, as appears from FITZHERBERT'S NATURA BREVIVM, 167 B., charges the retainer and admission of the servant into the defendant's service after he has been induced to withdraw, or has withdrawn without reasonable cause, from that of the plaintiff. C D E

I do not wish unnecessarily to multiply citations from the YEAR BOOKS, but it will be necessary to refer to some, and at greater length than they are found in the abridgments. I begin with one out of the order of time, because it is so full to the purpose, and because it may be referred to as abridged by BROOKE (ABRIDGEMENT, tit. LABORERS, pl. 21.), I think incorrectly in a material point. He says that it was agreed in it that case lay for the departure by procurement, but not where the servant departed without procurement and was afterwards retained. The case is YEAR BOOK Mich. 11 Hen. 4 [1409], fol. 23 A., pl. 46. Not, as he cites it with a slight inaccuracy, 21.22. F

"Thomas Frome brings writ of trespass at the common law against defendant for his close broken, and one J. his servant taken out of his service (pris hors de son service), and certain sheep driven away with force and arms." G

There were different pleadings and much discussion as to the separate causes of action, which introduces some confusion into the case. As to the servant, *Tremain* pleaded: H

"We found him wandering in a certain place in another county; and there he came and offered his service to us, and made covenant with us to serve us; and so demands judgment." I

Skrene, for the plaintiff, replies:

"He has admitted that the servant was in our service, and that he has received him into his service; and so he has admitted our action."

HANKFORD, J., said, however:

"When the servant was wandering, if the defendant had not cognizance that he was in your service, then this first receiver cannot be adjudged a wrong done by the defendant but by the servant."

Upon this *Skrene* amends his pleading, and says that the servant made a covenant with the plaintiff to serve him in the office of "berchier" [shepherd]

A "for a whole year, within which year the defendant procured our servant to go out of our service, by force of which procurement he went out of our service within the year, and the defendant retains him in his service; which matter we wish to aver;"

and demands judgment. On which HILL, J., says:

B "His writ of trespass as to the servant does not lie upon the matter shown; for the plaintiff says that the defendant did nothing but procure the servant to go out of his service, by which procurement he went out of his service, and was retained with the defendant, in which case action on the Statute of Labourers is given, and not this action."

Skrene argues:

C "If a man procures my servant to go out of my service, and retains him upon that, he does me wrong."

HANKFORD, J., and HILL, J., both say:

"True it is that he does you wrong: but you shall not have a remedy on this manner of writ as it is here."

D CULPEPER, J.:

"This action is taken upon an action at the common law . . . the actions which were at the common law before the Statute of Labourers are not taken away by that statute; and, if a man procure and abet my servant to go with him in his service, action at common law lies well."

E HILL, J.:

"No, certes, action at common law of trespass does not lie on such a case; for such a procurement cannot be said in any manner to be against the peace."

THIRNING, C.J.:

F "If my servant before the statute went out of my service, I suppose well that no action is given to the master; but if a man took my servant out of my service, there action of trespass lay at the common law, and still lies; and, if I am beaten by the abettment and command of a man, the commander is guilty of trespass: so in the case here, when he shall procure the servant to depart and retains him with him, he seems guilty of trespass."

G But HILL, J., answers him:

"Sir, in your case there is no marvel, because the principal actor in your case is guilty of trespass: but the case at Bar is different; for the procurement only is not a trespass against the peace, nor is the departure of the servant a trespass against the peace; then, if the cause of action is not against the peace, the remainder which follows after it is not trespass against the peace: and I well agree that the defendant in this case is guilty, as of a thing done against the provisions of the statute; and this matter is as clearly within the statute as it could be, both as to the servant, who has departed from his service, and as to the defendant, who has presumed to retain him in his service against the statute."

I HANKFORD, J.:

"I am of the same opinion, as my master has expressed, that, if my servant depart out of my service, at common law I have no action, and the cause was for that between my servant and me the contract sounds in the manner of a covenant in itself (en luy meme), upon which no action was given at the common law without a specialty; and for this mischief was the statute ordained and action given on it; wherefore, if you will not say that he took your servant out of your service, as you have supposed by your writ, this writ is not maintainable."

CULPEPER, J., says :

"If a man procure my ward to go from me, and he goes by his procurement, I shall have ravishment of ward against him."

HANKFORD, J., admits this, and says the reason is, because the ward "is a chattel and vests in him who has the right." After some more discussion, *Skrene* amends, and says : "He came to our house, and procured our servant, and took him, as we have supposed by our writ." *Tremain*, being ordered to answer, pleads :

"He was wandering, and offered his service to us; and we received him : without this that we took him in manner as he has alleged."

On this, in the end, they seem to have gone to the country.

There were several points in this case, and it is not clear whether on this part the court was ultimately divided or not, but it is clear that the judges who argued in support of the count as first pleaded contended only that it showed a trespass. THIRNING, C.J., admits that, before the statute, if a servant went out of the service no action lay, but if he was taken trespass did; and then contends that the procuring in the case at Bar was a taking and made the party guilty of trespass, in which he was clearly wrong. If at this time case lay at common law for procuring the servant to depart, what becomes of the argument of the necessity for the statute. Or if, where one party broke a covenant at the instigation of another case lay, why was not that applicable to the case of a covenanted servant. But it is clear that all agreed in this—if the defendant has taken the servant under such circumstances, you may have trespass at common law now as before the statute, but, if you cannot lay it as a trespass, your only remedy is under the statute.

I may as well add FITZHERBERT'S ABRIDGEMENT (tit. LABORERS, pl. 16), which is fuller, and I think more accurate, than BROOKE'S.

"Trespass at common law of his servant taken out of his service with force. *Tremain* : We found him vagrant in a certain place in another county, and there he came and proffered his service to us, and made covenant with us to serve. Judgment if action, etc. *Skrene* : He was retained with us to serve us in the office of a bergier for a year, within which the defendant procured him to go out of our service; by reason of which he went out of our service within the year and hired himself with the defendant. HILL, J. : This action does not lie on the matter. *Skrene* : If a man procure my servant to go out of my service, and retains him, he does me wrong. HILL and HANKFORD, JJ. : That is true; but you shall not have remedy on such a writ as this is. CULPEPER, J. : The action which was at common law is not taken away by the Statute of Labourers. THIRNING, C.J. : At common law, before the statute, if my servant went out of my service, no action was given me; but, if a man took him out of my service, an action was given at the common law, and still is; and, if I am beaten by the command of another, the commander is a trespasser. HILL, J. : The procurement only is not trespass against the peace, nor the departure of the servant : then, if the cause of the action is not against the peace, the remnant, to wit the retainer, cannot be : but this case here is openly within the statute, as it may be against the servant upon the departure, and against the master upon the retainer. HANKFORD and HILL, JJ. : There was no action at the common law upon the departure, because the contract between the servant and me sounds in covenant in a manner; and for that mischief was the statute made; wherefore, if you will not say that he took your servant, this action does not lie. Whereupon the plaintiff said that the defendant procured his servant etc. and took him : and the other side traversed this : et alii e contra."

But, says FITZHERBERT, it seems that the defendant should have traversed the taking at first in his plea in bar. In a case in YEAR BOOK, Mich. 47 Edw. 3 [1373], fol. 14 A, pl. 15, which was on the Statute of Labourers against a servant for departing within the term for which he was retained, the plea was "we were never in your service." The question was whether that was good without a traverse of

A the retainer, and FINCHDEN, C.J., said this, which was agreed to by the whole court:

B "At common law, before the statute, if a man took my servant out of my service, I should have writ of trespass there, where he was in my service bodily: now the statute was made for this mischief, that if he never comes into my service, after he has made covenant to serve me, but he elognes himself from me, I shall have such writ and suggest that he was retained in my service and departed, as here is: wherefore it is necessary to traverse the retainer;"

which accordingly was done by the defendant, issue taken, and sic ad patriam.

C Any one, I am certain, who will go through the cases abstracted by FITZHERBERT under the title LABORERS, will be satisfied that at common law, before the statute, such an action as the present could not be maintained. Under that title sixty-one cases are abridged. Many of them are for the seduction of servants, but there is no instance of any one in which the action at common law was sustained unless an actual trespass was charged, and it is clear from the case which I have cited at so much length that the distinction between taking and procuring to go was familiar to the lawyers of that day. I can hardly imagine that this could have been D said if the common law would have given relief in such a case, and, if it could, the rapid growth of the action after the Statute of Labourers had passed would be difficult to account for.

E I come then to the Statute of Labourers, 1349, and my object now is to show that nothing in the provisions or policy of that statute will warrant the action under the circumstances of this case, and that the older authorities are decidedly against it. As we learn from the preamble, it was enacted in consequence of the great mortality among the lower classes, especially workmen and servants, in a pestilence which had prevailed in 1348-9. This pestilence will be found mentioned in our historians. In the preamble it is said:

F "Many seeing the necessity of masters, and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather willing to beg in idleness, than by labour to get their living; we considering the grievous in-commodities, which of the lack especially of ploughmen and such labourers may hereafter come, have . . . ordained."

G This preamble is followed by an enactment, that every person of whatever condition, free or bond, able in body, and under the age of sixty, not living by merchandise nor having any certain craft, nor having of his own wherewith to live, nor land of his own on the cultivation of which he may occupy himself, and not being in service, shall be compelled to enter into service when required on customary wages. By s. 2 it is made penal by imprisonment for any mower, reaper, or other labourer or servant of whatsoever state or condition he shall be, to depart from service before the expiration of the term agreed on, and no one is to receive or retain such offender in his service under like pain of imprisonment. This ordinance is the foundation of the action for the seduction of a hired servant. Upon reference to FITZHERBERT, NATURA BREVIVM, 167 B, it will be seen that the writ in such an action always recited the statute.

H It will be observed that, in order to bring a person within the first section, he must have been one who was not living by merchandise, nor having any certain craft, "certum habens artificium," nor having of his own wherewith to live, "habens de suo proprio unde vivere possit," or land of his own in the culture of which he can occupy himself, and these limitations are more pointed by the second statute [25 Edw. 3, St. 2: 1350], which speaks of "messor falcator aut alius operator vel serviens." Looking at these words and the language of the preamble, it is clear that mechanics and labourers in husbandry were the principal objects of the statute, and the decisions were accordingly. FITZHERBERT (NATURA BREVIVM, 168 E) says:

I "And so a gentleman by his covenant shall be bound to serve, although he were not compellable to serve. For if a gentleman, or chaplain, or carpenter, or such

which should not be compelled to serve, etc., covenant to serve, they shall be bound by their covenant, and an action will lie against them for departing from their service."

And LORD HALE in a note refers to YEAR BOOK, Mich. 10 Hen. 6 [1431], fol. 8 B, pl. 30, as showing that a writ does not lie on the statute for the departure of a chaplain who is retained to say the mass. Several cases will be found earlier in the YEAR BOOKS to the same effect. In YEAR BOOK, Trin. 50 Edw. 3 [1376], fol. 13 A, pl. 3, is a case in which the parson of B. sued Thomas F., a chaplain, on the Statute of Labourers, and counted of a covenant made with him to serve in the office of seneschal and to be his parochial chaplain for a certain term, and complained of a departure within the term. As to the office of seneschal, the defendant traversed the covenant, and, as to the residue, contended that the statute was only made for labourers and artificers, and he was neither the one nor the other, but the servant of God, and so was not bound by the statute. *Clopton*, for the plaintiffs, took a distinction between a parochial and a private chaplain, contending that the former, from the variety and daily pressure of his duties, was in many respects to be regarded as a labourer, and within the statute "as any other person of the people." The case was adjourned, the judges of the King's Bench were consulted, the decision was that a chaplain was not bound by the statute, and as to that part of the writ he was discharged. The same law will be found in YEAR BOOK, Mich. 4 Hen. 4 [1402], fol. 2 B, pl. 7, where the count on the statute, against a chaplain, was that he was retained by the plaintiff to be his chaplain and also his proctor and collector of tithes and to serve him "as pees et as maines" for a certain time. The retainer to be proctor and collector was specially traversed, and it was pleaded that his retainer as chaplain was only to do divine service. The decision is not very clearly stated: but FITZHERBERT (ABRIDGEMENT tit. LABOURERS, pl. 51) appears to have understood that it was against the defendant, for he abstracts the case very shortly, and adds:

"quod mirum, for he shall not be compelled to serve, but the statute is in servitio congruo."

Immediately after this he abstracts PASCH. 12 Hen. 6 [1434] thus: "Action on the Statute of Labourers is not maintainable against an esquire." And in YEAR BOOK, Hil. 19 Hen. 6, fol. 53 B, pl. 15 [1441], is a case on the statute, where the count charged a retainer in the office of labourer, and the plea was that

"he retained us to collect his rents in a certain place, without this that we were retained with him in the office of labourer."

NEWTON, J., says:

"He cannot be required to serve him in the office of collecting his rents, nor to be his seneschal; which proves that he cannot be punished by this action; for this action lies only against those who can be required to serve the party as a labourer."

Then, by the advice of all, the issue was held well tendered.

I am tempted to add one case more from YEAR BOOK, Mich. 10 Hen. 6, [1431] fol. 8 B, pl. 30. The Prior of W. brings writ on the Statute of Labourers against a chaplain, and counts that he was retained in his service with him for a year to do divine service and that he departed within the year. The defendant's counsel demands judgment of the writ:

"for you see well how he brings this action against a chaplain upon the Statute of Labourers; and the statute is only to be understood against labourers in husbandry. STRANGEWAYS, J.: The writ is not maintainable by the statute; for you cannot compel a chaplain to sing in mass; for that at one time he is disposed to sing it, and at another not; wherefore you cannot compel him by the statute. COTTESMORE, J.: To the same intent; for it was not made but for labourers in husbandry: as in case of a knight, an esquire, or gentleman, you cannot compel them to be in your service by the statute, for that the statute

A is not to be understood but of labourers, who are vagrant, and have nothing whereby to live; these shall be compelled to be in service; but a chaplain hath whereof he may live in common understanding as a gentleman : "

wherefore the writ is abated, by the whole court. BROOKE (ABRIDGEMENT, fol. 57, tit. LABORERS, pl. 47), abstracting this, gives, as the reason of the judgment :

B "for it is to be understood that he hath whereof he may live, and is not always disposed to celebrate divine service."

It will be observed that many of these cases are with respect to chaplains. In one of them it is said that a chaplain is the servant of God; in another that the service for which the retainer is alleged must be a service congruous to his condition. At this distance of time it may be difficult, without more inquiry into history, to assign a reason why there should be such a majority of cases relating to chaplains.

C It must be referable of course to some circumstances in the state of society at those periods. It may be collected from a royal mandate to the archbishops and bishops that the services of stipendiary chaplains were at the date of the statute much in request. The bishops are required to enforce their serving for their accustomed salary under pain of suspension and interdict. This mandate is printed in the

D statutes at large at the end of the statute, but none of the cases refers to it. It is, however, clear that the courts were not laying down any rule of law applicable to chaplains only. They are repeatedly put in the same category with knights, squires, and gentlemen, all who must be understood to have means of living of their own. The courts construed the statute, and as it seems to me quite correctly. They said that if any of these covenants to serve, he will be bound by his covenant, and an

E action will lie at common law for the breach, but if you rely on the compulsion of the statute, such persons are not within it. These authorities, of a date when the statute must have been well understood, might be multiplied, and, whatever may be said of the uncertainty and often conflicting nature of decisions from the YEAR BOOKS, and, however we may now smile at some of the reasonings of the judges, probably not without their weight when uttered, they seem to me satisfactorily to establish the principle that actions framed on the statute were governed

F by a consideration of the object and language of the statute, and that these pointed only to the compulsion of labourers, handicraftsmen, and people of low degree who had no means of their own to live upon, and who, if they did not live by wages earned by their labour, would be vagrants, mendicants or worse. If this be so, I apprehend it is quite clear that Johanna Wagner could not have been compelled, while the statute was unrepealed, to serve the plaintiff in any of the capacities

G stated in this declaration.

Nor, I think, can it be successfully contended that we may not take judicial cognisance of the nature of the service spoken of in the declaration. Judges are not necessarily to be ignorant in court of what everyone else, and they themselves out of court, are familiar with; nor was that unreal ignorance considered to be an attribute of the Bench in early and strict times. We find in the YEAR BOOKS the judges reasoning about the ability of knights, esquires and gentlemen to maintain themselves without wages, and distinguishing between private chaplains and parochial chaplains from the nature of their employments. And in later days we have ventured to take judicial cognisance of the moral qualities of Robinson Crusoe's "man Friday" [see *Forbes v. King* (22)] and Esop's "frozen snake" [see *Hoare v.*

I *Silverlock* (23)]. We may certainly, therefore, take upon ourselves to pronounce that a singer at operas, or a dramatic artiste to the owner and manager of the Queen's theatre, is not a messor, falcator, aut alius operarius vel serviens, within either the letter or the spirit of the Statute of Labourers. If we were to hold to the contrary as to the profession of Garrick and Siddons, we could not refuse to hold the same with regard to the sister arts of painting, sculpture and architecture. We must lay it down that Reynolds when he agreed to paint a picture, or Flaxman when he agreed to model a statue, had entered into a contract of service, and stood in the relation of servant to him with whom he had made the agreement.

Here we are not without authority. In *Taylor v. Neri* (5), where the declaration in case stated that the plaintiff, being manager of the Opera House, had engaged one Breda as a public singer during the season at a salary, that the defendant had assaulted and beaten Breda, by which plaintiff lost his service as a public performer, EYRE, C.J., nonsuited the plaintiff, saying the record stated Breda was a servant hired to sing, and he was of opinion he was not a servant at all. It seems to me that this is the language of common sense; and no case has been cited which conflicts with it. But, if Johanna Wagner be not within the statute, and could only have been sued, as at common law, upon her contract for the breach of it, it will follow, I conceive, that the present action could not have been maintained against the defendant while the statute was in force, and, of course, cannot now if, as I contend, the action arises from and is limited by the purview of the statute. Under the statute the one depended on the other: if a party sued on the second branch of the second section, he was bound to show the servant, received or retained wrongfully, was such a one as was spoken of in the first branch, for so were the words, *talem in servitio suo recipere vel retinere presumat*. In the action, accordingly, against the seducer, the condition of the servant seduced and the character of the service, were always material; if not stated in the count, the defendant introduced them in his plea, where they were such as were thought to take the servant out of the statute. A B C D

I conclude then that this action cannot be maintained because (i) merely to induce or procure a free contracting party to break his covenant, whether done maliciously or not, to the damage of another, for the reasons I have stated, is not actionable; (ii) that the law with regard to seduction of servants from their master's employ, in breach of their contract, is an exception, the origin of which is known, and that that exception does not reach the case of a theatrical performer. I know not whether it may be objected that this judgment is conceived in a narrow spirit, and tends unnecessarily to restrain the remedial powers of the law. In my opinion, it is not open to this objection. It seems to me wiser to ascertain the powers of the instrument with which you work, and employ it only on subjects to which they are equal and suited, and that, if you go beyond this, you strain and weaken it, and attain but imperfect and unsatisfactory, often only unjust, results. But, whether this be so or not, we are limited by the principles and analogies which we find laid down for us, and are to declare, not to make, the rule of law. I think, therefore, with the greatest and most real deference for the opinions of my brethren, and with all the doubt as to the correctness of my own which those opinions, added to the novelty and difficulty of the case itself, cannot but occasion, that our judgment ought to be for the defendant: though it must be pronounced for the plaintiff. E F G

Judgment for plaintiff.

A

M'NAGHTEN'S CASE

[HOUSE OF LORDS (Lord Lyndhurst, L.C., Lord Cottenham, Lord Wynford, Lord Brougham and Lord Campbell), May 26, June 19, 1843]

B

[Reported 10 Cl. & Fin. 200; 8 Scott, N.R. 595; 4 State Tr.N.S. 847; 1 Town. St. Tr. 314; 1 Car. & Kir. 130, n.; 8 E.R. 718]

Criminal Law—Insanity—Defence to charge—Presumption of sanity—Proof that prisoner did not know nature and quality of his act or that he was doing what was wrong—Medical evidence.

C

Where, in a criminal case, the defence is set up that at the time of his committing the offence charged the prisoner was insane, the jury should be directed that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that to establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that he was doing what was wrong. If the accused was conscious that the act was one which he ought not to do, and if that act was contrary to the law of the land, he is punishable, and it is correct to leave the question to the jury whether he had a sufficient degree of reason to know that he was doing an act that was wrong, with such observations and explanations as the circumstances of each case require. A person labouring under a partial delusion only and not in other respects insane must be considered in the same situation as to responsibility as if the facts in respect to which the delusion exists were real.

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E

F

A medical man, who has been present in court and heard the whole of the evidence may, where the facts are admitted or not disputed and the question becomes substantially one of science only, be asked whether the facts stated by the witnesses show that the prisoner had at the time of the crime a state of mind incapable of distinguishing between right and wrong, although he has never seen the prisoner previously to the trial.

House of Lords—Judges of Supreme Court—Right to require attendance—Answers to abstract questions of existing law.

G

The House of Lords has a right to require the attendance of the judges of the Supreme Court of Judicature to answer abstract questions of existing law which might arise for their consideration in their legislative capacity.

Notes. The introduction, by s. 2 of the Homicide Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 174), of the doctrine of diminished responsibility does not, it would seem, affect the validity of the rules laid down in the present case.

H

Considered: *R. v. Francis* (1849), 14 J.P. 24; *Wensleydale Peerage Case* (1856), 8 State Tr.N.S. 479; *R. v. Haynes* (1859), 1 F. & F. 666. Followed: *R. v. Burton* (1863), 3 F. & F. 772. Applied: *R. v. Davis* (1881), 14 Cox, C.C. 563. Explained: *R. v. Codere* (1916), 12 Cr. App. Rep. 21. Considered: *R. v. Jolly* (1919), 83 J.P. 296; *D.P.P. v. Beard*, [1920] All E.R.Rep. 21; *R. v. Holt* (1920), 15 Cr. App. Rep. 10; *R. v. True* (1922), 127 L.T. 561. Applied: *White v. White*, [1949] 2 All E.R. 339. Considered: *Lissack v. Lissack*, [1950] 2 All E.R. 233; *R. v. Windle*, [1952] 2 All E.R. 1. Distinguished: *Morriss v. Marsden*, [1952] 1 All E.R. 923. Applied: *Swan v. Swan*, [1953] 2 All E.R. 854. Considered: *R. v. Holmes*, [1953] 2 All E.R. 324. Applied: *R. v. Kemp*, [1956] 3 All E.R. 249. Considered: *R. v. Gallagher*, [1961] 3 All E.R. 299; *Bratty v. A.-G. for Northern Ireland*, [1961] 3 All E.R. 523; *R. v. Price*, [1962] 3 All E.R. 957; *Williams v. Williams*, [1963] 2 All E.R. 994. Referred to: *R. v. Kay* (1904), 68 J.P.Jo. 376; *R. v. Smith* (1910), 26 T.L.R. 614; *R. v. Marsland* (1911), 7 Cr. App. Rep. 77;

I

Felstead v. R., [1914] A.C. 534; *R. v. Kenneally* (1930), 22 Cr. App. Rep. 52; *A Dixon v. Sutton Heath and Lea Green Colliery, Ltd.* (1930), 23 B.W.C.C. 135; *Woolmington v. D.P.P.*, [1935] All E.R. Rep. 1; *Sodeman v. R.*, [1936] 2 All E.R. 1138; *Beresford v. Royal Insurance Co.*, [1937] 2 All E.R. 243; *R. v. Dillon* (1939), 27 Cr. App. Rep. 149; *Re Pollock, Pollock v. Pollock*, [1941] 1 All E.R. 360; *R. v. Rivett* (1950), 34 Cr. App. Rep. 87; *Re Park, Park v. Park*, [1953] 2 All E.R. 1411; *R. v. Spriggs*, [1958] 1 All E.R. 300; *R. v. Walden*, [1959] 3 All E.R. 203; *A.-G. for State of South Australia v. Brown*, [1960] 1 All E.R. 734; *R. v. Morris*, [1961] 2 All E.R. 672; *R. v. Ahmed Din*, [1962] 2 All E.R. 123.

As to the defence of insanity in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 287-289; and for cases see 14 DIGEST (Repl.) 60 et seq. As to judges as assistants to the House of Lords, see 9 HALSBURY'S LAWS (3rd Edn.) 365, 366; and for cases see 36 DIGEST (Repl.) 371, 372.

Opinions by the judges on questions submitted to them by the House of Lords.

The prisoner, Daniel M'Naghten, was indicted for that he, on Jan. 20, 1843, at the parish of Saint Martin in the Fields, in the county of Middlesex and within the jurisdiction of the Central Criminal Court, did feloniously, wilfully, and with malice aforethought, murder one Edward Drummond by shooting him with a pistol. The prisoner pleaded Not Guilty. Evidence having been given of the fact of the shooting of Mr. Drummond, and of his death in consequence thereof, witnesses were called on behalf of the prisoner to prove that he was not, at the time of committing the act, in a sound state of mind. The medical evidence was in substance that persons of otherwise sound mind might be affected by morbid delusions, that the prisoner was in that condition, that a person labouring under a morbid delusion might have a moral perception of right and wrong, but that in the case of the prisoner it was a delusion which carried him away beyond the power of his own control and left him no such perception, that he was not capable of exercising any control over acts which had connection with his delusion, and that it was of the nature of the disease with which the prisoner was affected to go on gradually until it had reached a climax, when it burst forth with irresistible intensity so that he would all at once break out into the most extravagant and violent paroxysms. In his charge to the jury TINDAL, C.J., said:

"The question to be determined is whether at the time the act in question was committed the prisoner had or had not the use of his understanding so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favour, but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him."

The jury returned a verdict of Not Guilty on the ground of insanity.

This verdict, and the question of the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort, having, on Mar. 6 and 13, 1843 [see 67 HANSARD 288, 714], been made the subject of debate in the House of Lords, it was determined to take the opinion of the judges on the law governing such cases. Accordingly, the judges attended their Lordships and the following questions of law were propounded to them:

(i) What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons, as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

- A (ii) What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?
- (iii) In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?
- B (iv) If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?
- (v) Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his
- C opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?

MAULE, J.—I feel great difficulty in answering the questions put by your Lordships on this occasion: First, because they do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts, not inconsistent with those assumed in the questions: this difficulty is the greater, from the practical experience both of the Bar and the court being confined to questions arising out of the facts of particular cases. Secondly, because I have heard no argument at your Lordships' Bar or elsewhere, on the subject of these questions, the want of which I feel the more the greater are the number and extent of questions which might be raised in argument. Thirdly, from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice when they are cited in criminal trials. For these reasons I

F should have been glad if my learned brethren would have joined me in praying your Lordships to excuse us from answering these questions, but as I do not think they ought to induce me to ask that indulgence for myself individually, I shall proceed to give such answers as I can after the very short time which I have had to consider the questions, and under the difficulties I have mentioned, fearing that my answers may be as little satisfactory to others as they are to myself.

G The first question, as I understand it, is, in effect: What is the law respecting the alleged crime when at the time of the commission of it the accused knew he was acting contrary to the law, but did the act with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? If I were to understand this question according to the strict meaning of its terms, it would require, in order to

H answer it, a solution of all questions of law which could arise on the circumstances stated in the question, either by explicitly stating and answering such questions, or by stating some principles or rules which would suffice for their solution. I am quite unable to do so, and, indeed, doubt whether it be possible to be done, and, therefore, request to be permitted to answer the question only so far as it comprehends the question whether a person, circumstanced as stated in the question, is,

I for that reason only, to be found Not Guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding. I am of opinion that he is not. There is no law that I am aware of that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong. The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind. If the state

described in the question be one which involves or is necessarily connected with such an unsoundness, this is not a matter of law but of physiology, and not of that obvious and familiar kind as to be inferred without proof. A

Secondly, the questions necessarily to be submitted to the jury. Are those questions of fact which are raised on the record. In a criminal trial, the question commonly is whether the accused be guilty or not guilty, but, in order to assist the jury in coming to a right conclusion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions as the course which the trial has taken may have made it convenient to direct their attention to. What those questions are, and the manner of submitting them, is a matter of discretion for the judge—a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law, and if, on a trial such as is suggested in the question, he should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question, as being, in my opinion, the law on this subject. B C

Thirdly, there are no terms which the judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused. D

Fourthly, the answer which I have given to the first question, is applicable to this.

Fifthly, whether a question can be asked, depends, not merely on the questions of fact raised on the record, but on the course of the cause at the time it is proposed to ask it and the state of an inquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity, may be such that such a question as either of those suggested is proper to be asked and answered, though the witness has never seen the person before the trial, and though he has merely been present and heard the witnesses. These circumstances, of his never having seen the person before, and of his having merely been present at the trial, are not necessarily sufficient, as it seems to me, to exclude the lawfulness of a question which is otherwise lawful, though I will not say that an inquiry might not be in such a state, as that these circumstances should have such an effect. E F

Supposing there is nothing else in the state of the trial to make the questions suggested proper to be asked and answered, except that the witness had been present and heard the evidence; it is to be considered whether that is enough to sustain the question. In principle it is open to the objection that as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts, as makes it irrelevant to the inquiry. But such questions have been very frequently asked, and the evidence to which they are directed has been given, and has never, that I am aware of, been successfully objected to. Evidence, most clearly open to this objection, and on the admission of which the event of a most important trial probably turned, was received in *R. v. M'Naghten*, tried at the Central Criminal Court in March last, before the LORD CHIEF JUSTICE, WILLIAMS, J., and COLERIDGE, J., in which counsel of the highest eminence were engaged on both sides, and I think the course and practice of receiving such evidence, confirmed by the very high authority of these judges, who not only received it, but left it, as I understand, to the jury, without any remark derogating from its weight, ought to be held to warrant its reception, notwithstanding the objection in principle to which it may be open. In cases even where the course of practice in criminal law has been unfavourable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of Parliament. G H I

A TINDAL, C.J.—Her Majesty's judges (with the exception of MAULE, J., who has stated his opinion to your Lordships), in answering the questions proposed to them by your Lordships' House, think it right, in the first place, to state that they have forborne entering into any particular discussion upon these questions from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case, and as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your Lordships' questions. They have, therefore, confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by your Lordships, and as they deem it unnecessary in this peculiar case to deliver their opinions seriatim, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your Lordships.

The first question proposed by your Lordships is this :

D "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons, as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

E In answer to this question, assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land.

Your Lordships are pleased to inquire of us, secondly :

G "What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?"

And, thirdly :

H "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?"

I As these two questions appear to us to be more conveniently answered together we have to submit our opinion to be that the jurors ought to be told in all cases that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally

and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong, and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your Lordships have proposed to us is this :

"If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?"

To this question the answer must, of course, depend on the nature of the delusion, but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The question lastly proposed by your Lordships is :

"Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?"

In answer thereto, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

LORD BROUGHAM.—The opinions of the learned judges, and the very able manner in which they have been presented to the House, deserve our best thanks. One of the learned judges has expressed his regret that these questions were not argued by counsel. Generally speaking, it is most important that in questions put for the consideration of the judges, they should have all that assistance which is afforded to them by an argument by counsel, but at the same time there can be no doubt of your Lordships' right to put, in this way, abstract questions of law to the judges, the answer to which might be necessary to your Lordships in your legislative capacity. There is a precedent for this course in the memorable instance of Mr. Fox's Bill on the law of libel, where, before passing the Bill, this

A House called on the judges to give their opinions on what was the law as it then existed.

B **LORD CAMPBELL.**—I cannot avoid expressing my satisfaction that the noble and learned Lord on the Woolsack carried into effect his desire to put these questions to the judges. It was most fit that the opinions of the judges should be asked on these matters, the settling of which is not a mere matter of speculation, for your Lordships may be called on, in your legislative capacity, to change the law, and, before doing so, it is proper that you should be satisfied beyond doubt what the law really is. It is desirable to have such questions argued at the Bar, but such a course is not always practicable. Your Lordships have been reminded of one precedent for this proceeding, but there is a still more recent instance, the judges having been summoned in the case of the Canada Reserves, to express their opinions on what was then the law on that subject. The answers given by the judges are mostly highly satisfactory, and will be of the greatest use in the administration of justice.

D **LORD COTTENHAM.**—I fully concur with the opinion now expressed, as to the obligations we owe to the judges. It is true that they cannot be required to say what would be the construction of a Bill, not in existence as a law at the moment at which the question is put to them, but they may be called on to assist your Lordships, in declaring their opinions upon abstract questions of existing law.

E **LORD WYNFORD.**—I never doubted that your Lordships possess the power to call on the judges to give their opinions upon questions of existing law, proposed to them as these questions have been. I myself recollect, that when I had the honour to hold the office of Lord Chief Justice of the Court of Common Pleas, I communicated to the House the opinions of the judges on questions of this sort, framed with reference to the usury laws. Upon the opinion of the judges thus delivered to the House by me, a Bill was founded, and afterwards passed into a law.

F **LORD LYNDBURST, L.C.**—I entirely concur in the opinion given by my noble and learned friends, as to our right to have the opinions of the judges on abstract questions of existing law; and I agree that we owe our thanks to the judges, for the attention and learning with which they have answered the questions now put to them.

A

FENTON v. LIVINGSTONE

[HOUSE OF LORDS (Lord Brougham, Lord Cranworth, Lord Wensleydale and Lord Chelmsford), June 9, 10, 15, 16, 17, July 15, 1859]

[Reported 33 L.T.O.S. 335; 23 J.P. 579; 5 Jur.N.S. 1183;
7 W.R. 671; 3 Macq. 497]

B

Conflict of Laws—Marriage—Validity—Determination by lex domicilii of parties at time of ceremony—Legitimacy—Determination by law of birthplace and parents' domicil—Real property—Title or succession—Determination by lex loci rei sitae—Status in foreign country—Recognition in England if in accordance with English law.

C

As a general rule the validity of a marriage is to be determined by the law of the country where the parties were domiciled at the time of the ceremony, and in most cases the legitimacy of a person is to be determined by the law of his birthplace and of his parents' domicil. To these rules, however, there is the exception that in determining questions relating to the title or succession to real property the *lex loci rei sitae* must always prevail.

D

Semble. The status of a person in a foreign country will not be recognised in England if it is of a kind which is not in accordance with English law.

Notes. Considered: *Re Goodman's Trusts*, [1881-5] All E.R.Rep. 1138; *R. v. Dibdin*, [1910] P. 57; *Re Bischoffsheim, Cassel v. Grant*, [1947] 2 All E.R. 830.

As to the law affecting the title to real property, validity of marriage, and legitimacy, see 7 HALSBURY'S LAWS (3rd Edn.) 38, 50, 88, 128; and for cases see 11 DIGEST (Repl.) 369, 389, 455, 489.

E

Cases referred to:

(1) *Doe d. Birtwhistle v. Vardill* (1826), 5 B. & C. 438; 8 Dow. & Ry.K.B. 185; on appeal sub nom. *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895; 4 Jur. 1076; 7 E.R. 1308; sub nom. *Doe d. Birtwhistle v. Vardill*, 6 Bing.N.C. 385; West, 500; 1 Scott, N.R. 828, H.L.; 3 Digest (Repl.) 424, 203.

F

(2) *Compton v. Bearcroft* (1769), Bull.N.P. 113; 2 Hag. Con. 444, n.; 161 E.R. 799; 11 Digest (Repl.) 463, 967.

(3) *Ilderton v. Ilderton* (1793), 2 Hy. Bl. 145; 126 E.R. 476; 11 Digest (Repl.) 498, 1182.

G

(4) *Harford v. Morris* (1776), 2 Hag. Con. 423; 161 E.R. 792; 27 Digest (Repl.) 38, 150.

(5) *Middleton v. Janverin* (1802), 2 Hag. Con. 437; 161 E.R. 797; 11 Digest (Repl.) 462, 957.

(6) *Edmonstone v. Edmonstone*, Ferg. 404.

(7) *R. v. Lolley* (1812), Russ. & Ry. 237; sub nom. *Sugden v. Lolley*, 2 Cl. & Fin. 567, n., C.C.R.; 11 Digest (Repl.) 486, 1108.

H

(8) *Sommersett's Case* (1772), 20 St. Tr. 1; 11 Digest (Repl.) 444, 845.

(9) *Knight v. Wedderburn* (1778), 8 Fac. Coll. 5; 33 Mor. Dict. 14545; 43 Digest 16, 84 i.

(10) *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; 6 State Tr.N.S. 79; 3 L.T.O.S. 277; 8 Jur. 793; 8 E.R. 1034, H.L.; 11 Digest (Repl.) 464, 973.

I

(11) *Munro v. Saunders* (1832), 6 Bli.N.S. 468; 5 E.R. 665, H.L.; 3 Digest (Repl.) 421, 187.

(12) *Lady Herbert v. Lord Herbert* (1819), 2 Hag. Con. 263; 3 Phillim. 58; 161 E.R. 1257; 11 Digest (Repl.) 462, 958.

(13) *Brook v. Brook* (1858), 3 Sm. & G. 481; 27 L.J.Ch. 401; 30 L.T.O.S. 184; 4 Jur.N.S. 317; 6 W.R. 110; affirmed, [1861-73] All E.R.Rep. 493; 9 H.L.Cas. 193; 4 L.T. 93; 25 J.P. 259; 7 Jur.N.S. 422; 9 W.R. 461; 11 E.R. 703, H.L.; 11 Digest (Repl.) 457, 915.

- A (14) *R. v. Chadwick, R. v. St. Giles in the Fields (Inhabitants), St. Giles in the Fields v. St. Mary, Lambeth* (1848), 11 Q.B. 173; *Cripps' Church. Cas.* 34; 17 L.J.M.C. 33; 10 L.T.O.S. 155; 11 J.P. 839; 12 Jur. 174; 2 Cox, C.C. 381; 116 E.R. 441; 27 Digest (Repl.) 43, 210.
- (15) *Lord Advocate v. Stewart and Wallace* (1845), 2 Broun. 544.
- B (16) *Dalrymple v. Dalrymple* (1811), 2 Hag. Con. 54; 161 E.R. 665; on appeal (1814), 2 Hag. Con. 137, n.; 22 Digest (Repl.) 618, 7112.

Also referred to in argument:

- Re Don's Estate* (1857), 4 Drew. 194; 27 L.J.Ch. 98; 30 L.T.O.S. 190; 21 J.P. 694; 3 Jur.N.S. 1192; 5 W.R. 836; 62 E.R. 75; 3 Digest (Repl.) 424, 205.
- R. v. Millis* (1844), 10 Cl. & Fin. 534; 8 Jur. 717; 8 E.R. 844, H.L.; 11 Digest (Repl.) 464, 970.
- C *Ray v. Sherwood and Ray* (1836), 1 Curt. 193; 163 E.R. 65; affirmed sub nom. *Sherwood v. Ray* (1837), 1 Moo.P.C.C. 353, P.C.; 27 Digest (Repl.) 448, 3799.
- Hinks v. Harris* (1693), Carth. 271; 4 Mod. Rep. 182; 90 E.R. 760; sub nom. *Hicks v. Harris*, Comb. 200; 12 Mod. Rep. 35; sub nom. *Harris v. Hicks*, 2 Salk. 548; 27 Digest (Repl.) 535, 4813.
- D *Brownsword v. Edwards* (1751), 2 Ves. Sen. 243; 28 E.R. 157, L.C.; 27 Digest (Repl.) 535, 4815.
- Conway v. Beazley* (1831), 3 Hag. Ecc. 639; 162 E.R. 1292; 11 Digest (Repl.) 459, 931.

Appeal from a decision of the Court of Session in Scotland.

- E Sir Thomas Livingstone, Baronet, of Bedlormie, Linlithgowshire, died in 1853. His estates in Scotland were limited to heirs male "lawfully procreated." The deceased baronet left no issue, brother, or issue of a brother, except the respondent, who was the son of Sir Thomas's brother, Thurstanus Livingstone, by his second wife who was the sister of his first wife. Thurstanus and the mother of the respondent, were married in 1808 in England, where both parties were domiciled.
- F The respondent was born in 1809, his father being still domiciled in England. His mother died in 1832, and no suit to nullify the marriage on the ground that it was illegal [which it then was, such a marriage not being legalised until the Deceased Wife's Sister's Marriage Act, 1907: see now Marriage Enabling Act, 1860, s. 1] had been promoted in the ecclesiastical court. The respondent's claim as heir male was not disputed, provided he was to be deemed legitimate by the Scottish courts.
- G The appellant, Fenton, was the heir entitled to succeed if the respondent should be held illegitimate. The Court of Session held that the respondent was legitimate, and entitled to succeed to the Scottish estates. The court took the view that as no suit to nullify the marriage had been brought during the lives of his parents, an English court would be barred after the death of one of them from inquiring into the legitimacy of the respondent, and the Scottish courts were also barred from inquiring into that matter. That decision was now appealed against.

H *Roundell Palmer, Q.C.*, and *Anderson, Q.C.*, for the appellant.
Sir Richard Bethell, Q.C., *Rolt, Q.C.*, and *Moncrieff* for the respondent.

Their Lordships took time for consideration.

July 15, 1859. The following opinions were read.

- I **LORD BROUGHAM.**—This case arises out of facts which are either admitted on all hands, or are clearly proved in evidence, or are assumed, together with one proposition of law by the court below, in disposing of the matter before it, their judgment being given upon the main question on that assumption; but the evidence in the cause leaves no doubt as to the facts assumed. The question is raised between the respondent Alexander Livingstone, claiming, as lawful son of Thurstanus Livingstone, estates in Scotland, to which he asserts his right of succession as heir of entail upon the decease of his uncle Sir Thomas Livingstone, the person last in possession, and the appellant, Anne Fenton, claiming the same estates as

heir of entail upon the decease of Sir Thomas Livingstone on the ground that all the preceding substitutes and heirs have failed, and this raises the question between her and the respondent, whose title she impeaches upon the ground of his father's marriage with his mother having been illegal by the law of Scotland and the issue excluded from inheritance to a Scottish estate. A

The facts either admitted or clearly proved are these. Thurstanus Livingstone married two sisters, one after the other. He was domiciled in England, his two wives were both Englishwomen, and in England the respondent was born. His mother died in 1882, and no proceedings were had for the purpose of declaring the marriage void. He contends, therefore, that he is in all respects legitimate. The only objection raised to the marriage of his parents, which took place before his birth, was that their marriage was incestuous, which, as he contends, only made it voidable, and not void, by the law as it stood before the year 1835. B C

It must be granted that the general rule is to determine the validity of a marriage by the law of the country where the parties were domiciled, and in most cases the legitimacy of a party is to be determined by the law of his birthplace and of his parents' domicil. But to this application of the *lex loci contractus* there are exceptions from the nature of the case in which the question arises. Thus, in deciding upon the title to real estate, the *lex loci rei sitae* must always prevail. D So that a person legitimate by the law of his birthplace and of the place where his parents were married, may not be regarded as legitimate to take a real estate by inheritance elsewhere. This was laid down in *Doe d. Birtwhistle v. Vardill* (1), which, in some of the opinions of the learned judges below, is supposed to have been decided in consequence of a statutory provision. But the Statute of Merton is only declaratory of the common law, or rather it is a refusal to alter that law. E A person legitimated by the marriage of his parents after his birth is in Scotland and in some other countries legitimate. He is *legitimus*, that is *factus legitimus*. As to invalidate is to make invalid, so to legitimate is to make legitimate. And by the *lex loci* the party was legitimate to all intents and purposes in Scotland. That was so laid down in *Doe d. Birtwhistle v. Vardill* (1). But when he claimed a real estate in England, he was not held legitimate to that effect, because legitimacy F by the English law requires the party to have been born in lawful marriage, while in the law of Scotland no such requisite exists. If the Scottish law had held a person legitimate, who, though born in marriage, was the issue of an incestuous marriage, or of a marriage with a second wife living, he would not have been held entitled to take a real estate in England, and perhaps have not been held legitimate to any effect, though he might have been to all intents and purposes legitimate in G the country of his birth, and of his parents' domicil and marriage.

Was the marriage of the respondent's parents such that the law of Scotland could recognise its validity in dealing with the rights of the issue of it to take real estate by inheritance? First of all, let us consider if it was legal in the country where contracted and where the parties had their domicil. It was clearly illegal by the law of England. That law treated it as incestuous [*Legitimation per subsequens matrimonium* was recognised by the Legitimacy Act, 1926, s. 1 (1). H Section 1 (2) which created an exception to the general provision was repealed by the Legitimacy Act, 1959, s. 1 (1)]. By the rules of the ecclesiastical courts, which alone had cognisance of this objection to a marriage, it could not be questioned except during the lives of both husband and wife. But it was illegal, and if questioned while both parties were alive, the marriage must have been declared I void *ab initio*. And why? Because it was contrary to law. The circumstance of one party to it having died before this dispute arose, and before it was questioned, did not make the marriage legal, though it precluded the possibility of setting it aside, and the son was issue not of a lawful marriage but of a marriage which could not be questioned with effect, according to the rules of the ecclesiastical courts. The temporal courts held the same principles on this subject as the ecclesiastical, and would act with them if they could entertain the question. Indeed, the Marriage Act, 1885 (commonly called Lord Lyndhurst's Act) [repealed by Marriage Act,

A 1949], proceeds upon the ground that marriages within the forbidden degrees of affinity are void if questioned—void because illegal—and enacts that henceforth they shall be ipso facto void and not voidable by any proceedings.

It is unnecessary to inquire whether a marriage so void if questioned in England before the Act, but prevented from being questioned by the course of procedure in the English courts, could be questioned in Scotland, if the Scottish and English law differed upon the grounds of the objection, because the Scottish law is much more stringent on the subject than the English, holding all marriages within the forbidden degrees, not only to be incestuous, but also to be severely punishable, even capitally. The Court of Justiciary proceeded upon this view a few years ago during the presidency of LORD JUSTICE GENERAL BOYLE, when the late Lord Justice Clerk, and LORDS MACKENZIE, MONCRIEFF, COCKBURN and WOOD were upon the Bench (*Lord Advocate v. Stewart and Wallace* (15)). They sentenced the prisoners (*Stewart and Wallace*) to fourteen years' transportation, the Lord Advocate having restricted the libel from the capital part. This was the case of marriage of uncle and niece, but there is by law no difference whatever between consanguinity and affinity in this respect. If the *lex loci contractus* were to prevail absolutely, and a marriage good in a country where it took place, and where the party claiming under it was born, were to make that party inheritable in Scotland, then uncle and niece marrying in a foreign country with papal dispensation, their issue might claim to take a Scottish estate and Scottish honours—although, had the marriage been contracted in Scotland, the parties might have been capitally convicted and sentenced to death, or sentenced to transportation with consent of the public prosecutor, as in the case of *Stewart and Wallace*. It is impossible that such can be the law. The claimant might, as in this case, call a marriage what the law calls a crime—*conjugium vocat, hoc praetexit nomine culpam*.

The respondent cannot be held the heir male lawfully procreate by parties whose marriage was an offence severely punishable by the law of Scotland, and "heir male," even without the words "lawfully procreate," must be intended as if these words were added, because "heir" means the issue lawfully procreated, and it is wholly impossible to separate the notion of valid marriage from the question of legitimate issue, which the heir must be—valid marriage either before the birth, or by the Scottish law it may be after the birth—but valid marriage in either case. It is contended that marriage legal in the country where it takes place must be held valid everywhere, even in countries where, the law being different, the marriage would be invalid.

G The case is referred to of Scottish marriages between parties coming from England to escape the requirements of the English law, and it is argued that their marriage, which would have been illegal in England, is valid for English purposes because good in Scotland. But first, the marriage in those cases is not such as the English law prohibits. It is only one requiring in England certain things not necessary to give it validity in Scotland. And, next, the validity of a Scottish marriage in these circumstances has never been decided absolutely and without qualification. *Compton v. Bearcroft* (2) originally decided in the Court of Arches, and afterwards before the delegates, first determined that Scottish runaway marriages were valid in England, contrary to LORD MANSFIELD's pretty plainly indicated opinion; and in *Ilderton v. Ilderton* (3), where, in answer to a claim of dower out of an English estate, *ne unques accouple* was pleaded, the discussion arose upon a question of pleading, *Compton v. Bearcroft* (2) being taken as having decided the point of the Scottish marriage being valid in England, and the debate arose on two questions—whether the replication was well in concluding to the country, and whether a venue should not have been laid. It is remarkable that SIR GEORGE HAY, who decided *Compton v. Bearcroft* (2), states in *Harford v. Morris* (4) (2 Hag. Con. at p. 430), as SIR WILLIAM WYNNE does in *Middleton v. Janverin* (5) (*ibid.* at p. 444), that the decision was: "A Scottish marriage is valid in England if there be nothing in it contrary to the law of England." That is a very material qualification. If the parties had been uncle and niece, and if the

law of Scotland, instead of reprobating and punishing such a marriage, had allowed it like that of many countries acknowledging the power of a papal dispensation in which such marriages are of daily occurrence, surely no one can doubt that the decision of SIR GEORGE HAY, affirmed by the delegates, would have been the other way, and that the affirmative issue in *Ilderton v. Ilderton* (3), of ne unques accouple in loyal matrimonie would not have been held sustained by the evidence of a marriage which the law of England prohibits and could in no sense be called loyal matrimonie. A B

Much more clearly must the respondent in Scotland fail in his defence to the declaration of bastardy, when he had to prove himself the issue of a lawful marriage, and the marriage is by the law held prohibited—nay, is even severely punishable. It must be observed that the authorities upon the conflict of laws qualify the admission of a foreign law much as SIR GEORGE HAY does in the case of Scottish marriage. HUBER, the authority most often cited, adds to the statement of admission, “quatenus nihil potestati aut juri alterius imperantis ejusque civium praejudicetur,” and he refers to incest as one example of the admission being excluded. Other writers take the same view which LITTLEDALE, J., in *Doe d. Birt-whistle v. Vardill* (1) (5 B. & C. at p. 455), fully adopts. C

There are other cases of marriage prohibited by the law of Scotland. Thus, by the Act of 1600, on the dissolution of marriage for adultery, the intermarriage of the adulterer and the adulteress is prohibited. Suppose such a marriage contracted in England, where by our law it would not be invalid, can it be doubted that the issue of it claiming an estate in Scotland would be considered illegitimate? This is the very case put in *Edmonstone v. Edmonstone* (6), by a most learned judge—a person, too, of very enlarged views upon general subjects as well as law —LORD GLENLEE, and he held that the son of such a second marriage would not exclude a daughter of the first and lawful marriage. Another instance may be given arising from the difference between the laws of the two countries on the indissolubility of the contract. In England, until very lately [i.e., the passing of the first Matrimonial Causes Act, 1857], it was impossible to dissolve a marriage originally valid by any legal proceeding—an Act of Parliament alone could have this operation. In Scotland a divorce could be obtained by sentence of the court. If an English marriage were thus dissolved in Scotland, and one of the parties contracted a second marriage in Scotland during the other's life, it would be perfectly valid in Scotland, but, if the issue claimed an English estate, the validity of the divorce would come in question in order to determine the validity of the second marriage, which would probably be held (I do not say that it has ever been held) G to be governed by *R. v. Lolley* (7).

Great reliance was placed on the respondent's part, and by some of the learned judges below, upon the proposition that status acquired in one country follows a person everywhere. It is said sicut umbra personam sequitur. Nothing can be more a case of status than liberty and slavery, yet when a man from a country where he was by law held in slavery comes to England or Scotland, the light of liberty chases away the shadow. He is in all respects free as regards his person and his property, though in the place he came from he was a mere chattel, and whatever he earned or became possessed of in any way while there belonged to his master. That master could not recover it in our courts, since the principles which were laid down in *Sommerset's Case* (8) in England, and in *Knight v. Wedderburn* (9) in Scotland somewhat earlier. LITTLEDALE, J., says: H

“The rule that a personal status accompanies a man everywhere is admitted to have this qualification, that it does not militate against the law of the country where the consequences of that status are sought to be enforced.” I

I, therefore, humbly move your Lordships to give judgment for the appellant in this case.

LORD CRANWORTH.—The question for decision in this case is whether Alexander Livingstone, the respondent, is, according to the terms of the deed of entail

A of Dec. 17, 1702, heir male lawfully procreate of the body of Alexander Livingstone, the entailor. It is admitted that he is so if he is heir male of the body of Thurstanus Livingstone who died in 1839. It must be taken as established beyond all controversy that Thurstanus was for above forty years prior and up to his decease domiciled in England; that in 1797, being so domiciled, he married in England Susannah Brown, a widow, and that she died in 1806 without leaving any issue by him; that in 1808 Thurstanus married in England Catherine Ann Dupuis, an Englishwoman, being a sister of Susannah his first wife, and by her, who died in 1832, had issue the respondent, his eldest son, who was born in 1809. No proceedings were ever taken in the ecclesiastical courts in England to declare void the marriage of Thurstanus with Catherine Ann Dupuis, and the point for decision is whether in these circumstances the respondent, as the eldest son of Thurstanus, is the heir male of his body, and so heir male of the body of Alexander the entailor in 1702. The case was considered by the Court of Session on the assumption that by the law of Scotland the marriage of a widower and the sister of his deceased wife is incest under the Scottish statute of 1567, and that the parties living together in Scotland as man and wife, under such a marriage, would be committing a capital offence, that the marriage would be void, and that the issue of such a connection would be illegitimate, and so incapable of inheriting as heirs of entail. The argument at the Bar of this House proceeded on the same hypothesis, it being understood that if in the judgment of your Lordships the case should turn on the question whether the respondent could succeed as heir of the body of the entailor, assuming the law of Scotland to be the law which is to govern the decision, then the case must be remitted back to the Court of Session to be reconsidered by them. Their decision proceeded on the ground that as the marriage took place in England between parties domiciled there, the law of England must decide whether the marriage was or was not valid, and whether the issue of that marriage was or was not capable of inheriting as heir of the body of his parents lawfully procreate. They came to the conclusion that by the law of England the marriage was valid, and that the respondent was the eldest son of that marriage lawfully procreate, and, therefore, was entitled to succeed to the lands in question.

After giving to this subject my best attention, I have come, though not without some fluctuation of opinion, to the conclusion that the Court of Session was wrong in treating this marriage as a valid marriage by the law of England, and in treating the respondent as the legitimate son of Thurstanus for the purpose of the Scottish succession. The Act prohibiting marriage within the prohibited degrees, 25 Hen. 8, c. 22, s. 4 [repealed by the now repealed Marriage Act, 1536], expressly enacts that no man shall marry his wife's sister, and in case of any marriage being contracted in violation of that prohibition, the ecclesiastical court, with whom, in this country, jurisdiction on these subjects exclusively rested, would declare any such marriage to be void. It is true that, by the construction put upon the statute, no inquiry as to the validity of marriage could be instituted by the ecclesiastical court after the marriage had come to an end by the death of one of the parties. So that, inasmuch as the temporal courts had no jurisdiction, the issue would succeed to the estate of a deceased parent as his or her heir if no proceedings had been taken in the lifetime of both parents to declare the marriage void, for it must be observed that the court had no authority to interfere actively to dissolve any marriage validly contracted, but only to declare what the law was as to the alleged marriage—the marriage *de facto* as it was called—to declare that there never was any marriage—to declare it *esse et fuisse invalidum ab initio*. That such a result must have followed a proceeding in the ecclesiastical court, calling in question the second marriage of Thurstanus, is a matter which can admit of no doubt. But if so, how can the true character of the marriage be altered by the accident of whether any third person did or did not think it worth his while to call it in question? It is not the proceeding in the ecclesiastical court which made such a marriage void. No court in this country could affect by its decree a valid

marriage. Its jurisdiction was only of a declaratory nature, that is, to declare the legal invalidity of an act already complete, but which was not what it purported to be—a marriage. The ground on which alone such a declaration could be made was that which must have been equally true whether such a declaration was or was not made, namely, the original invalidity of the marriage. A

I, therefore, think, if the case turns on the mere question whether the second marriage of Thurstanus was a valid marriage by the law of England, that it was not so, and, consequently, that the respondent on this hypothesis fails to make out that he is the heir male of the body of the entailor. But it was urged that the question is one depending, not directly on the question of the validity of the marriage, but on the question of the legitimacy of the respondent, and that, inasmuch as he is certainly legitimate in England, therefore, he is so everywhere; that his status of legitimacy is established conclusively all over the world; and, therefore, in Scotland by the fact of his legitimacy in England, the place of his domicile. But I think there is a fallacy in this reasoning. The point to be established is whether he is the heir male lawfully procreate of the body of Alexander the entailor—and this, as I have already stated, depends on the question whether he is the lawful son of Thurstanus. If, as I think, the marriage of his parents was not a good marriage in England, where they were domiciled and were married, he could not be their legitimate child in the view of a Scottish court. The rule of English law, which gives to the child of an invalid marriage the status of legitimacy, unless the marriage is called in question before the ecclesiastical court cannot be binding beyond its own territory. Such a child is in the same position in the point of status as a child clearly illegitimate born in this country would be if an Act of Parliament were passed declaring that he should be deemed to be legitimate to all intents and purposes: the legitimacy so constituted would have no effect beyond the limits of the country so legislating, so far, at all events, as relates to the succession to real estates. In such cases, even supposing the law of the domicile to govern, the question is not whether the claimant is legitimate in the country of his birth or his domicile, but whether he is legitimate by reason of his being the issue of a lawful marriage. B C D E F

I have hitherto considered the case on the assumption that the Scottish courts ought to be guided by the law of England as to the marriage of Thurstanus. But this is not, as I think, a true view of the case. We must assume, as was assumed by the Court of Session for the purpose of this case, that by the law of Scotland the alleged marriage of Thurstanus was, by Scottish law, a mere nullity, that it was a criminal connection contrary to the laws of God and the law of the land, and that the parties, if they had been in Scotland, would have been liable to suffer death as the penalty of their offence. Admitting that *prima facie*, in inquiring whether a marriage is or is not valid, we must look to the law of the place where it has been contracted, or where the parties were domiciled, that is a rule which must be received with some qualifications. Where it has been the policy of the law of any country to prohibit marriage in any particular circumstances, the prohibition attaches on the subjects of that country wherever they may go. It was on this principle that the *Sussex Peerage Case* (10) was decided. The marriage there was clearly valid according to the laws of the country where it was contracted, but it was held in this House that the Royal Marriages Act, 1772, having prescribed certain steps, by which alone the descendants of King George II could contract marriage, the laws of this country would prevail against the law of the place where the marriage was contracted, and I can conceive no case to which this principle is more clearly applicable than a case where the law makes void marriages of a particular description as being contrary to the express command of the Almighty, and punishes capitally those who contract them. It is true that in the *Sussex Peerage Case* (10), the parties who contracted marriage at Rome were domiciled in England, but I do not think that the opinion of the judges, delivered by TINDAL, C.J., was affected by that circumstance. The ground of that opinion was that the prohibition caused a personal disqualification attaching on one of the parties to G H I

A the contract, from which he could never free himself wherever he might be. The same principle is applicable here. The law of Scotland must be taken as having positively prohibited Thurstanus from marrying Catherine Anne Dupuis, and that prohibition, as I think, was fixed on him absolutely and indelibly, wherever he might be domiciled.

The present case, though not the same as that of *Doe d. Birtwhistle v. Vardill* (1), bears a close resemblance to it. There the plaintiff was undoubtedly the legitimate son of his parents in the country where he was born and domiciled, but it was the policy and law of this country, in which he claimed to succeed to a real estate, that no one should be deemed to sustain the character of son and heir unless he was born after the marriage of his parents, and as the claimant there was born before marriage, he was held to be incapable of inheriting real estate here: the *lex loci rei sitae* prevailed. So in the present case, the Scottish law expressly enacts that no one shall marry his first wife's sister, and that, if he does, the marriage is void and the children are bastards (for this we must, in the present case at least, assume to be the law of Scotland), and I think that, reasoning by analogy from *Doe d. Birtwhistle v. Vardill* (1), that is a law which must be taken to operate whatever may be the law of the country where the marriage is contracted or the parties are domiciled. On these grounds I concur with my noble and learned friend in thinking that the Court of Session was wrong, and, according to the arrangement made on the argument below, the case must now be remitted back.

LORD WENSLEYDALE.—The question which your Lordships have to decide arose on a competition for the succession to the entailed estate of Bedlormie. The entail was made in 1702. The estate descended, according to the terms of that entail, on Sir Thomas Livingstone, who died in 1853 without issue. He had several brothers, all of whom died before him without issue, except one, named Thurstanus, who left a son—the respondent; and the right of that son to succeed to the estate as nearest and lawful heir male of tailzie and provision of Sir Thomas Livingstone, is the question in this case. This question was raised on a petition presented by the respondent Alexander Livingstone to the sheriff of Chancery. Another petition was presented by Mrs. Fenton, the eldest surviving sister under the Service of Heirs (Scotland) Act, 1847. The cause was advocated into the Court of Session, and afterwards Mrs. Fenton brought an action of declarator of bastardy against the respondent, which raised the question not merely of his being the lawful child of Thurstanus, but also that he was not lawfully procreated, and was not entitled to succeed as heir to Sir Thomas Livingstone by virtue of the tailzie. The case on the part of the respondent was that he was born in England in 1809, and that his father Thurstanus was domiciled in that kingdom, married there in August, 1808, when so domiciled, to his mother, and died in December, 1839. She died in 1832.

H On the part of the appellant it was alleged that Thurstanus had, previously to the marriage with the respondent's mother, married her sister, who died in 1806, and it was contended that this second marriage was incestuous and void, and the issue, therefore, illegitimate and incapable of succession to a Scottish estate. Proof was gone into by both parties at great length—on the part of the respondents to prove the domicile of Thurstanus in England at the time of his marriage and his own birth; on the part of the appellant to establish the fact that the mother of the respondent was the sister of Thurstanus's first wife. The Lord Ordinary was satisfied that both the domicile and relationship were established. On the hearing of this appeal both these questions were again brought forward, particularly that of domicile, at some length, but your Lordships have already intimated an opinion that the evidence of both were quite satisfactory, and it is unnecessary to say anything more as to the facts of the case. The question of law which arises upon them is most important. The Lord Ordinary was of opinion that the legitimacy of the respondent was to be decided according to the law of his domicile; that by the

law of England (his domicile) his legitimacy could not be disputed; and his interlocutor referred to an annexed note in which his reasons are very fully and ably stated, and among them he intimates a doubt whether the marriage with a wife's sister was expressly prohibited by divine law or to be capitally punishable under the Scottish law (statute 1567, c. 14), if it had taken place in Scotland. Upon a reclaiming note to the First Division of the Court of Session, the court adhered to the interlocutor, but deleted the part which referred to the reasons, and the judges of the Court of Session in delivering their opinions proceeded upon the assumption that such a marriage entered into between parties domiciled in Scotland would, according to the law of that country, be struck at by the statute 1567, c. 14 and c. 15, and that the issue of that marriage would be illegitimate. But they all were of opinion that the question of legitimacy was to be determined by the law of the country of the respondent's domicile and that by the law of England he would be held to be legitimate. I have fully considered the very able arguments of the learned judges and those that were urged at your Lordships' Bar, and with the greatest respect for the judges I am satisfied that they have come to wrong conclusions, and, therefore, advise your Lordships to reverse the judgment of the Court of Session.

In order to decide the very important question in this case we must inquire, first, assuming the marriage of the claimant's parents to have been lawful, and himself to have been legitimate by the law of England, whether he is entitled to succeed to this Scottish estate; secondly, if the question is to be decided by the law of domicile (England), was this marriage legal so as to make the issue of it legitimate? It must be considered as established that the law of a man's domicile regulates his rights to personal property wherever situate, on the acknowledged principle of *mobilia sequuntur personam*, and, therefore, the succession to his effects takes place according to the law of the place where he is domiciled at the time of his death, in the cases of intestacy or testacy. It is now fully and perfectly settled by our law that the law of the domicile regulates the distribution of personal estate in the former case, and the form of the will in the latter. The law of the domicile regulates also the personal qualities which take effect from birth, such as legitimacy or illegitimacy, or absolutely as to the succession of personal property: STORY ON THE CONFLICT OF LAWS, 481; but subject to a qualification as to realty, to be afterwards explained, or the qualities which arise after birth, such as majority and minority. The laws of the State affecting the personal status of its subjects travel with them wherever they go, and attach to them in whatever country they are resident: WHEATON, chap. 11, p. 122.

I do not stop to inquire whether the expression that the laws of foreign countries where they have an extra-territorial operation are said to owe it to the comity of nations is the best mode of expression: it certainly is in common use, and is perfectly intelligible. STORY, in s. 38, says:

"There is not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and is inadmissible when it is contrary to its known policy or prejudicial to its interests."

The principle is well explained by HUBER in his third proposition on the subject of the CONFLICT OF LAWS. To the same effect PRESIDENT BOHIER expresses himself in his OBSERVATIONS SUR LA COUTUME DE BOURGOYNE, c. 23, ss. 62 and 63, p. 457 (WHEATON'S ELEMENTS OF INTERNATIONAL LAW, c. 2, p. 115):

"This effect given to foreign laws is founded on a kind of comity of the law of nations, by which different people have tacitly agreed that they shall apply, whenever it is required by equity and common utility, provided they do not contravene any prohibitory enactment."

But in respect to immovable property the rule is different. Though there have been questions, perhaps not difficult to decide, as to the capacity to convey and

- A the form of conveyance where the country of the domicile and that of the estate differ, it is fully established that the law of the country in which the property is situated governs exclusively as to the tenure, the title, and the descent of such property: WHEATON'S ELEMENTS OF INTERNATIONAL LAW, part 2, c. 2, p. 116; 4 BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS, p. 581. Therefore, lands in each country descend to those who are heirs by the laws of that country; to all children equally where the custom of gavelkind prevails [descent by the custom of gavelkind was abolished by the Administration of Estates Act, 1925, s. 45 (1) (a)], or as it is in France, where all share equally a certain part, or in Austria where all share the whole in certain proportions. That rule must prevail, though a different rule regulates the descent in the country of the domicile of the deceased owner. If in the country where the lands are situate the youngest son takes [e.g., where the custom of borough english prevailed: abolished by Administration of Estates Act, 1925, s. 45 (1) (a)], it matters not that the eldest is entitled in the country of the domicile. If the eldest legitimate son, or the eldest son lawfully procreated, is to succeed by the *lex loci rei sitae*, he alone can succeed who is legitimate or lawfully procreated according to the law of that place. But when the claimant is not a native of that place, the law gives effect by the comity of nations to the law of his domicile where he was born, and if legitimate and born of a lawful marriage there, he would be legitimate according to the *lex loci*, with the qualification afterwards noticed. If not legitimate according to the law of his domicile, he could not succeed, even though he would under the same circumstances be legitimate and entitled to succeed if born in the country *rei sitae*, as appears by *Munro v. Saunders* (11); and even though legitimate by the law of his domicile when born before marriage, he could not succeed to real estates if illegitimate by the law of the place where the land is situated, as was decided in that case after the most deliberate consideration. It matters not whether that law was by a special statute or the common law of the land.
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There is no doubt, however, that the law forbidding the antenatus to succeed in England was part of the common law, and the Statute of Merton was in affirmation of it, or, more correctly speaking, a refusal to vary it. The reasoning in that case applies in every respect to this—a claimant born after a marriage, valid according to the law of the domicile, would be *prima facie* entitled to succeed to the estate. As to the fact of the marriage, LORD STOWELL in *Lady Herbert v. Lord Herbert* (12) says (2 Hag. Con. at p. 271):

- G “It is the established principle that every marriage is to be universally recognised which is valid according to the law of the place where it was had, whatever that law may be.”

- But if, using the language of HUBER, the adoption of the law of the domicile would occasion a prejudice to the rights of other States and their citizens; or if, using the language of BOHIER, they contravene a prohibitory enactment, the comity of nations would not require or authorise their adoption. If such a marriage, good according to the law of domicile, were contrary to their notions of religion and morality, it would be impossible to contend that it ought to be adopted by them, and the issue of that marriage deemed legitimate for the purpose of succession to real estate. Supposing the law of the domicile considered the eldest natural son to be legitimate, and to be entitled to his father's property, real and personal, it could not for a moment be contended that he could succeed to a Scottish estate; or suppose that polygamy was permitted in the country of domicile, it could not be contended that the son of a second wife should be heir in Scotland to real property after the death of the first without children. Such a marriage would be contrary to the moral and religious and political institutions of that country, and is forbidden by the law of Scotland in Scotland itself under severe sanctions, the confiscation of goods, the piercing of the tongue and infamy: statute 1551, c. 19.
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Is there not precisely the same objection, or rather more, to this marriage of which the claimant is the issue, as being contrary to the moral and religious institutions

of the Scots, for it is characterised by the law as "vile, filthy and abominable in the presence of God." It is forbidden by much more severe sanctions, and if it had taken place in Scotland would be punishable by death. The case is precisely the same, as to its legality, as if, instead of being the marriage of a husband with his deceased wife's sister, it was a marriage in a foreign country by a man with his sister, daughter or mother, and can anyone doubt that such a marriage would never be tolerated and that the issue would not be deemed illegitimate? STORY, J., in s. 114 of the CONFLICT OF LAWS, states that marriages involving polygamy and incest could not be recognised in any Christian country, but he distinguishes in the case of incest, confining the doctrine to such marriages as are by the general consent of all Christendom incestuous. This distinction has been disapproved of with reason by SIR CRESSWELL CRESSWELL in *Brook v. Brook* (13). One cannot see how any country can be called on to give effect to a marriage, as to real estates within its limits, which is by its own law deemed incestuous and void. I think, therefore, that this case falls within the exceptions allowed in the rule as to adopting the laws of a foreign State as to the personal status in the question of heirship. If the case is to turn on this point the respondent ought to have the option, if he thinks fit to exercise it, of having the case remitted for the purpose of considering whether the assumption as to the law of Scotland forbidding the marriage of the sister of a deceased wife is correct, though I cannot feel any doubt whatever on that question. A B C D

The second question for consideration is whether, supposing the legitimacy of the respondent is to be decided by the law of domicile only, the marriage was valid, so as to make the issue of it legitimate according to that law. My opinion is that by the law of England the marriage of a widower with his deceased wife's sister was always as illegal and invalid as a marriage with a sister, daughter, or mother was. This appears to be clear by the decision in *R. v. Chadwick* (14), in which the several statutes and authorities prior to Lord Lyndhurst's Act [Marriage Act, 1835] are commented upon and considered. It was always deemed as being within the prohibited and Levitical degrees. But from the peculiarity that the question of the validity of marriage with reference to the objection of being within the Levitical degrees was matter of ecclesiastical cognisance, and cognisable in the spiritual court alone, it could not be questioned after the death of either party, for it could not be dissolved by the court then as death had already dissolved it, nor could the issue be bastardised, though the survivor might be visited with ecclesiastical censures. But the marriage was still an unlawful and forbidden marriage, and the issue really was born illegitimate, though the validity of the marriage, and the legitimacy of the issue could not be questioned in the country of domicile by reason of the rules of the peculiar law which made these matters cognisable in one tribunal only in that country. The marriage would be good in one sense, because it could not be set aside, and the issue would be legitimate in that sense, because there were no means provided by the English law to deprive them of the rights belonging to legitimate issue, but such marriages were all forbidden at the time of contracting them—all illegal—all capable of being set aside as void ab initio, on account of their illegality, and the comity of nations cannot require them to be valid in another country where there exists no means of setting them aside. Suppose the succession had opened in the lifetime of both parents, as it would have done if the estate had been settled on the eldest son of Thurstanus on the death of Sir Thomas Livingstone, and not on Thurstanus himself, and he and his wife were both alive, would that son have been deemed legitimate? If, as has been argued, the Scottish court had written to the English court requesting them to certify what was the law, or if the law had been proved by English advocates, it would unquestionably have been stated that the marriage was illegal and might be set aside, because it was ab initio void on the ground of its illegality. Could the Scottish court, under those circumstances, give effect to that marriage, and allow the issue to be legitimate and to succeed to a Scottish estate? Could E F G H I

A the legitimacy, if it did not exist then, be afterwards created by the omission to set aside the marriage in the lifetime of both parents?

Upon these grounds I think that the respondent had not any right to the estate even if his legitimacy was to be determined by the law of the country of his domicile.

B **LORD CHELMSFORD.**—The question in this case is whether the respondent is entitled to be served as nearest and lawful heir male of tailzie and provision in special of Sir Thomas Livingstone in the lands of Bedlormie, or whether by the failure of heirs male of his body, and also of heirs male of Alexander Livingstone the entailor, the appellant is his nearest heir.

C The respondent is the son of a second marriage of Thurstanus Livingstone with his first wife's sister, and, if legitimate, would be indisputably the nearest son and lawful heir male. The case in the Court of Session was argued and decided upon the assumption that the marriage, of which the respondent was the issue, if it had taken place in Scotland, would have been incestuous and void, and would have subjected the parties to capital punishment under the statute law of that country. This, however, must not be considered to have been absolutely decided to be the law of Scotland, but merely to have been taken for granted for the purpose of the argument. The only question which was raised and determined was that the parents of the respondent, being both of them domiciled in England at the time of the respondent's birth, the marriage upon the death of the parents became irrevocable in England, and consequently the legitimacy of the respondent having been established there for all purposes, the personal status attached upon him as E an inseparable incident, and accompanied him wherever he went, and consequently determined his claim to be regarded in Scotland as heir male lawfully procreated under the deed of tailzie and provision in question. In considering the case, two circumstances must throughout be borne in mind. First, that the marriage of the parents of the respondent is to be regarded not only as having been void, but as being a criminal act in Scotland; secondly, the title of the respondent depends upon F his answering a description contained in an instrument relating to real property in that country.

The marriage of the parents of the respondent having taken place prior to 1835, it is necessary to consider what was the law of England with respect to a marriage with a deceased wife's sister before the Marriage Act of that year. I think it cannot properly be questioned that such a marriage was void ab initio. There is a G well-known maxim of our law, *quod ab initio non valet in tractu temporis non convalescit*. This rule would have had its full force and operation in these marriages if it had not been for the interference of the temporal courts with the proceedings of the ecclesiastical courts after the death of one of the parents. This jurisdiction of the temporal courts appears to have been exercised in favour of the issue of the marriage which they had just protected from being bastardised by H preventing the ecclesiastical courts from declaring the marriage to have been void which had been already dissolved by death. It is to be observed, as my noble and learned friend LORD CRANWORTH has stated, that in these cases the ecclesiastical courts pronounced no decree of divorce, but merely made a declaration of the nullity of the marriage, and the temporal courts only restrained the ecclesiastical courts from making this declaration at a time when it could have no practical effect upon the marriage itself and when its only operation would be to bastardise I the issue. This is not unimportant as showing that the question of the original validity of the marriage was not at all touched by the temporal courts, thus disabling the ecclesiastical courts from pronouncing a declaration respecting it, and that the temporal courts did not by their interposition profess to deal in any way with the validity or invalidity of the marriage itself is shown by their leaving the ecclesiastical courts at liberty to proceed to punish the surviving party for incest—a power which, according to the opinion of SIR HERBERT JENNER FUST, continues even as to marriages protected by the Act of 1835.

The respondent's condition, therefore, in England was this. He was the offspring of a marriage which was incestuous and void, but of a marriage which, by the course of events, had become irrevocable. Therefore, by the law of the country of his domicil, his legitimacy was established, because it could not be impeached. He had, therefore, a personal status of legitimacy which by the course of events had become virtually absolute in this country, and it may be conceded that this would determine his rights in all other countries if not opposed by any peculiar laws or views of morality or religion regulating the subjects of marriage and succession in those countries. But I cannot think the status of legitimacy in the country of domicil can be regarded as being more than a condition relative to the laws and institutions of that country, and that it is necessarily of universal efficacy. *Doe d. Birtwhistle v. Vardill* (1) is an authority the other way. There was no doubt in that case that the plaintiff in the ejectment was a legitimate child according to the law of Scotland where his parents were domiciled, but the character of legitimacy was not allowed to prevail in England where he was claiming lands as heir to his father.

It seems to have been assumed throughout this argument before your Lordships that, if the claim in this case had been to moveable property, the respondent would have succeeded, but I am not disposed, without further consideration, to concede that if the marriage is regarded in Scotland as an incestuous marriage, and it had become necessary, in order to make out the title to be next-of-kin, to prove such a marriage, that result would have followed. It is, however, unnecessary to consider that question, as we are dealing with a different description of property. The respondent contends that, although this is a case of real property and of lawful issue generally, or of lawful issue according to a particular description in a deed of tailzie, yet that the status of legitimacy being established by the indissolubility of the marriage in England, the law of Scotland will not go back and inquire into the circumstances of the marriage, but, having ascertained that it cannot now be impeached according to the *lex loci contractus*, it will retire and put no further questions. This is grounded on SIR WILLIAM SCOTT's judgment in *Dalrymple v. Dalrymple* (16). That was a suit for the restitution of conjugal rights, in which a question was raised in answer as to the validity of a marriage in Scotland, *per verba de presenti*, without religious celebration. This, however, like every other contract, was to be determined by the *lex loci*. But, suppose the contract of marriage in that case had been one which the law of England repudiated on the grounds of immorality, I apprehend the English court would not have accepted the response of the Scottish law and submissively acquiesced in it by sanctioning such a contract. This is clearly the opinion of CRESSWELL, J., and also of STUART, V.-C., in *Brook v. Brook* (13), with which I agree.

STOREY, J., in considering the cases where marriages celebrated according to the *lex loci* will be recognised in other countries, admits the exception of marriages positively prohibited by the public law of a country from motives of policy or from considerations of morality or religion. But when he comes to the question of incestuous marriages, he says (s. 114):

"Care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous."

But surely this must be incorrect. No country can be bound in a case of this kind to wait and collect the opinions of all Christendom before it can act upon its own views of morality or religion. An incestuous marriage is one which, in the eyes of the nation which regards it in that light, is an offence against the laws of God as well as against its own laws, and it cannot be expected to tolerate such a marriage when it becomes the proper subject of its jurisdiction, whatever views may be entertained upon it by other countries, as to which it ought not to permit itself to inquire. Nor can it in such a case pay any deference to the rules of proceeding of another country, which, upon views of convenience or forbearance

A of its own, will not permit, after a certain event, a marriage which even that country holds to be void in its nature and essence to be avoided.

If the Scottish courts were to put any question to the English courts in this case, it would be this: What do you hold as to the original validity of such a marriage? The question cannot properly be regarded as it now stands when time and accident have rendered that which was essentially bad virtually good by protecting it from being assailed. But the question is: What answer would the courts of England have returned immediately upon the marriage or upon the birth of the respondent, or, it may be added, at any time during the lives of both the parents? The answer to that question would not have been, that the marriage was good and valid until it was impeached, but that it was void and liable to be proved to be so during the lives of the parties to it. It appears to me to be a mistake to suppose that in this case the Scottish courts will put any question at all to the English courts. The question of legitimacy having relation to real estate is a question which each country will answer for itself, and will not ask the aid of another country to determine it. That this is the rule of all countries with respect to the title to real property appears from the passages in the jurists cited in the course of the argument, and is established by the case to which such frequent reference has been made, that of *Doe d. Birtwhistle v. Vardill* (1). The Court of Session, therefore, ought in this case to have refused to hear the English law declaring legitimate a person whom, from being the offspring of an incestuous and criminal marriage, they would themselves have pronounced to be illegitimate, and upon the assumption on which the argument proceeded they ought to have held that the respondent was not the lawful heir male of tailzie and provision of Sir Thomas Livingstone. On these grounds I agree with my noble and learned friends that the Court of Session was wrong, and that the interlocutor must be reversed.

Appeal allowed.

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ABERDEEN RAIL. CO. v. BLAIKIE BROTHERS

[HOUSE OF LORDS (Lord Cranworth, L.C., and Lord Brougham), May 13, 30, 31, 1853, July 20, 1854]

[Reported 2 Eq. Rep. 1281; 23 L.T.O.S. 315; 1 Macq. 461]

H

Company—Director—Duty of director—Promotion of interests of company—Prohibition entering into contract on behalf of company with himself or firm or company of which he is a member—Companies Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 16), s. 86.

I

It is the duty of a director of a company so to act as best to promote the interests of the company. That duty is of a fiduciary character, and no one who has such duties to discharge can be allowed to enter into engagements in which he has, or can have, a personal interest which conflicts, or possibly may conflict, with the interests of the company. A director, therefore, is precluded from entering on behalf of the company into a contract with himself or with a firm or company of which he is a member, and so strictly is this principle adhered to that no question can be raised as to the fairness or unfairness of a contract so entered into. The application of the principle is not affected by s. 86 of the Companies Clauses Consolidation Act, 1845 [3 HALSBURY'S STATUTES (2nd Edn.) 311], which provides that if a director "be either directly or indirectly concerned in any contract with the company, or participate in any

manner in the profits of any work to be done for the company . . . the office of such director shall become vacant." A

Notes. Applied: *Stears v. South Essex Gas Light and Coke Co.* (1860), 7 Jur.N.S. 447; *Flanagan v. Great Western Rail. Co.* (1868), L.R. 7 Eq. 116. Followed: *Imperial Mercantile Credit Association v. Coleman* (1870), 6 Ch. App. 562, n. Distinguished: *Murray v. Epsom Local Board*, [1897] 1 Ch. 35. Considered: *Costa Rica Rail. Co. v. Forwood*, [1901] 1 Ch. 746. Applied: *Transvaal Lands Co., Ltd. v. New Belgium (Transvaal) Land and Development Co., Ltd.*, [1914-15] All E.R.Rep. 987; *Re Thomson, Thomson v. Allen*, [1930] 1 Ch. 208; *Bell v. Lever Bros., Ltd.*, [1931] All E.R.Rep. 1. Considered: *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378. Distinguished: *Re Mulholland's Will Trusts, Bryan v. Westminster Bank, Ltd.*, [1949] 1 All E.R. 460. Referred to: *Armstrong v. Jackson*, [1916-17] All E.R.Rep. 1117; *Wright v. Morgan*, [1926] All E.R.Rep. 201. B C

As to the duties and liabilities of directors, see 6 HALSBURY'S LAWS (3rd Edn.) 293 et seq.; and for cases see 10 DIGEST (Repl.) 1241-1243, 1267, 1268.

Cases referred to:

- (1) *Keech v. Sandford* (1726), Sel. Cas. Ch. 61; 2 Eq. Cas. Abr. 741; Cas. temp. King, 61; 25 E.R. 223, L.C.; 43 Digest 633, 720. D
- (2) *Whelpdale v. Cookson* (1747), 1 Ves. Sen. 9; 27 E.R. 856, L.C.; 43 Digest 779, 2192.
- (3) *Ex parte James* (1803), 8 Ves. 337; 32 E.R. 385, L.C.; 43 Digest 779, 2193.
- (4) *York Buildings Co. v. Mackenzie* (1795), 8 Bro. Parl. Cas. 42; 3 E.R. 432, H.L.; 43 Digest 784, 2239.
- (5) *Foster v. Oxford, etc., Rail. Co.* (1853), 13 C.B. 200; 22 L.J.C.P. 99; 20 E L.T.O.S. 224; 17 Jur. 167; 1 W.R. 151; 138 E.R. 1174; 10 Digest (Repl.) 1239, 8724. E
- (6) *Campbell v. Walker* (1800), 5 Ves. 678; 31 E.R. 801; 43 Digest 780, 2209.
- (7) *Ex parte Lacey* (1802), 6 Ves. 625; 31 E.R. 1228, L.C.; 43 Digest 780, 2202.

Also referred to in argument:

- Fox v. Mackreth* (1788), 2 Bro.C.C. 400, L.C.; affirmed (1791), 2 Cox, Eq. Cas. 320; 30 E.R. 148; sub nom. *Mackreth v. Fox*, 4 Bro. Parl. Cas. 258, H.L.; 43 Digest 780, 2206. F
- Murphy v. O'Shea* (1845), 8 I.Eq.R. 329; 2 Jon. & Lat. 422; 43 Digest 834, n.
- Coles v. Trecothick* (1804), 9 Ves. 234; 1 Smith, K.B. 233; 32 E.R. 592, L.C.; 43 Digest 779, 2196. G
- Lord Selsey v. Rhoades* (1824), 2 Sim. & St. 41; 57 E.R. 260; on appeal (1827), 1 Bli.N.S. 1; 4 E.R. 774, H.L.; 34 Digest (Repl.) 34, 114.

Appeal from a decision of the Court of Session in an action brought by the respondents, Blaikie Brothers, ironfounders and engineers at Aberdeen, against the appellants, the Aberdeen Rail. Co., for specific performance of a contract to accept iron chairs and, alternatively, for damages for breach of contract in not accepting part of the chairs. H

The respondents in their summons set forth the grounds of action and relief in substance as follows. Alexander Gibb, a civil engineer, acting as resident engineer for and on behalf of the Aberdeen Rail. Co., having prepared a specification of chairs required for the permanent road of the railway, and having on or about Jan. 19, 1846, being the date of the specification, communicated the same to John Blaikie the youngest, one of the partners of the firm of Blaikie Brothers, with a view to the respondents contracting for the manufacture and supply of the chairs, John Blaikie, the youngest, on Feb. 6, 1846, addressed an offer to Alexander Gibb to furnish the chairs for the railway, agreeably to the plan and specifications, to be delivered at Aberdeen at the price of £8 10s. per ton. On the same day A. Gibb, acting for and on behalf of the railway company, addressed to John Blaikie, the youngest, on behalf of the respondents, the following acceptance of the said offer: I

A "As authorised by the directors of the Aberdeen Rail. Co., I hereby accept your offer for supplying the chairs for the permanent road of the Aberdeen Railway, at the rate of £8 10s. per ton, delivered at Aberdeen, the chairs to be supplied in every respect of the quality and dimensions stated in the specification of date Jan. 19 last, signed by me, and the quantity to be performed, and to which this acceptance is meant to refer, is also stated in this specification, and the period of delivery."

B The quantity of chairs stated in the specification was 78,131 joint chairs, and 312,531 intermediate chairs, or, when reduced to weight, the whole quantity to be supplied amounted to 4,150 tons of chairs. Before any of the chairs had been supplied to the railway company, or required by them to be delivered, the company requested the respondents to adopt Messrs. Ransome and May's patent mode of casting the chairs, which request the respondents had agreed to comply with. The respondents had already implemented their part of the contract to the extent of furnishing and delivering to the company at such times and in such quantities as they required for the construction of the permanent road of their railway with reference to the state and progress of their works, 2,710 tons of chairs, manufactured in terms of the aforesaid specification and subsequent agreement as to the patent mode of casting.

C The respondents pleaded that they were able and willing further to implement the contract by furnishing and delivering to the company the remaining quantity of chairs contracted for, to wit, 1,440 tons of chairs; but the company refused to implement the contract by receiving delivery of the same. The respondents prayed that the company might be ordered either specifically to perform the contract by accepting delivery, or to make payment to the respondents of £7,000, or such other sum as should be ascertained to be the amount of the loss and damage sustained by the respondents.

E The company pleaded, first, that Mr. Gibb had no authority to bind them; secondly, that they never contracted in manner and form as alleged; thirdly, that at the time when the agreement was entered into, viz., on Jan. 19 and Feb. 6, 1846, Thomas Blaikie, one of the respondents and a partner in the respondent firm, was a director and chairman of the company, and continued to hold those offices until Feb. 25, 1846, when he resigned on the ground that a firm with which he was connected had accepted employment, and was performing work, for the railway. The company pleaded that

F "under the Companies' Clauses Consolidation Act, 1845 [see s. 86], any such contract or agreement, to which the plaintiff Thomas Blaikie was a party while he remained a director of the company, was illegal, and cannot be enforced."

G The principal question arose on the third plea, in a form analogous to a demurrer in England. The Court of Session pronounced the following order:

H "Find, that the circumstance of Mr. Thomas Blaikie, one of the [respondents], having been a director of the Aberdeen Rail. Co. for some months before and on Feb. 6, 1846, and having thereafter continued to act as such, and not having resigned the office of director till on or about Feb. 25, 1846; is not fatal to the validity of the contract."

From that order the company now appealed.

I *Sir Richard Bethell, Q.C.*, and *E. Gordon* (of the Scottish Bar) for the appellants. *Rolt, Q.C.*, and *Macfarlane* (of the Scottish Bar) for the respondents.

Their Lordships took time for consideration.

July 20, 1854. The following opinions were read.

LORD CRANWORTH, L.C.—The ground relied on by the appellants is that Mr. Thomas Blaikie, holding as he did the situation of chairman of the board of directors, was a trustee for the company, or, at all events, that as between himself and the company he was subject to the same objections as those which affect a trustee in his relation to the cestui que trust, whose interests he is to protect, so that

he could not make any contract for his own benefit in relation to the affairs of the company. Messrs. Blaikie, on the other hand, contended, first, that no such defence is set up by the pleas in defence, for that the third plea is not founded on any general doctrine as to the duties of trustees, but on the special provisions of the Companies Clauses Consolidation Act, 1845, and that those clauses do not support the proposition contended for. Secondly, they say, even supposing any general question to be properly raised by the plea, still that no such general rule exists in Scotland which would prevent a director from entering, on behalf of the company whose affairs he was managing, into a contract with a firm of which he is a member. A B

Disregarding for the present the statute, I will proceed to consider the more general question, which divides itself into two branches—first, is any such general question raised by the pleas, and, secondly, if it is, then what is the law of Scotland on this subject? The language of the third plea is as follows : C

“Under the Companies Clauses Consolidation Act, 1845, any such contract or agreement to which the plaintiff, Mr. Thomas Blaikie, was a party, while he remained a director of the company, was illegal and cannot be enforced.”

The respondents contend that the plea raises no question as to the invalidity of the contract arising from Mr. Blaikie's situation as director, except so far as that invalidity is created by the statute, and so the general law on this head is not properly in controversy. But is this so? In order to test the accuracy of this argument we must assume the law to be such as the appellants contend for, namely, that, as a general rule, no director can enter into a contract on behalf of the company with a firm in which he is a partner. What the plea insists on is that the contract entered into by Mr. Blaikie when he was director, is incapable of being enforced, because it is avoided by an Act of Parliament. The proposition itself, that is, the invalidity of the contract by reason of the character which Mr. Blaikie sustained, is distinctly brought forward. The objection *ex hypothesi* is valid, but a wrong reason is alleged in its support. I confess this seems to me to be immaterial. The object of pleading is to compel the litigant parties to state distinctly the facts on which their title to relief rests. If this is done, the court is bound to apply the law. The only error (assuming the law to be such as the appellants contend it to be) is, that the words “under the Companies Clauses Consolidation Act, 1845,” with which the third plea commences, ought to be struck out. But surely this cannot invalidate the plea, so as to prevent the court from applying the law to the facts which correctly appear. I must advise your Lordships, therefore, to hold that, if, on general principles of law, the contract was one incapable of being enforced, there is sufficient on the pleadings to enable your Lordships to decide in conformity with those principles. D E F G

This, therefore, brings us to the general question, whether a director of a railway company is or is not precluded from dealing on behalf of the company with himself or with a firm in which he is a partner. The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the *cestui que trust* which it was impossible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could have been obtained from any other H I

A person; they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted.

The English authorities on this subject are numerous and uniform. The principle was acted on by LORD KING in *Keach v. Sandford* (1), and by LORD HARDWICKE, in *Whelpdale v. Cookson* (2), and the whole subject was considered by LORD ELDON on a great variety of occasions. It is sufficient to refer to what fell from that very able and learned judge in *Ex parte James* (3). It is true that the questions have generally arisen on agreements for purchases or leases of land, and not, as here, on a contract of a mercantile character. But this can make no difference in principle. The inability to contract depends not on the subject-matter of the agreement, but on the fiduciary character of the contracting party, and I cannot entertain a doubt of its being applicable to the case of a party who is acting as manager of a mercantile or trading business for the benefit of others no less than to that of an agent or trustee employed in selling land.

Was, then, Mr. Blaikie so acting in the case now before us? If he was, did he, while so acting, contract, on behalf of those for whom he was acting, with himself? Both these questions must obviously be answered in the affirmative. Mr. Blaikie was not only a director, but, if that was necessary, the chairman of the directors. In that character it was his bounden duty to make the best bargains he could for the benefit of the company. While he filled that character, viz., on Feb. 6, 1846, he entered into a contract on behalf of the company with his own firm for the purchase of a large quantity of chairs at a certain stipulated price. His duty to the company imposed on him the obligation of obtaining these iron chairs at the lowest possible price. His personal interest would lead him in an entirely opposite direction—would induce him to fix the price as high as possible. This is the very evil against which the rule in question is directed; and I see nothing whatever to prevent its application here. I observe that LORD FULLERTON seemed to doubt whether the rule would apply where the party whose act or contract is called in question, is only one of a body of directors not a sole trustee or manager. But, with all deference, this appears to me to make no difference. It was Mr. Blaikie's duty to give to his co-directors, and through them to the company, the full benefit of all the knowledge and skill which he could bring to bear on the subject. He was bound to assist them in getting the articles contracted for at the cheapest possible rate. As far as related to the advice he should give them, he put his interest in conflict with his duty, and whether he was the sole director, or only one of many, can make no difference in principle. The same observation applies to the fact, that he was not the sole person trading with the company. He was one of the firm of Blaikie Brothers with whom the contract was made, and so was interested in driving as hard a bargain with the company as he could induce them to make.

It cannot be contended that the rule to which I have referred is one confined to the English law, and that it does not apply to Scotland. It so happens that one of the leading authorities on the subject is a decision of this House on an appeal from Scotland. I refer to *York Buildings Co. v. Mackenzie* (4), decided by your Lordships in 1795. There the respondent, Mackenzie, while he filled the office of common agent in the sale of the estates of the appellants, who had become insolvent, purchased a portion of them at a judicial auction, and though he had remained in possession for above eleven years after the purchase and had entirely freed himself from all imputation of fraud, yet this House held that, filling as he did an office which made it his duty both to the insolvents and their creditors to obtain the highest price, he could not put himself in the position of purchaser and so make it his interest that the price paid should be as low as possible. This was a very strong case, because there had been acquiescence for above eleven years. The charges of fraud were not supported—the purchase was made at a sale by auction. LORD ELDON and SIR WILLIAM GRANT were counsel for the respondent, and, no doubt, everything was urged which their learning and experience could suggest in favour of the respondent. But this House considered the general principle one of such importance, and of such universal application, that they reversed the decree

of the Court of Session, and set aside the sale. The principle, it may be added, A
is found in, if not adopted from, the civil law. In the Digest (Lib. xviii, t. 1,
c. 84, s. 7) is the following passage :

"Tutor rem pupilli emere non potest; idemque porrigendum est ad similia, id
est, ad curatores, procuratores, et qui negotia aliena gerunt."

In truth, the doctrine rests on such obvious principles of good sense, that it is B
difficult to suppose that there can be any system of law in which it would not be
found.

It was argued that here the contract ultimately acted on was not entered into
while Mr. Blaikie was director, for, though a contract had been entered into in
February, yet that contract was afterwards abandoned and new terms agreed on in
the following month of June. This, however, is not a true representation of the C
facts. The contract of February was, it is true, afterwards modified by arrangement
between the parties, but this cannot vary the case. If, indeed, the contracting
parties had in June unconditionally put an end to the original contract so as to
release each other from all obligation, the one to purchase and the other to sell
at a stipulated price, the case would have assumed a different aspect. But this was
not done. The contract of June was not a contract entered into between parties D
on the footing of there being no obligation then binding on them, but an agreement
to substitute one contract for another supposed to be binding. Messrs. Blaikie did
not say to the directors in June: "We have no binding contract with you, but we
are now willing to contract." What they said amounted in fact to this: "We
have a contract which was entered into in February, but we are ready if you desire
to modify it." To hold that this in any manner cured the invalidity of the original E
contract would be to open a wide door for enabling all persons to make the rule in
question of no force.

It was further contended that, whatever may be the general principle applicable
to questions of this nature, the legislature has, in cases of corporate bodies like
this, modified the rule. The Companies Clauses Consolidation Act, 1845, s. 86,
it was argued, has impliedly, if not expressly, recognised the validity of the contract F
by enacting that its effect shall be to remove the director from his office, indicating
thereby that a binding obligation would have been created which would render the
longer tenure of the office of director inexpedient. Your Lordships were referred
to *Foster v. Oxford, etc., Rail. Co.* (5). That was an action for breach of a contract
under seal, whereby the defendants covenanted with the plaintiffs (as in the case
now before your Lordships) to purchase from them a quantity of iron. The defen- G
dants pleaded that at the time of the contract one of the plaintiffs was a director
of their company, and to this plea there was a general demurrer. That such a
contract would in this country be good at common law is certain. The rule which
we have been discussing is a mere equitable rule, and, therefore, all that the
Court of Common Pleas had to consider was how far the contract was affected by
the statute. The decision was, that the statute left the contract untouched, and H
that its operation was only to remove the director from his office. Sections 85 and
86 of the Act of 1845, on which the court proceeded, were in the same words as
ss. 88 and 89 of the Companies Clauses Consolidation (Scotland) Act, 1845, and the
counsel at your Lordships' Bar relied on this decision as being strictly applicable to
the case now under appeal. But there is a clear distinction between them. In I
Scotland there is no technical division of law and equity [By s. 24 of the Supreme
Court of Judicature Act, 1873 (see now s. 36 of the Supreme Court of Judicature
(Consolidation) Act, 1925) it was provided that, as from Nov. 2, 1874, law and
equity in England were to be administered concurrently]. The whole question,
equitable as well as legal, was before the Court of Session. All which the Court of
Common Pleas decided was that a contract clearly good at law was not made void
by an enactment that its effect should be to deprive one of the contracting parties
of an office.

A That decision will not help the respondents unless they can go further, and show that the statute had the effect of making valid a contract which is bad on general principles enforceable here only in equity and not recognised in our courts of common law. I can discover no ground whatever for attributing to the statute any such effect. Its provisions will still be applicable to the case of directors who become interested in contracts as representatives or otherwise, and not by virtue of contracts made by themselves. I have, therefore, satisfied myself that the Court of Session came to a wrong conclusion; and that the third plea was a sufficient answer to the plaintiff's case. I, therefore, move that the judgment of the court below be reversed.

C **LORD BROUGHAM.**—I also arrive at the conclusion that the law of Scotland differs in no respect from the law of England upon this matter, and it is very important that it should be understood that there is no such difference between the two systems of jurisprudence. The cases which have been referred to, *Whelpdale v. Cookson* (2) and chiefly *Ex parte James* (3), in bankruptcy, clearly lay down what the law of England upon the point is. LORD ELDON, either in *Ex parte James* (3) or in *Campbell v. Walker* (6) or in *Ex parte Lacey* (7) goes even further than D LORD HARDWICKE did in *Whelpdale v. Cookson* (2), and considers (though he expresses it, no doubt, with the respect due to that eminent judge, rather as a grave doubt than as a well-matured opinion) that LORD HARDWICKE did not go far enough in giving effect to this principle when he said that it was possible that the assent of the creditor might validate the sale.

E How far the two systems of law are the same upon this very important question appears, not only from that to which my noble and learned friend has adverted, namely, *York Buildings Co. v. Mackenzie* (4), which is the ruling case upon this subject, and which was decided upon an appeal from Scotland, and according to the principles of Scottish law in this House, but it also appears, from the fact that in that case a distinct reference was made, at least in the argument at the Bar, to the English law authorities, and to the very case of *Whelpdale v. Cookson* (2). F *Ex parte James* (3) could not have been referred to, because it was decided some years afterwards, but *Whelpdale v. Cookson* (2) is referred to in the argument at the Scottish Bar, as well as the passage in the Digest from the Roman law which my noble and learned friend has read. It is also to be observed that, not only were the English cases cited in Scotland in that instance, but conversely, the Scottish case of *York Buildings Co. v. Mackenzie* (4) is referred to afterwards in the English cases—repeatedly at the Bar, and once or twice, I think, by LORD ELDON himself in disposing of English cases.

G *York Buildings Co. v. Mackenzie* (4) was, as has been observed, after eleven years of possession; and it is remarkable, too, that there was no fraud whatever found imputable to Mr. Mackenzie, the purchaser in that case. I think that, in the account of the subsequent proceedings, though not in the court below, it appears H that so entirely bona fide was Mr. Mackenzie's possession found to be that the rule of the civil law, happily the rule in Scotland, though most unfortunately never introduced into our jurisprudence, namely, that "*fruges bona fide perceptae et consumptae*" are to be held to be the property of the party who is ultimately held not to have the title, was applied in the case of Mackenzie. So entirely free from I all imputation of fraud was he found to be that he was allowed not merely to remain in undisputed and undisturbed possession of the rents and profits of the estate during those eleven years, that is, up to the period of the appeal, because the rule of bona fide consumption applies not only up to the time of a decision against him in the court below, but up to the final decision of the Court of Appeal. Accordingly, Mr. Mackenzie's bona fides was found to be so unimpeachable and his conduct in the whole transaction was found to be so entirely without fraud that not only did the court below find the other party liable to costs because they had charged him with fraud, which the court at the first decided in his favour, but afterwards he was

adjudged to have the whole of the expenses allowed to him to which he had been A
put in ornamental improvements upon the estate.

That is certainly one very strong instance of the application of the rule. Perhaps
it is stronger than any other within our recollection, because in that case it clearly
shows that so entirely was the opinion of the court in favour of the rule, that even
while they held that the transaction could not be sustained, but that his purchase B
was invalid, they nevertheless decreed him possession of the rents and profits,
and also to be allowed for the expenses of the improvement. In that case, my Lords,
I must also observe that it was not merely the decision of this House which set
the court below right upon a point of Scottish law, as it has once and again done,
but the Scottish law appears to have been by no means distinctly maintained by the
court below to be as it was ultimately found not to be by your Lordships' decision,
for, in the first instance, they decided against the party seeking to set aside the C
sale, but the court afterwards by a narrow majority set aside the sale. Then
again came both parties to appeal against this second decision, and then by a
narrow majority again the court refused to set aside the sale, and found, as I have
already stated, that in respect of the charge of fraud, the defendant, Mr. Mackenzie,
was entitled to his expenses.

Therefore, it cannot be said to have been at all the understanding of the Court of D
Session that the law was in favour of such purchases at the time when you find
these two conflicting decisions in the court below, and each by such a very narrow
majority. I also agree with my noble and learned friend that the decision in
Foster v. Oxford, etc., Rail. Co. (5), in the Common Pleas, upon which great reliance
was placed at your Lordships' Bar does not apply to this case, because there the
transaction was past all doubt valid at common law, though not in equity. If the E
Common Pleas had had an equitable jurisdiction as well as a common law jurisdic-
tion, the anomaly never could have happened of a transaction being found legal
and valid in that court, which could not stand examination on the other side of
Westminster Hall.

Appeal allowed.

NATIONAL EXCHANGE CO. OF GLASGOW v. DREW AND ANOTHER

[HOUSE OF LORDS (Lord Cranworth, L.C., Lord Brougham and Lord St. Leonards),
February 27, March 1, 2, 5, 9, 1855]

[Reported 25 L.T.O.S. 223; 2 Macq. 103]

*Company—Director—Fraudulent representation—Inducement to take shares—
Liability of company.*

The appellants, bankers and brokers, sued the respondents for money lent to them to purchase shares in the company. The respondents pleaded that the directors of the company had in their annual report falsely represented the affairs of the company to be flourishing, whereas it was insolvent, and that they had declared large dividends which, in fact, were paid out of capital. The respondents also said that B., the manager of the company, had falsely represented the shares to be of great value, thus inducing the respondents to purchase them, and at the same time, on behalf of the company, he offered to advance the money necessary to make the purchase, promising that the company would hold the shares for the respondents until they could be sold at a profit, without the respondents being called upon for the price. The respondents said that, relying on these representations, they agreed to this arrangement, and B. bought and paid for the shares, which he retained.

Held: where directors of a company in the discharge of their duties made fraudulent representations about the financial position of the company and so induced persons to buy shares in the company the company was liable for those misrepresentations; in the present case, the transaction must be looked at as a whole, the so-called loan being part of the machinery for giving effect to the fraud; and, therefore, the matters pleaded by the respondents constituted a good defence to the action.

Notes. Considered: *Re North Shields Quay and Improvements Co., Davidson's Case* (1858), 4 K. & J. 688; *Re National Patent Steam Fuel Co., Ex parte Worth* (1859), 4 Drew. 529; *Re Royal British Bank, Nicol's Case* (1859), 3 De G. & J. 387; *Barry v. Croskey* (1861), 2 J. & H. 1. Applied: *Ludgater v. Love*, [1881-5] All E.R.Rep. 270. Referred to: *Eastern Counties Rail. Co. v. Hawkes* (1855), 5 H.L.Cas. 331; *Re Royal British Bank, Brockwell's Case* (1857), 4 Drew. 205; *Re Home Counties and General Life Assurance Co., Ex parte Woolaston* (1859), 7 W.R. 540; *Re Overend, Gurney & Co., Ex parte Oakes and Peek* (1867), L.R. 3 Eq. 576; *Western Bank of Scotland v. Addie, Addie v. Western Bank of Scotland* (1867), L.R. 1 Sc. & Div. 145; *Armstrong v. Strain*, [1951] 1 T.L.R. 856.

Cases referred to :

- (1) *Burnes v. Pennell* (1849), 2 H.L.Cas. 497; 14 L.T.O.S. 245; 9 E.R. 1181; sub nom. *Burnes v. Pennell, Forth Marine Insurance Case*, 13 Jur. 897, H.L.; 9 Digest (Repl.) 367, 2348.
- (2) *Cornfoot v. Fowke* (1840), 6 M. & W. 358; 9 L.J.Ex. 297; 4 Jur. 919; 151 E.R. 450; 1 Digest (Repl.) 683, 2435.

Also referred to in argument :

- Gerhard v. Bates* (1853), 2 E. & B. 476; 22 L.J.Q.B. 364; 22 L.T.O.S. 64; 17 Jur. 1097; 1 W.R. 383; 1 C.L.R. 868; 118 E.R. 845; 9 Digest (Repl.) 125, 673.
- Re North of England Joint Stock Banking Co., Dodgson's Case* (1849), 3 De G. & Sm. 85; 14 L.T.O.S. 207; 14 Jur. 386; 64 E.R. 391; 9 Digest (Repl.) 260, 1646.
- Ranger v. Great Western Rail. Co.* (1854), 5 H.L.Cas. 72; 24 L.T.O.S. 22; 18 Jur. 795; 10 E.R. 824, H.L.; 1 Digest (Repl.) 686, 2451.

- Wontner v. Shairp* (1847), 4 C.B. 404; 4 Ry. & Can. Cas. 542; 17 L.J.C.P. 38; 9 L.T.O.S. 148; 11 Jur. 373; 136 E.R. 563; 9 Digest (Repl.) 257, 1632.
- Langridge v. Levy* (1837), 2 M. & W. 519; 6 L.J.Ex. 137; affirmed sub nom. *Levy v. Langridge* (1838), 4 M. & W. 337; 150 E.R. 1458; sub nom. *Levi v. Langridge*, 1 Horn. & H. 325; 7 L.J.Ex. 387, Ex. Ch.; 35 Digest (Repl.) 53, 472.
- Fuller v. Wilson* (1842), 3 Q.B. 58; 2 Gal. & Dav. 460; 11 L.J.Q.B. 251; 6 Jur. 799; 114 E.R. 429; on appeal, 3 Q.B. 68, 1009; 1 Digest (Repl.) 684, 2436.
- Evans v. Collins* (1843), 5 Q.B. 804; 1 Dav. & Mer. 72; 12 L.J.Q.B. 339; 7 Jur. 743; 114 E.R. 1453; reversed sub nom. *Collins v. Evans* (1844), 5 Q.B. 820; 1 Dav. & Mer. 669; 13 L.J.Q.B. 180; 2 L.T.O.S. 425; 8 Jur. 345; 114 E.R. 1459, Ex. Ch.; 35 Digest (Repl.) 80, 214.

Appeal from a decision of the Court of Session whereby the court held certain defences to an action for money lent relevant in law, i.e., good on demurrer.

The appellants were the National Exchange Co. of Glasgow, a joint-stock company established in 1845 for the purpose of making advances on railway stocks and other securities, and for discounting bills and carrying on every kind of banking business. They afterwards added sharebroking to their other business. The respondents were holders of 1,130 shares in the company. In October, 1847, the respondents, wishing jointly to purchase 240 additional shares, instructed the manager of the company to purchase them, and the company, through their manager, acted as the brokers for the purchase. The company also advanced the money to the respondents wherewith to make the said purchase. Afterwards, the respondents having repudiated the contract, were sued by the company for the amount advanced to purchase the shares, viz., £600, with interest at 8 per cent, and commission for purchasing the shares. In their defence the respondents stated that at the first annual meeting of the company, held on Sept. 17, 1846, the shareholders were presented with a report stating that the company's affairs were in a prosperous state, and a dividend of £8 6s. 8d. per cent. was declared, and accordingly paid. At the second annual meeting in September, 1847, another favourable report was submitted, and a dividend of 8 per cent. declared, besides leaving reserved profits exceeding £5,500. This report, it was alleged, was entirely delusive, for no sufficient allowance had been made for bad debts, and the company, so far from being in a situation to pay a dividend, was insolvent. Large losses had arisen from gross neglect and mismanagement on the part of the directors and their manager Mr. Barlow, who had, on his own authority, made large loans on inadequate security. About October, 1847, before the shareholders were aware of the true condition of the company's affairs, the respondents were urgently solicited by Mr. Barlow, the manager, to purchase additional shares of the company's stock. At that period the shares began to fall in the market, and the directors were anxious to counteract rumours unfavourable to the stability of the concern. The manager assured the respondents that the company would advance the necessary funds for purchasing the shares and that the stock would be held until it could be sold at a profit without the respondents being called upon for any contribution in money. The respondents, relying on the representations given by the directors in their reports, and the assurances of the manager Mr. Barlow, bought 240 shares. The company acted as brokers in purchasing the shares and paid the price, and the transfers were taken in favour of the respondents jointly, and remained in the company's hands. The respondents said that they were prevailed on to enter into this transaction by gross fraud and misrepresentation; the reports of the directors and the statements of the manager were a tissue of falsehoods; and at the time when the company undertook to act as brokers for the respondents and to advance the price of the stock, they concealed the fact that the affairs of the company were desperate, and that the stock which they professed to purchase was of no value, and might entail a serious loss to those who acquired it. The appellants contended that the above

A plea was not a relevant defence, but the Court of Session held that it was and gave judgment for the respondents. The appellants appealed.

Sir Fitzroy Kelly and Willes for the appellants.

Sir Richard Bethell, Q.C., and Anderson, Q.C., for the respondents.

Their Lordships took time for consideration.

B Mar. 9, 1855. The following opinions were delivered.

LORD CRANWORTH, L.C.—This was an action brought by certain members of the National Exchange Co. of Glasgow to recover from the respondents the sum of £600 with interest and certain small charges, being, as they allege, money advanced by them in order to enable the respondents to purchase 240 shares in the company of third parties, strangers. There is no doubt that the purchase of these shares by the company was made upon the account of the respondents, and made out of the funds of the company, and the simple case made by the appellants, is that this was a loan of money, or in the nature of a loan of money, by them, the company, to the defendants, that that money has never been repaid, and, therefore, the company seek the repayment of that money with interest and certain expenses. Inasmuch as there is no doubt that the advance of money was made, the case so stated undoubtedly presents a *prima facie* case on the part of the appellants. The respondents set up certain defences in the court below to this claim, and the question is whether those defences are relevant.

The case made by way of defence is that this advance of money was made by the company under circumstances which disentitled the appellants to take it as having created any debt due to them from the respondents, for they said that, shortly before the advance, the company by their directors had fraudulently represented to the respondents that the affairs of the company were in a flourishing state, whereas the company was insolvent or nearly so. The defendants say that that fraudulent misrepresentation induced them to enter into this transaction, into which they would not otherwise have entered. Secondly, they say that the company by their manner urged them to make the purchase, and offered, if they would do so, to advance the money and to take the shares as security for repayment, and said that they would not enforce payment till the shares could be sold at a profit.

The question is whether any relevant defence is stated by means of this statement on the record? The Court of Session held that there was. Undoubtedly, if the contract sued on was obtained by fraudulent misrepresentations on the part of the appellants, no action could be sustained either in Scotland or in this or any other country, governed by any known system of law. I need not travel to any other countries, but certainly in this country and in Scotland a contract obtained by fraud may be treated as being no contract at all. The appellants say, however, that no such case is made, first, because the fraud alleged was not a fraud leading to the contract sued on, that is, the loan. What is sued on is the contract of loan, whereas the plaintiffs say that the fraud, if there were a fraud, was not connected with the contract leading to the loan, but was an inducement to the persons who had borrowed to apply the money in purchasing something at an exorbitant price, supposing the price to be exorbitant, which they would not have done had it not been for the fraudulent misrepresentation. The appellants say that that does not affect the loan; that that was an independent transaction, which was unconnected with the fraud. Secondly, they say that no fraud is alleged against the appellants, but only fraud by the directors, which was a fraud upon the appellants and not a fraud by the appellants. Thirdly, they say, supposing those difficulties were all removed, still that the alleged fraud is not stated with sufficient precision, and is merely a general allegation of falsehood, which it is impossible to meet.

To deal with the first proposition, namely, that there is a relevant case of defence stated independently of any allegation of fraud, I wish to consider the case as it would have stood if the appellants, instead of being a joint-stock company, had been a mere association of two or three individuals, or a single individual or banker.

Would his have been a relevant defence stated, if he had been sued? I must confess this case is one in which my opinion has fluctuated from time to time in the course of the argument, but I have, after much deliberation, come to the conclusion that, quite independently of this statement of fraud, a relevant defence is here stated, which entitles the respondents to resist the demand, even supposing that there had been no question of directors, no question of manager, but this had been a single suit by a single person carrying on business. I come to the conclusion for this reason—I think that the real result of this statement is not that there was a loan at all. The whole transaction must be stated together. What really took place was that the appellants (I will suppose that they were merely two individuals carrying on business in partnership as individuals and as brokers) say to the respondents: "There are certain matters in the market which may be purchased and which are worth 50s. a share." I will assume it was very much for their interest that the shares should be purchased, but whether they made any misrepresentation or not, what they really say to the respondents upon this statement is this: "If you wish to purchase these shares we have such confidence in their value that, if you like, we will, as your agents, advance the money, make the purchases, take the shares ourselves and hold them, and not call upon you for payment until they can be sold at a profit."

Suppose there were no other defence than that, having turned the thing over and over again in my mind, I think that it is a relevant defence, because, in truth, it negatives the assumption which has been proceeded on all along, that this was a loan. A loan means, in ordinary parlance, an advance of money upon a contract to repay it at the will of the lender. There was no such contract here, because the real meaning of this case is (assuming the statement to be accurate), not that there should be a right on the part of the persons who made the purchase, the company, to call for the repayment of the money when it should be their pleasure so to do, but that they should hold the shares which by their representation they were confident would rise and sell at a profit, and then sell them, putting so much money into the pocket of the persons for whom they were thus acting as agents. That may seem a short cut to a conclusion in this case, but I confess that I can see no answer to it. It appears to me that, independently of the questions which have been raised about fraud and as to how far the company are bound by any representations by the directors, and how far there are proper averments of fraud, the statements contained in the defence constitute a good, valid and relevant defence to the action.

If I am right in saying that the whole was one transaction, that there never was a loan in the ordinary sense of the word, that there was merely a purchase by the appellants as agents for the respondents upon a special contract for being repaid in a particular manner, which does not constitute a loan so as to warrant this action, it would seem to be unnecessary to consider the other matters which have been argued. But I should be extremely reluctant to let the case fall through, as it were, upon that short and summary statement, without explaining to some extent what my views would have been supposing that were not a relevant defence. In this part of the case also I have had from time to time the greatest fluctuation of opinion.

The defences which have been insisted upon are, first, that the contract sued on was not a contract arising out of the alleged fraud and misrepresentation. I quite agree that, in order to vitiate a contract and to make it a nullity by reason of fraud, it must be a fraud according to the language which has been so often quoted, *dans locum contractui*, that is to say that as to the contract in question, if the plaintiffs were right in saying that the loan was one independent transaction, and the purchase another independent transaction, the circumstance that the defendants had been induced by the fraud of the lenders to make the alleged fraudulent purchase, would not vitiate the transaction of the loan. I quite accede to that argument. I think that if I fraudulently represent to another that something in the market is worth £100, when I know it is not worth 100 pence, and he says: "Upon the faith of your representation I will make the purchase, but I have not

- A the money"; and if I say: "Very well, I will lend you the money," I do not think that, when the time came at which I was entitled, according to the contract respecting the loan, to sue for the money lent, the party who had borrowed could say, as a defence to my action: "I should not have borrowed this money of you, if you had not told me the mode in which I was going to apply the money was a lucrative instead of being a disastrous purchase." I think that would not have been a
- B *dolus dans locum contractui*. The proper remedy in such a case would have been that the party who lent the money would recover the loan, and the person who had borrowed would have a right of action to recover by way of damages against the lender whatever damage he had incurred by having been fraudulently induced to invest the money in an improper mode. I think that course would certainly do complete justice. I do not think any other course would do complete
- C justice in such a case, because, supposing that, instead of a loan of the exact sum, the purchaser had said: "This will cost £600, and I want some money for some other purposes. If you will lend me £1,000 I will make that purchase"; that would have been equally a fraudulent misrepresentation, and a fraudulent misrepresentation that, in one sense, led to the loan. But nobody could say that the lender could not recover any portion of the £1,000 in such a case. There are no means
- D that I can see of apportioning the loan so made. The answer would have been in that case as in this: "If they had been separate transactions, you, the lender, would recover your money, and the person who was fraudulently led by you to invest that money in a mode in which he would not have invested it but for your fraud, must recover in an action of fraud, or an action of that nature, against the person who so deceived him."
- E That I take to be the law both of Scotland and of England, and I should think of most civilised countries. It was argued by counsel for the respondents that justice might be done by forcing the contract upon the person who had lent the money. I do not think that would be the correct mode. I know no principle nor authority that would enable him to do that. It would be setting off against a liquidated demand something that may be recovered of the nature of unliquidated
- F damages. I think that, not only by the law of England and of Scotland but by the law of all other civilised countries, that cannot be done. The inconvenience of it would be excessive. If a person has an actual liquidated money demand which he seeks to enforce and the amount is undisputed, it might be monstrously unjust to him to involve him in a question whether the person who is bound to pay that liquidated sum may or may not have a right of action against him regarding some
- G entirely collateral matter—an action for a fraudulent misrepresentation, or an assault, or a trespass, or any other of those various wrongs which may be inflicted upon a man and for which he may be entitled to compensation. It is clear, in my opinion, that that cannot be the case, either by the law of England or the law of Scotland. Again, to attempt to force the lender of the money to take to the purchase, as it is said, might cause the greatest injustice. There might be cases in which that
- H might do justice, but there might be cases in which it would be very unjust. Suppose, for instance, the purchase had been of a much larger quantity than that represented by the loan, is the lender of the money to take to the whole? It appears to me to be conclusive that neither upon principle nor upon authority could there be anything to warrant such a course as that. Therefore, I am of
- I opinion that if the loan and the purchase had been independent transactions, I should have agreed with the appellants that the *dolus* was not a *dolus dans locum contractui*. But, as I have already stated, I think that in this case there was no loan independently of the purchase. I think that the transaction cannot be properly described as a loan. The company wished to induce the defendants to purchase the shares, and for that purpose they made a fraudulent misrepresentation under which they offered to make the purchase for them in the terms I have mentioned. I think that this makes the advance of money not an independent loan, but a part of the machinery for giving effect to the fraud.

Then it was said that, taking that to be so, still there was no fraud on the part of the company; the fraud was a fraud by the directors, and, in fact, the company were not deceivers, but were deceived. The directors of this company appear to have had the duty of superintending, directing, managing, and transacting the whole business and concerns of the company. Part of that duty was to make a correct and honest report as to the state of the concern. They are stated to have done it. I will assume that in order to raise the value of the company and of the shares held by the company they fraudulently misrepresented the real state of the concern, the real amount of its assets, and the real amount of the demands upon it. The question is: What is the consequence of the company receiving such a report (if you can separate the company from the directors) and publishing it to the world? I confess that, in my opinion, that must be taken, as between the company and third persons to be a representation of the company. The company as an abstract being can represent or do nothing. It can only act by its managers in its ordinary transactions, or by its directors or agents where there are duties to be performed by the directors. When, therefore, the directors, in the discharge of their duties, fraudulently and for the purpose of misleading others as to the state of the company, represent the company to be in a different state from that in which they know it to be, and the persons to whom that is addressed act upon it in the belief that it is true, I cannot think that that can be treated as being other than a misrepresentation by the company. Otherwise companies of this kind would be in the extraordinary predicament that they must employ agents to carry on their concerns, and that those agents might make representations, be they never so false, and never so fraudulent, and yet the company must benefit by those representations without being liable for fraud. It was plausibly urged that these reports were not made by the company, but to the company. In form, that is so. No doubt, they are reports made to the company, but I assume that they were made to the company under such circumstances that what they so report is known, and intended to be known, not only to the shareholders, but to all persons who may be minded to be shareholders, just as if they were published to the world. I repeat that I think the exigencies of society demand that reports so made and so circulated should be deemed to be the reports of the company.

It was pressed upon us that the contrary has been held by your Lordships in *Burnes v. Pennell* (1). To every word of that decision I most entirely agree as it would be my duty to do even if I did not go along with the reasoning. But I do go along with the reasoning. There the representation was made by a person who knew the subject-matter he was representing, but had no duty to perform towards the company, he being in the same position towards the company as if he had been a mere stranger. It was the duty of the directors to make a report, showing correctly the state of the company. It was no duty of the solicitor of the company to make any representation at all. He was speaking quite ultra vires when he made the representation which he did make, and to have bound the company by what he said would have been an act of very gross injustice. I think, therefore, that it must be taken that the representation of the state of the company made by the directors in their report must be taken as being a representation made by the company. Therefore, if there were fraudulent misrepresentations made by the directors in their annual report to the company, and they were circulated so as to mislead the respondents, I think that must be taken as being the fraud of the company.

It was said that the persons imposed upon were the company; that the company was a party imposed upon and not imposing, and that the respondents were themselves part of those persons who were imposed upon, because they were the owners of 1,100 odd shares in the company previously to this purchase. I do not think that the circumstance that the person was already a shareholder would have made any difference in a transaction of this sort. I do not wish to bind myself on that subject conclusively with respect to the law of this country, but certainly by the law of Scotland a shareholder, even in an ordinary partnership, is considered as

A having a distinct identity from the partnership. We see continually, in pleadings in actions, that both the partnership individuals sue or are sued as being independent parties. It is quite clear to my mind that the individual shareholders or partners have a right in a transaction of this sort to treat themselves as something different from the company, even if that could not have been the case according to the law of England. Therefore, I come to the conclusion, that if the directors, B in the discharge of their duty of making annual reports, giving a correct representation as to the state of the company, fraudulently and with a view to raising the value of the shares of the company, misrepresent what the state of the company is so that third persons, or shareholders (whom for this purpose we may treat as third persons), are deceived, and act upon that misrepresentation, the persons so deceived and so acting have a right to treat themselves as having been fraudulently deceived C by the company. I, therefore, move your Lordships to affirm the judgment of the court below.

LORD BROUGHAM.—I, as well as my noble and learned friend, have had very grave doubts, to say the least of it, during the course of the argument and since it closed, in considering the result of it whether this decree of the Court of Session D could be affirmed.

This company, being minded to have the value of its shares in the market kept up by the purchase of shares by the respondents, suggested to them that they ought to go into the market and buy those shares; and in order to remove any difficulty from their way in making that purchase, they offered to advance them a sufficient fund, £600 odd, by way of loan, wherewithal they might be able to make the E purchase which the company, for their own interest, were desirous that they should make. So doing they make a misrepresentation of the value of the shares; they are really worth £50 in the market, and they represent that they are worth £100; but they lend the £100, or whatever may be the sum required to make the purchase, in order to facilitate the transaction, and it turns out that they deceived the respondents. They deceived them for they bought for £100 shares which proved not to F be worth more than £50.

It is quite clear that the respondents for that false representation had an action against those who made the misrepresentation. But are they not to repay the loan of money which was lent to them? Did they not voluntarily take that loan for the purpose of enabling them to purchase the shares? No doubt they bought the shares owing to the misrepresentation, and suffered a loss. But they borrowed G the money from the company, and are they not bound to repay that loan, though they may have an action against the company for the misrepresentation? If the company bring their action against them for the repayment of the loan, they cannot set off against the company any claim that they may have against them in tort for the misrepresentation. But are they not bound to repay the loan? No doubt, if the whole is taken to be one transaction, it may be liable to a different construction. H Are they to retain the shares, and not to pay back the money which the company advanced to them in order to enable them to purchase the shares? My noble and learned friend's view of the case is calculated to get over that difficulty, because, though he does not, upon the whole, deny that the judgment below may stand upon the ground upon which alone, be it observed, it is put, and upon which alone, I rather think, upon examining the pleadings, it could be put, yet, my noble I and learned friend, though not denying the possibility of affirming the judgment below upon that ground, holds that this is the real nature of the transaction, and thereby, I admit, if this view is well founded, it, to a certain extent, no doubt, gets over the difficulty that I have stated with respect to retaining the shares, such as they are, whatever their real value may be.

It is said: "The manager assured the defenders that the company would advance the necessary funds for purchasing the shares, and that the stock would be held until it could be sold at a profit." If it had stopped there, I should have had no doubt whatever that my noble and learned friend would have had a right to put

it in the way he did—that there was an undertaking upon the part of the company in lending the money not to call upon them for the repayment until that event took place—“until the shares could be sold at a profit.” But I am afraid that what follows renders that somewhat doubtful, for, after the statement “that the stock would be held until it could be sold at a profit,” it goes on to say, “without the defenders being called upon for any contribution in money, the company being secure by the large amount of stock held upon joint account.” That seems to me to be an undertaking, not to the effect that they will not call upon the party borrowing for repayment of the money until a rise in value took place, but only an undertaking that he should be saved harmless from any call upon him in respect of those shares, “the company being secure by the large amount of stock held upon joint account.”

Upon the whole, my Lords, I retain very considerable doubts upon this subject. Had it not been for the view taken by my noble and learned friend, those doubts would have been so strong as to have prevented me from concurring in the judgment of affirmance. But, upon the view taken by my noble and learned friend, I go so far with him as not to object to that judgment of affirmance.

LORD ST. LEONARDS.—The facts of the case lie in a very small compass indeed. Independently of the questions which arise upon the representation made by the company in January in their report (upon which my noble and learned friend on the Woolsack has so much enlarged) there were specific representations made by the company, or by their manager, to the respondents. For the moment, I will put it out of sight, that the respondents themselves were shareholders in the company.

With respect to these reports, in which very often directors have indulged their fancy considerably, and not always consulted the exact facts, it is one thing to say how far the representations made are to affect third persons, and how far they are to affect the company. This is not a case in which the question is whether a dealing between two third parties could be affected by the representations in a report, which I am clearly of opinion it could not; that is to say, if John, believing the representations of the company, had gone into the market and bought of Thomas shares, which Thomas had to sell, John could never be relieved from his contract because he had believed the representations of the company that they were flourishing and paying properly a dividend out of profits, and not, as it might turn out, as often has been the case, out of capital. This is not that case; but it is a case in which, if the company made a representation, or if their manager made a representation which binds them, he acting as their agent, the company were to have the benefit of that representation, and, therefore, it is a case in which, if the company put forth representations which were false in order to keep up the value of their shares, and if, when dealing with the respondents, they were to reap a benefit by those representations, that benefit would throw upon them the obligation which attaches to persons who make false representations to those with whom they dealt.

What was the situation of the company? The company were bankers, money-lenders, and brokers. They acted in all these capacities, and they particularly had a power to lend money upon shares. The allegation, therefore, is this: “You, the company, in these various characters have induced us, the respondents, to buy shares in a falling market, representing that they were of value, when you knew they were valueless, and in order to induce us to do so, you said you would advance us money in your capacity as moneylenders to buy them. Further, in order to carry on this transaction, you told us that in your capacity as brokers you would buy the shares for us in the market, acting as our brokers. Consequently, we fell into this trap (for such it must be considered to be). We said we would take the shares, if you would advance the money, with the assurance that it would be all profit and no loss, and that the company would be perfectly secure.” What was the way in which it was attempted to carry the transaction into effect? The com-

A pany were acting as brokers for these persons. They show by their proceedings that they were acting as agents in the purchase, upon an advance of money. It shows simply only one transaction. Therefore, I cannot say that I participate in the doubts expressed by my noble and learned friends. I have looked throughout at this case as one in which there was one transaction. The measure of the value of the property is the measure of the money advanced. They are co-equal. The shares never were of that value, one knows, but they were the representatives of that value. The whole sum is a sum advanced which is called a loan, and that loan constituted the purchase-money. If there had been no loan, there would have been no purchase. The purchase and the loan were precisely one transaction, although consisting of two parts. I never have been embarrassed by considering the loan as a separate transaction. The company would never have lent the respondents five shillings upon any separate transaction without security; they would not have advanced them five shillings for any collateral purpose. But, in order to keep the shares up in the market, and to throw upon the respondents the liability which these shares would impose upon them, they advanced the money and got half per cent. commission upon the advances. That was a transaction, the temptation to which they could not resist. It was a transaction founded upon misrepresentation and fraud. What do they themselves say in their own declaration? By way of excuse in suing the respondents for the whole of the money advanced, which represented the whole of the purchase-money, they proceed to say that the shares are not saleable in the market, that is to say, in other words, the shares are valueless. That is their excuse for suing the respondents, whom they induced to make this purchase, for the whole of the purchase-money.

E I have certainly come to the conclusion that if representations are made by a company fraudulently for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, those representations so made by them for that purpose bind the company. I consider representations by the directors of a company as representations by the company, although they may be representations made to the company. It is their own representation. What is the first act which takes place at any such meeting as that at which this report was read? The first thing which takes place at every such meeting in Scotland and in England is, that, if there is not a rejection, there is an adoption of the report. Then, I say, the report is the act of the company, and not simply of the directors. It does not stand as the simple statement of the directors. It becomes the act of the company by the adoption of the report, and sending it forth to the world as a true representation of their affairs. If that representation is made use of in dealing with third persons for the benefit of the company, it subjects the company to liability for the loss which may accrue to a party who deals trusting to those misrepresentations.

H The cases have been very much discussed, and a good deal of argument has turned upon representations by agents. I think we need not embarrass ourselves much with that question here, because I consider that here it is made out that the representations were by the company. There is no doubt that Mr. Barlow was the manager of the company, that Mr. Barlow was acting in conformity with the views of the directors, and that Mr. Barlow was the man who had the power to advance the money. That is the main point upon which everything turns. He was the person who advanced the money, he was the person who conducted the brokerage. Then I find that the agent, who has all these powers, is the manager of the bank. If I find him acting as the broker and lender of the money, and that his management leads to this transaction, I can have no doubt that the act of an agent so acting with all this authority, taking it all as one transaction, is binding upon the company.

We have had very much to consider *Cornfoot v. Fowke* (2), upon which I will say a word with regard to misrepresentations of agents. That was a very peculiar case. As it was explained by my noble and learned friend on the Woolsack, there is no fault to be found with the decision in that case, because there it was held that the defendant had not been induced, by fraud, covin and misrepresentation on the part

of the plaintiff to enter into the contract. The case was of this nature. A house was to let, I think it was next door to a brothel—it was a house which no respectable family could inhabit. The gentleman who was about to take it had a family growing up of both sons and daughters, and it would have been impossible for him to live in it under the circumstances. When he went to look at the house he was struck by the cheapness of the price, and he asked the agent whether there was anything objectionable about the house. That was admitted to include any nuisance next door. The agent, who was utterly ignorant of the nature of the occupation of the adjoining house, said that there was not. When the gentleman retired from the contract, the owner brought an action against him for non-performance of the contract. Upon the trial the jury, under the direction of LORD ABINGER, C.B., found for the defendant. That was set aside by the Court of Exchequer upon the ground that the allegation was of fraud and covin. There was no evidence of any fraud on the part of the owner of the house, who had made no false representation. There was no fraud upon the part of the agent, because he was not aware of the circumstances. Consequently, the gentleman was fixed with the contract.

Supposing there had been in that case no allegation of fraud, but it had been put simply upon the ground of misrepresentation, it was not denied in the course of the judgment, as I understand it, that if a principal, with knowledge of a fact which was material to the value of the property, with a view to concealing that fact employed an agent to sell it whom he knew to be ignorant of the fact, he could not avail himself of that concealment but would be responsible for any loss suffered by the purchaser. That, I think, seems to have been admitted in that judgment. But I should take the liberty of going further. I should say, that if, in that case, fraud had not been alleged, but it had been put upon misrepresentation, and the facts were that a man, knowing that there was so serious a nuisance affecting the house as to diminish its value in such a way that no man of respectability could live in it, and he took care himself not to make the contract, but left it to an agent, who he had no reason to suppose was aware of the fact, and if, in the course of the treaty for the contract, the agent being asked if such a fact existed, stated positively that it did not, and the contract was executed in silence upon the point, because the purchaser had been lulled to sleep and he believed the representation made to him by the agent, I say, in such a case as that, I should be very much shocked at the law of England if I could bring myself to believe that it would not reach the case of a principal so availing himself of a misrepresentation by his own agent, who might be ignorant of the fact, although the principal himself knew it and employed the agent in order to avoid making a direct representation to the contrary. I should hope that the law of England would reach a case of that sort. I should feel no hesitation, if I had to decide that case, in saying that, although the misrepresentation was not fraudulent, the agent not knowing that it was false, yet, as in fact it was false, and false to the knowledge of the principal, it ought to bind the principal. If, upon a matter so material to the value of the property, he left it to his agent to deal with the property without informing him of so important a fact, which was within his own knowledge, and the agent made a false representation with regard to that fact, it would bind the principal and thus impeach the validity of the contract.

The one great difficulty that has been raised in this case is with respect to the liability of the directors. Upon that I have already stated my view. But it has been pressed very much upon the doctrine of set-off, and upon the impossibility of setting aside this transaction in this particular case. I think the law of set-off has not the slightest bearing upon the subject. I never could understand the force of the argument. I know the way in which it was put, but I never have been able to satisfy my mind that the law of set-off has the slightest bearing upon the case. The appellants think fit to bring an action for the whole of the purchase-money, which is, in other words, the loan which they advanced. The defence is fraud and misrepresentation. Why should not that go to the whole of the loan? It is said: "You ought to have your counter-action; you should bring an action for damages,

A then those damages could be set off against a liquidated sum due under this contract." It is also said: "Why are you to be relieved from the whole of this sum, and yet to keep those shares? How monstrous for you to keep those valuable shares, which are not saleable in the market, and to keep the money too." What is the real state of the case? If the view I have submitted to your Lordships be the true one (and I have the authority of my noble and learned friend for saying that it is), that this is one transaction, all bound up, all depending upon the advance of money, and that money invested in this purchase leading to this result, where are the shares? In the custody of the company. Have they ever been in the custody of the respondents? Never. Can they ever get them into their hands? Never. Could they after this defence maintain an action for them? What is the value of their standing in their names with the power in the company over their own shareholders and over their dividends? Will any man represent that any action or proceeding could be maintained by the respondents for these shares after the defence which has been put into this action, if it be successful? Clearly and decidedly not.

But supposing it were necessary that there should be a transfer of the shares, why may not one of two things take place? In the first place, I asked during the argument, and I heard no answer to my question, what there was to prevent the Court of Session, if the issue be favourable to the respondents, in relieving them from their obligation to the lenders to direct a transfer of the shares, if the company desired, to the company? What is there to prevent the Court of Session from exercising that power? The Court of Session is a court of law and equity. A court of equity would not hesitate a moment, in giving relief in a case of this sort, in directing the respondents, if the appellants desired it, to transfer at the expense of the appellants the shares in question. No action is necessary to recover them; but, if it were necessary, it is the appellants' own act which would have rendered it necessary. They choose, in order to keep up the market, to buy shares in the names of these persons. They advance all the money, and now they seek to recover the whole of it. The defence is fraud on the part of the lenders, and the defence must go to the whole, for the purchase and the loan are one and the same transaction. There is nothing to set off. The shares are valueless. It is not a question of what the value of the shares is; that is utterly unimportant. Supposing I bought an estate, and I desired to be relieved from the contract on the ground of fraud, and I filed a bill upon that ground and proved the case, the court would relieve me from the contract. I should have that relief without any reference to the question of what the value of the estate was--whether the estate was worth but one-third of the money which I had given for it, or worth the whole amount, would be of no consequence. Supposing there was any defence to be set up, it would not be upon the question of what the value of the property was, but the question would be whether the party was entitled to make that defence as to the whole or not. Upon the whole I concur with my noble and learned friends in advising your Lordships to affirm the decision of the court below.

H

Appeal dismissed.

BUCKLAND v. JOHNSON

[COURT OF COMMON PLEAS (Jervis, C.J., Maule, Cresswell and Crowder, JJ.),
June 7, 1854]

[Reported 15 C.B. 145; 28 L.J.C.P. 204; 28 L.T.O.S. 190;
18 Jur. 775; 2 W.R. 565; 2 C.L.R. 784; 139 E.R. 375]

Estoppel—*Estoppel by record*—*Conversion*—*Joint conversion*—*Recovery against one convertor in trover*—*Bar to action against other convertor for money had and received.*

If two persons jointly convert goods and one of them receives the proceeds, the owner of the goods cannot, after a recovery against one convertor in trover, have an action against the other for the same conversion or an action for money had and received to recover the value of the goods for which judgment has been given in the former action.

The plaintiff recovered judgment in an action for conversion against the defendant's son, who was assisting his father, an auctioneer, and had sold the plaintiff's goods. The plaintiff received nothing under the judgment, and sought to sue the defendant for money had and received. The defendant was allowed to amend at the trial by adding that the money was "received for the sale of the goods."

Held: the judgment for conversion was a bar to the action for money had and received, even in respect of the excess of the price for which the goods were sold over the amount recovered on the judgment.

Notes. Considered: *Ellis v. John Stenning & Son*, [1932] All E.R.Rep. 597; *Re Simms, Ex parte The Trustee v. William Simms, Ltd. and S. H. Gillett*, [1933] All E.R.Rep. 302. Referred to: *Marston v. Phillips* (1863), 3 New Rep. 35; *Brinsmead v. Harrison*, [1861-73] All E.R.Rep. 465; *Smith v. Baker* (1873), L.R. 8 C.P. 350; *Flitters v. Alfrey* (1874), L.R. 10 C.P. 29; *Wegg Prosser v. Evans*, [1894] 2 Q.B. 101; *Rice v. Reed*, [1900] 1 Q.B. 54; *M. Isaacs & Sons, Ltd. v. Salbstein*, [1916-17] All E.R.Rep. 386; *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1940] 4 All E.R. 20.

As to a claim in tort being a bar to a claim in contract in respect of the same facts, see 8 HALSBURY'S LAWS (3rd Edn.) 247; and for cases see 12 Digest (Repl.) 633.

Cases referred to:

- (1) *Kitchen v. Campbell* (1772), 3 Wils. 304; 95 E.R. 1069; sub nom. *Hitchin v. Campbell*, 2 Wm. Bl. 827; 12 Digest (Repl.) 633, 4887.
- (2) *Cooper v. Shepherd* (1846), 3 C.B. 266; 4 Dow. & L. 218; 15 L.J.C.P. 237; 7 L.T.O.S. 282; 10 Jur. 758; 136 E.R. 107; 43 Digest 530, 666.
- (3) *Adams v. Broughton* (1737), Andr. 18; 2 Stra. 1078; 95 E.R. 278; 21 Digest (Repl.) 678, 1697.
- (4) *King v. Hoare* (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174; 8 Jur. 1127; 153 E.R. 206; 21 Digest (Repl.) 293, 591.
- (5) *Brown v. Wootton* (1605), Cro. Jac. 73; Moore, K.B. 762; 79 E.R. 62; sub nom. *Broome v. Wootton*, Yelv. 67; 21 Digest (Repl.) 296, 608.

Also referred to in argument:

- Watters v. Smith* (1831), 2 B. & Ad. 889; 1 L.J.K.B. 31; 109 E.R. 1373; 12 Digest (Repl.) 534, 4044.
- Bell v. Banks* (1841), 3 Man. & G. 258; 3 Scott, N.R. 497; Drinkwater, 236; 5 Jur. 486; 133 E.R. 1140; sub nom. *Bell v. Shuttleworth*, 10 L.J.C.P. 239; 12 Digest (Repl.) 583, 4501.

- A *Lechmere v. Fletcher* (1833), 1 Cr. & M. 623; 3 Tyr. 450; 2 L.J.Ex. 219; 149 E.R. 549; 21 Digest (Repl.) 295, 604.
Lacon v. Barnard (1626), Hut. 81; 123 E.R. 1115; sub nom. *Lacon v. Barnard*, Cro. Car. 35; 43 Digest 423, 483.
Putt v. Rawstern (1681), 3 Mod. Rep. 1; 2 Mod. Rep. 318; Poll. 634; 2 Show. 211; T.Raym. 472; 87 E.R. 1; sub nom. *Foot v. Rastall*, Skin. 48, 57; 43 Digest 422, 467.

B **Action** for goods sold and delivered, and for money had and received, with a count in trover.

Thomas Barbour Johnson, the son of the defendant William Johnson, assisted his father in his business of an auctioneer, and in that capacity sold goods of the plaintiff by auction in circumstances which amounted to a conversion. The father was in and out of the room during the progress of the sale, and the proceeds were paid to him alone. An action of trover was brought by the plaintiff against T. B. Johnson, and judgment was recovered, but no satisfaction was obtained, the son having applied for relief under the Insolvent Debtors Act.

D In the present action the plaintiff declared for money had and received, goods sold and delivered, and money found due upon an account stated, and also for that the defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of, the plaintiff's goods. The defendant pleaded, by the fourth plea in the defence, as amended by the permission of the learned judge at the trial, as to so much of the declaration as related to money payable for money received by the defendant to the plaintiff's use, and to the household furniture, glass, linen, china, books, and plate, that the said money was money received for, and as, and being the proceeds of the sale of the goods mentioned, and that the grievances in the last count mentioned, so far as they related to the household furniture, glass, linen, china, books, and plate, were committed by the defendant and T. B. Johnson jointly, and not by the defendant alone, and so T.B. Johnson was with the defendant jointly liable to the plaintiff for the said causes of action, and the judgment recovered by the plaintiff in the action against T. B. Johnson included all the causes of action put forward by the plaintiff. The cause was tried before WILLIAMS, J., who left the case to the jury, and they found that the defendant's plea was proved. Accordingly his Lordship directed a verdict to be entered for the defendant, reserving leave to the plaintiff to enter a verdict for £148 15s., if the court should now be of opinion that the plea as amended afforded no defence.

G *Serjeant Byles*, for the plaintiff, obtained a rule nisi to set aside the verdict. *Lush*, for the defendant, showed cause against the rule.

H **JERVIS, C.J.**—I am of opinion that this rule should be discharged. The question which was substantially in issue between the parties was, not whether the proceeds of the sale of the plaintiff's goods had been received by the defendant and his son jointly, but whether there had been a substantial recovery by the plaintiff in the former action so as to bar his right to recover in this.

I The authorities show—and indeed it is not denied—that, if Thomas Barber Johnson, the son, had received the money as well as converted the goods, and Buckland had sued him in trover, and obtained a judgment against him, even though it had produced no fruits, that judgment would have been a bar to another action against him for money had and received. Upon the same principle, if two jointly convert goods and one of them receives the proceeds, you cannot, after a recovery against one in trover, have an action against the other for the same conversion, or an action for money had and received to recover the value of the goods for which a judgment has already passed in the former action. It is said that, as the plaintiff recovered only £100 in the action against Thomas Barber Johnson, and the present defendant received £150 as the value of the goods, the plea should at all events only be considered as a bar to the extent of £100, and for this he relies on *Hitchin v. Campbell* (1). That case, however, does not sustain the position for which it was

cited. It was an action for money had and received by the defendant for the use A
of the plaintiff, to which the defendant pleaded in bar that the plaintiff had brought
an action of trover against him and one A.B. to recover damages against him for
divers goods and chattels of the plaintiff supposed to be converted by them to
their own use, to which they pleaded the general issue. A verdict was found for
them (the defendants), and judgment was entered thereupon, which the defendant B
pleaded in bar to the action, and averred that the goods and chattels for which
the action in trover was brought were the same goods for the produce whereof
(by sale) the action was brought by the plaintiff against the defendant for money
had and received for the plaintiff's use. On demurrer, the court held that a judg-
ment for the defendant in trover was no bar to an action for money had and
received by the defendant for the use of the plaintiff. As the verdict for the defen- C
dants in the action of trover might have gone upon the ground that the sale of the
goods took place with the plaintiff's authority—which, though it would negative
the alleged conversion, would be no answer whatever to an action for money had
and received—that case is obviously no authority on the present occasion.

The whole fallacy of the plaintiff's argument in the present case arises from his
losing sight of the fact that, by the judgment in the action of trover, the property
in the goods was changed, by relation, from the time of the conversion, and that, D
consequently, the goods from that moment became the goods of Thomas Barber
Johnson, and when the present defendant received the proceeds of the sale, he
received his son's money, the property in the goods being then in him. Some of
the authorities do, indeed, seem to lay it down that it is not the recovery only,
but the recovery coupled with the payment of the damages, that changes the
property. Thus, in *Cooper v. Shepherd* (2), TINDAL, C.J., delivering the judgment E
of the court, says (3 C.B. at p. 272):

"The plaintiff in trover, where no special damage is alleged, is not entitled to
damages beyond the value of the chattel he has lost; and, after he has once
received the full value, he is not entitled to further compensation in respect of
the same loss: and, according to the doctrine of the cases which were cited F
in the argument, by a former recovery in trover, and payment of the damages,
the plaintiff's right of property is barred, and the property vests in the defen-
dant in that action: see *Adams v. Broughton* (3), 2 Stra. 1078, and JENKINS,
4th Cent., Case 88, where it is laid down: 'A., in trespass against B. for taking
a horse, recovers damages: by this recovery, and execution done thereon, the
property in the horse is vested in B. *Solutio pretii emptionis loco habetur.*' "

But, in the fuller report of *Adams v. Broughton* (3) in Andrews, 18, where an action G
of trover had been brought by Adams against one Mason wherein he obtained judg-
ment by default and afterwards had final judgment, whereupon a writ of error was
brought, and another action of trover was afterwards brought by Adams for the
same goods for which the first action was brought, against Broughton, the court,
upon a motion to hold the defendant in the second action to bail, distinctly lay it
down that H

"the property of the goods is entirely altered by the judgment obtained against
Mason, and the damages recovered in the first action are the price thereof,
so that he hath now the same property therein as the original plaintiff had;
and this against all the world."

By "damages recovered," the court evidently did not mean "paid," for a writ of I
error was then pending in the first action.

This is explained by the principle laid down by PARKE, B., in *King v. Hoare* (4)
(13 M. & W. at pp. 504, 505):

"If there be a breach of contract, or wrong done, or any other cause of
action by one against another, and judgment be recovered in a court of record,
the judgment is a bar to the original cause of action, because it is thereby
reduced to a certainty, and the object of the suit attained, so far as it can be
at that stage; and it would be useless and vexatious to subject the defendant

A to another suit for the purpose of obtaining the same result. Hence the legal maxim, 'transit in rem judicatam,'—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two. Thus, it has been held, that if two commit a joint tort, the judgment against one is of itself, without execution, a sufficient bar to an action against the other for the same cause: *Brown v. Wootton* (5), Yelv. 67, Cro. Jac. 73, Moore, 762. And though, in the report in *YELVERTON*, expressions are used which at first sight appear to make a distinction between actions for unliquidated damages and debts, yet, upon a comparison of all the reports, it seems clear that the true ground of the decision was not the circumstance of the damages being unliquidated. *POPHAM*, C.J. (Cro. Jac. 74), states the true ground. He says: 'If one hath judgment to recover in trespass against one, and damages are certain,' (that is, converted into certainty by the judgment), 'although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, *à contrà*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other: and the difference betwixt this case and the case of debt and obligation against two, is, because there every of them is chargeable, and liable to the entire debt; and, therefore, a recovery against one is no bar against the other until satisfaction.' And it is quite clear that the chief justice was referring to the case of a joint and several obligation, both from the argument of the counsel, as reported in *CRO. JAC.*, and the statement of the case in *YELVERTON*. We do not think that the case of a joint contract can, in this respect, be distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tort-feasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case, and not in the other; but, for the purpose of this decision, they stand on the same footing. Whether the action is brought against one or two, it is for the same cause of action."

The right of action is merged in the judgment. It is the judgment that disposes of the matter, and not the payment.

G **MAULE, J.**—I also am of opinion that this rule should be discharged, and that the case was a very proper one for amendment at the trial. The amendment asked for and allowed did not alter the substance of the plea, or in any degree vary that which was the real question in controversy between the parties, viz., whether the plaintiff had recovered against one of two joint tortfeasors, so as to make that recovery a bar to a subsequent action against the other. That question was raised H by the plea as it originally stood, and it was also raised by the plea as amended. The plea as amended seems to me to be a good plea; and, being proved, afforded a good defence to the action. It states, in substance, that the money sought to be recovered in this action was the proceeds of certain goods of the plaintiff which the defendant and Thomas Barber Johnson had jointly converted, and that the plaintiff had sued Thomas Barber Johnson for that conversion, and recovered a verdict I against him for £100, the value of the goods so converted. That seems to me to afford a substantial answer to the action.

In an action of trover, the plaintiff may not always recover the full value of the thing converted, and, if it had been shown here that the plaintiff had not recovered the full value of the goods in question in the former action, I will not say what the consequences might have been. But here we must take it that the plaintiff did recover the full value in the former action. Having his election to sue in trover for the value of the goods at the time of the sale, or for the proceeds of the sale as money had and received, the plaintiff elected the former remedy, and he has

obtained a verdict and judgment. He has, therefore, got what the law considers equivalent to payment, viz., a judgment for the full value of the goods. It appears upon the plea and upon the evidence, that the sum actually received by the defendant as the proceeds of the sale exceeded the amount for which the plaintiff recovered judgment in the former action. But, when the plaintiff made his election to sue in trover for the value at the time of the sale, he was bound by the estimate of the jury. A

The circumstance of the present defendant's having been a joint converter, or a stranger, makes, I think, no difference. If he were a stranger, the plaintiff, having once recovered in respect of the same goods, cannot recover again the same thing against somebody else. There is an end of the transaction. Having once recovered a judgment, his remedy was altogether gone: his claim was satisfied as against all the world. He was in fact in the position of a person whose goods had never been converted at all. For these reasons, I think the rule should be discharged. B C

CRESSWELL, J.—I am of the same opinion upon both points, and for the reasons already given. As to the suggestion thrown out that the plaintiff ought to be allowed to recover the difference between the value of the goods as fixed by the verdict in the former action of trover and the sum received by the present defendant as the proceeds of the sale, I think there is no foundation whatever for it. The plaintiff had his election to treat the conversion as a wrongful act, and recover the value of the goods at the time of the sale, in an action of trover, or to adopt the sale as an act done with his sanction, and sue for the proceeds, as for money had and received to his use. Having elected the former course, he is bound by it, and cannot in a new action claim any part of the proceeds. D E

CROWDER, J.—I am entirely of the same opinion. The case clearly was a proper one for an amendment. The substance of the issue which the parties went down to try was whether or not the judgment in the former action against Thomas Barber Johnson, which had produced no fruits to the plaintiff, was a bar to the present action. The plea as originally framed alleged that the proceeds of the sale were received by Thomas Barber Johnson and the present defendant jointly, and it turned out upon the evidence that they were received by the defendant alone. The amendment, therefore, was asked for, and was I think properly allowed without the imposition of any terms. Then comes the question whether the plea as amended is a good bar to the action. It appears to me that it is, on the grounds stated by my Lord and MAULE, J. The plaintiff having a cause of action in trover or for money had and received, at his election against two has brought trover against one, and recovered judgment against him. It happens that that judgment is for £100 only, and that the defendant actually received £148 as the proceeds of the goods converted: and, therefore, it is contended that the recovery in the former action is no bar as to £48. The circumstance, however, of the two amounts being different is a mere accident, which cannot alter the principle upon which our judgment proceeds, which is that the plaintiff, having made his election to sue for the tort, and having recovered what the jury considered the value of the goods at the time of the conversion, cannot now bring money had and received in respect of the same cause of action. F G H

Rule discharged.

SMITH v. KENDRICK

[COURT OF COMMON PLEAS (Wilde, C.J., Maule, Cresswell and Williams, JJ.),
January 21, May 5, 1848, February 14, 1849]

[Reported 7 C.B. 515; 18 L.J.C.P. 172; 12 L.T.O.S. 556;
13 Jur. 362; 137 E.R. 205]

*Coal Mine—Working of mine—Flooding of adjoining mine—Right to work mine
in way most beneficial to owner—No negligence or malice.*

The plaintiff and the defendant occupied adjoining collieries, the plaintiff's colliery being at a lower level than the defendant's. Their mines were separated by a thick vertical seam of coal belonging to the plaintiff. Through this seam J. (a former occupier of the defendant's mine), had wrongfully made holes, called "thyrings," into the plaintiff's mine, for the purpose of ventilation. The defendant, in working his mine most advantageously to himself, removed a bar of coal which was in his colliery and had protected his colliery against a body of water on a higher level. The water entered the defendant's colliery, and part of it flowed down through the thyrings into the plaintiff's mine. Between J., who made the thyrings through the plaintiff's barrier, and the defendant, who succeeded J. in possession, there was neither privity of contract or of estate, but the defendant knew that the effect of his letting water into his own mine would be to flood the plaintiff's mine through the thyrings.

Held: (i) there was no special duty on the defendant, arising out of the fact that he had succeeded in occupation of J., who had wrongfully bored the thyrings, to protect against water flowing into the plaintiff's mine; (ii) it was the natural right of each of the owners of two adjoining coal-mines, neither of them being subject to servitude to the other, to work his mine in the manner most beneficial to himself, though the natural consequence might be that some prejudice would accrue to the owner of the adjoining mine, so long as it did not arise from negligent or malicious conduct; and, therefore, the plaintiff was not entitled to recover.

Notes. Distinguished: *Humphries v. Brogden* (1850), 12 Q.B. 739. Considered: *Scots Mines Co. v. Leadhills Mines Co.* (1859), 34 L.T.O.S. 34. Applied: *Baird v. Williamson* (1863), 15 C.B.N.S. 376. Distinguished: *Rylands v. Fletcher*, [1861–73] All E.R.Rep. 1. Considered: *Crompton v. Lea* (1874), L.R. 19 Eq. 115. Distinguished: *A.-G. v. Tomline*, [1874–80] All E.R.Rep. 981. Considered: *Greyvensteyn v. Hattingh*, [1911] A.C. 355; *Pontardawe R.D.C. v. Moore-Gwyn*, [1929] 1 Ch. 656. Referred to: *Chasemore v. Richards* (1859), ante p. 78; *Smith v. Fletcher* (1874), L.R. 9 Exch. 64; *Humphries v. Cousins*, [1874–80] All E.R.Rep. 313; *Angus v. Dalton* (1878), 4 Q.B.D. 162; *West Cumberland Iron and Steel Co. v. Kenyon* (1879), 11 Ch.D. 782; *Whalley v. Lancashire and Yorkshire Rail. Co.* (1884), 13 Q.B.D. 131; *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217; *Batcheller v. Tunbridge Wells Gas Co.* (1901), 65 J.P. 680; *Salt Union v. Brunner, Mond & Co.*, [1906] 2 K.B. 822; *Hoare & Co. v. Sir Robert McAlpine, Sons & Co.* (1922), 92 L.J.Ch. 81; *Westhoughton Coal and Cannel Co. v. Wigan Corpn., Ltd.*, [1939] 3 All E.R. 579; *Read v. J. Lyons & Co.*, [1945] 1 All E.R. 106.

As to discharge of water, see 26 HALSBURY'S LAWS (3rd Edn.) 409–410; as to ordinary user of land, see 28 HALSBURY'S LAWS (3rd Edn.) 133–134; as to damage by water, see 39 HALSBURY'S LAWS (8rd Edn.) 529 et seq.; and for cases see 33 DIGEST (Repl.) 866–868.

Cases referred to:

- (1) *Roswell v. Prior* (1701), Holt, K.B. 500; 12 Mod. Rep. 635; 90 E.R. 1175; sub nom. *Rosewell v. Prior*, 1 Ld. Raym. 718; 2 Salk. 460; 6 Mod. Rep. 116; 36 Digest (Repl.) 318, 640.

- (2) *Tenant v. Goldwin (or Golding)* (1704), 1 Salk. 21, 360; Holt, K.B. 500; 2 Ld. Raym. 1089; 6 Mod. Rep. 311; 91 E.R. 20, 314; 36 Digest (Repl.) 287, 356. A
- (3) *Turberville v. Stampe* (1697), 1 Ld. Raym. 264; 1 Com. 32; Comb. 459; Holt, K.B. 9; 12 Mod. Rep. 152; 1 Salk. 13; Skin. 681; Carth. 425; 91 E.R. 1072; 36 Digest (Repl.) 323, 679. B
- (4) *Vaughan v. Menlove* (1837), 3 Bing.N.C. 468; 3 Hodg. 51; 4 Scott, 244; 6 L.J.C.P. 92; 1 Jur. 215; 132 E.R. 490; 36 Digest (Repl.) 29, 126. B
- (5) *Sutton v. Clarke* (1815), 6 Taunt. 29; 1 Marsh. 429; 128 E.R. 943; 42 Digest 975, 57. B
- (6) *Boyle v. Tamlyn* (1827), 6 B. & C. 329; 9 Dow. & Ry.K.B. 430; 5 L.J.O.S.K.B. 134; 108 E.R. 473; 7 Digest (Repl.) 297, 186. C
- (7) *Brown v. Windsor* (1880), 1 Cr. & J. 20; 19 Digest (Repl.) 185, 1249. C
- (8) *Dodd v. Holme* (1834), 1 Ad. & El. 493; 3 Nev. & M.K.B. 739; 110 E.R. 1296; 19 Digest (Repl.) 183, 1234. C
- (9) *Anon.* (1466), Y.B. 6 Edw. 4, fo. 7, pl. 18; 43 Digest 373, 3. C
- (10) *Lambert and Olliot v. Bessey* (1680), T.Raym. 421, 467; 83 E.R. 220, 244; 1 Digest (Repl.) 94, 259. D
- (11) *Haward v. Bankes* (1760), 2 Burr. 1114; 97 E.R. 740; 36 Digest (Repl.) 256, 74. D
- (12) *Firmstone v. Wheeley* (1844), 2 Dow. & L. 203; 13 L.J.Ex. 361; 33 Digest (Repl.) 868, 1159. D
- (13) *Clegg v. Dearden* (1848), 12 Q.B. 576; 17 L.J.Q.B. 233; 11 L.T.O.S. 309; 12 Jur. 848; 116 E.R. 986; 33 Digest (Repl.) 868, 1161. E
- (14) *Acton v. Blundell* (1843), 12 M. & W. 324; 13 L.J.Ex. 289; 1 L.T.O.S. 207; 152 E.R. 1223, Ex. Ch.; 33 Digest (Repl.) 865, 1139. E
- (15) *R. v. Pagham, Sussex Sewers Comrs.* (1828), 8 B. & C. 355; 2 Man. & Ry.K.B. 468; 108 E.R. 1075; sub nom. *R. v. Bognor Sewers Comrs.*, 6 L.J.O.S.K.B. 338; 36 Digest (Repl.) 322, 672. E

Also referred to in argument:

- Aldred's Case* (1610), 9 Co. Rep. 57 b; 77 E.R. 816; 36 Digest (Repl.) 267, 183.
- Filliter v. Phippard* (1847), 11 Q.B. 347; 17 L.J.Q.B. 89; 10 L.T.O.S. 225; 11 J.P. 903; 12 Jur. 202; 116 E.R. 506; 36 Digest (Repl.) 76, 407.
- Wyatt v. Harrison* (1832), 3 B. & Ad. 871; 1 L.J.K.B. 237; 110 E.R. 320; 19 Digest (Repl.) 178, 1200.
- Partridge v. Scott* (1838), 3 M. & W. 220; 1 Horn. & H. 31; 7 L.J.Ex. 101; 150 E.R. 1124; 19 Digest (Repl.) 74, 420. G
- Peyton v. London Corp'n.* (1829), 9 B. & C. 725; 109 E.R. 269; sub nom. *Peyton v. St. Thomas's Hospital (Governors)*, 7 L.J.O.S.K.B. 322; 19 Digest (Repl.) 185, 1247.
- Keighley's Case* (1609), 10 Co. Rep. 139a; 77 E.R. 1136; 36 Digest (Repl.) 164, 869. H

Action on the Case, in which the New British Iron Co.—who were incorporated by an Act of Parliament (7 & 8 Vict., c. xxx) and sued by their secretary and registered public officer, were the real plaintiffs—to recover damages against the defendant for wrongfully omitting to prevent water from flowing through his mine into the mine of the company; and also for wrongfully causing water to flow from his mine into the mine of the company. I

The action was tried at Chester Summer Assizes, 1846, when a verdict by consent was taken for the plaintiff, subject to a Special Case for the opinion of this court. The pleadings form a part of the Special Case, all the material passages of which are fully set out in the judgment.

Townsend and T. Jones for the plaintiff.

Evans, Q.C., Welsby and J. Brown for the defendant.

Feb. 14, 1849. **CRESSWELL, J.**, delivered the following judgment of the court.—This was an action on the case, tried at Chester at the Summer Assizes of 1842, when a verdict, by consent, was found for the plaintiff, subject to a Special Case. The pleadings form part of the Special Case.

The declaration consisted of two counts; the first of which was abandoned by the plaintiff. By the second count the plaintiff, in substance, complained that there were two collieries underground adjoining one another; one called Plas Bennion, and the other Avon Eitha; the Avon Eitha being on a higher level than the Plas Bennion; that Plas Bennion had many chambers from which coal had been extracted, and belonging to a party called the Plas Bennion Colliery; that there had been a wall or seam of coal between those chambers and certain other chambers, forming part of Avon Eitha Colliery, from which coal had been extracted; that the plaintiffs were in possession of the Plas Bennion Colliery, and while the company were so possessed of Plas Bennion, one Evan Jones, and others, were possessed of Avon Eitha; and while they were so possessed, the said Evan Jones and the other persons who were possessed of the Avon Eitha Colliery, by force and arms, broke into and entered the Plas Bennion Colliery, and made divers holes in the wall forming the eastern extremity thereof; and from such wall aforesaid, extracted large quantities of coal; and after the extraction of the said coal, the said Evan Jones, and others, ceased to be possessed of Avon Eitha, and the defendant became possessed of Avon Eitha; and while the defendant continued so possessed, the holes remained, and were not stopped up; and by reason of the grievance so committed by the said Evan Jones, the Plas Bennion Colliery became, and was, and still is, liable to be inundated and flooded on occasions of water being introduced into Avon Eitha, by such water coming to the eastern extremity of the Plas Bennion Colliery, and penetrating through the holes. That before the said holes were made, and before the extraction of the coal from the seam or bed of coal, that seam of coal, into and through which the water was introduced, would have formed a barrier sufficient to prevent the water from entering into the Plas Bennion Colliery; and that by reason of the defendant's possession of the Avon Eitha Colliery the defendant, while so possessed, and still, of right, ought to prevent the water so introduced to Avon Eitha by the defendant from flowing through the said holes and penetrating through the seam or vein of coal in the eastern extremity of Plas Bennion. The declaration then charged that the defendant wrongfully introduced large quantities of water into the Avon Eitha Colliery, and that the defendant wrongfully omitted to prevent the said water so introduced into Avon Eitha from flowing into Plas Bennion.

The defendant pleaded Not Guilty, and several other pleas traversing some material allegations in the declaration. The fourteenth plea denied the right to prevent the water flowing into Plas Bennion as alleged in the declaration. The defendant also pleaded a judgment recovered in a former action.

The case was referred to a member of the Bar, who was to state a Special Case for the opinion of the court; and that Case stated in substance that the plaintiffs for many years last past, and up to the time of the commencement of this action, have been in possession of a colliery called Plas Bennion, in the parish of Ruabon, in the county of Denbigh. In 1840, and while the plaintiffs were in the possession of Plas Bennion as aforesaid, one Evan Jones and other, his partners, became possessed of an adjoining colliery, called the Avon Eitha Colliery, in the same parish. Evan Jones and his partners continued to be possessed of the last-mentioned colliery until December, 1844. At this time they quitted possession and were succeeded by the defendant who has remained in possession ever since. The Avon Eitha Colliery is on a higher level than the Plas Bennion Colliery. At the time when Evan Jones and his partners commenced their occupation of the Avon Eitha Colliery both that colliery and the Plas Bennion Colliery had been worked to a great extent, and they each contained several chambers made by the removal of large quantities of coal. At the time last mentioned the colliery of Plas Bennion

was bounded on the east by a vertical seam or vein of coal the property of the plaintiffs, and part of their colliery and this seam or vein of coal formed a barrier between the chambers in Plas Bennion and the chambers in Avon Eitha. A

In the beginning of the year 1844, Evan Jones and partners made three large holes called "thyrings" in and through the barrier above mentioned for the purpose of giving air to the Avon Eitha Colliery. The defendant became the occupier of Avon Eitha without any privity either of contract or of estate between him and his predecessors Evan Jones and partners. At the time when the defendant became such occupier there was a large subterranean body of water in Avon Eitha which communicated with and was fed by springs in the neighbourhood. This body of water was on a higher level than the chambers of Avon Eitha, and separated from them by a thick horizontal bar of coal which was part of Avon Eitha Colliery. The chambers of Avon Eitha were on a higher level than the "thyrings" above mentioned, and the "thyrings" were on a higher level than the chambers of Plas Bennion. The effect of removing the horizontal bar of coal in Avon Eitha would be that the water above mentioned would of itself flow into the chambers of Avon Eitha, and that a large portion of such water would also flow on of itself from the chambers of Avon Eitha through the "thyrings" into the chambers of Plas Bennion. The defendant, during his occupation, and before June, 1845, knowing that these "thyrings" were then open into Plas Bennion, and that the effect of removing the horizontal bar of coal in Avon Eitha would be as above stated, nevertheless did remove the said bar of coal for the purpose of obtaining the said coal, and so working his mine in the manner most advantageous to himself. In consequence of the removal of this horizontal bar of coal in Avon Eitha the water of itself flowed from the said subterranean body of water into the chambers of Avon Eitha, and one portion of the water which had so flowed into the chambers of Avon Eitha flowed on of itself through the "thyrings" into the chambers of Plas Bennion. Another portion of the water which so flowed into the chambers of Avon Eitha, and which if not obstructed in its natural course, would have flowed down to the bottom of Avon Eitha and below the "thyrings" was obstructed in its natural course by a dam which the defendant had placed in Avon Eitha and near to the "thyrings," and was thereby impelled through the "thyrings" into the chambers of Plas Bennion. This dam was removed before the commencement of the action next after mentioned, by some of the workmen of the Plas Bennion colliery. The vertical seam of coal above mentioned as forming the eastern boundary of Plas Bennion would have been sufficient to have prevented the said flow of water into Plas Bennion if the "thyrings" had not been made as aforesaid in the said seam of coal by Evan Jones and his partners. B C D E F G

On June 4, 1845, the plaintiff brought an action on the case against the defendant for the injury caused to Plas Bennion by the flow of water as aforesaid. On Jan. 30, 1846, the defendant paid £70 into court and pleaded the payment in the usual form; and on Mar. 28 in the same year the plaintiff replied accepting the said payment in satisfaction. The record in that action forms part of this case. The present action was brought on April 30, 1846. Since the commencement of the first action, and up to the time of the commencement of the present action, water has, in consequence of the removal of the said horizontal bar of coal in Avon Eitha, occasionally flowed of itself in the manner already stated from the said subterranean body of water adjoining to Avon Eitha into the chambers of Avon Eitha and so also flowed on of itself through the "thyrings" into the chambers of Plas Bennion in manner as before stated, and the colliery of Plas Bennion has been thereby injured. With respect to the sufficiency of the said vertical seam of coal forming the eastern boundary of Plas Bennion as a subsisting barrier to prevent the last-mentioned flow of water, if the "thyrings" had not been made in the said barrier, and with respect to the defendant's knowledge that the "thyrings" continued open, the facts are the same as before stated with reference to the former action. H I

The claim of the plaintiff to compensation in this case is advanced upon two grounds: first, on the supposed duty of the defendant, arising out of the act of

A Evan Jones, in removing the plaintiff's barrier, and the subsequent occupation of the same by the defendant; and secondly, on the general liability said to be imposed by law upon the defendant, in being responsible for the injury done, to the adjoining colliery, by water casually introduced into his own, in consequence of the working of his colliery.

B As to the first point it is to be observed, there was no privity of any kind, between Evan Jones and the defendant; the act done by Evan Jones was not on the premises now occupied by the defendant, but on those of the plaintiff; nor does the defendant derive his title to the premises he occupies in any way from Evan Jones. In the Special Case it is expressly stated there is no privity of any kind between Evan Jones and the defendant. In *Rosewall v. Prior* (1), the defendant was tenant for years, and erected on his own premises that which was a nuisance to the plaintiff's house; and then made an under lease; and it was held that the plaintiff might sue either the defendant or the sub-lessee. On the same principle, if Evan Jones did any thing in Avon Eitha colliery, which made the premises in their then state a nuisance to the plaintiff's colliery, the defendant, as occupier, might have been made responsible for continuing them in the same state, and so upholding the nuisance. But this is a very different case. The premises occupied by the plaintiff are not a nuisance, and the act done by Evan Jones, which is an injury to the plaintiff, was upon the plaintiff's soil, where he, the defendant would have no right to go, even if he wished it, for the purpose of remedying the evil Evan Jones had formerly done. We think there is no special duty in the defendant to protect against water the plaintiff's mine, when he occupied Avon Eitha, in consequence of his having succeeded in such occupation Evan Jones who removed the plaintiff's barriers.

E The next ground on which it was contended that the defendant was liable, is broader; namely, that he was, of common right, bound to prevent the water coming into his own mine from flowing into his neighbour's. In considering this question, it is important to remark that in the Special Case it is stated that the defendant worked out the coal, which protected his own mine from the subterranean body of water, for the purpose of obtaining the coal, and so making the mine in a manner beneficial to himself; there is nothing from which we can infer that that was an unusual or negligent mode of proceeding, or done with any design to injure his neighbour's mine. In order to establish the proposition that the defendant was bound to prevent the flowing of the water into the plaintiff's mine, *Tenant v. Goldwin* (2) was relied on. That was an action on the case, in which the plaintiff declared that he was possessed of a messuage, in which a cellar was built to lay coals, etc., and that the cellar adjoined the defendant's messuage, and by the wall of the defendant the cellar was separated and divided from the defendant's privy, and for want of repairing the wall the filth flowed through into the plaintiff's cellar. There was judgment by default, and damages were assessed upon a writ of inquiry; then there was a motion in arrest of judgment, and the declaration was held sufficient. LORD HOLT said:

H "It was the defendant's wall and the defendant's filth, and that he was bound of common right to keep the wall so as not to damnify the property of his neighbour; and it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's."

I That was, therefore, a very different case from the present. There was no barrier between the plaintiff's mine and the defendant's, which the latter could repair, and the flow of water into the plaintiff's mine cannot be considered a trespass. Again, the declaration in that case was held good, on account of the words *debet reparandum*, which are inapplicable to the present one. But for the removal of part of the barrier of coal that existed in the plaintiff's mine, the water in the defendant's mine would have done no harm, and for that removal the defendant is not responsible.

A great many cases were referred to in the argument, independently of all question as to the removal of the barrier to show that the defendant was bound at all events to take care that the water which flowed in his own mine should not pass into another's. *Turberville v. Stampe* (3), *Vaughan v. Menlove* (4), *Sutton v. Clarke* (5), *Boyle v. Tamlyn* (6), *Brown v. Windsor* (7), *Dodd v. Holme* (8), and other cases were referred to. In each of these the negligence imputed to the defendant in doing the act on his own premises had proved injurious to his neighbours; but there is here nothing to show any negligence on the part of the defendant in working the colliery.

A case quoted from the YEAR BOOK (*Anon.* (9)), in *Lambert and Olliot v. Bessey* (10) (T. Raym. at p. 422), was relied on as authority for the plaintiff, where negligence was imputed to the defendant; but on examination of the original report in the YEAR BOOK it appears to us hardly to support that statement. It was an action of trespass on the plaintiff's close, and for damaging the grass, etc., the defendant justified for that he had a close separated from the plaintiff's by a thorn hedge, and when cutting the thorns they fell invite solo into the plaintiff's close, wherefore he entered into the close to take them away. After much discussion it was held that in order to make the plea good, not only must the thorns have fallen invite solo, but that he did all in his power to prevent their falling into the plaintiff's soil.

Haward v. Bankes (11) was said to be a direct authority for the plaintiff; but it is not so. The decision of the court was given on a count charging the defendant with having caused water to flow through divers other collieries into the plaintiff's, which was a count in case; and it is true that the plaintiff recovered in that action; and, though there can be no doubt that a man may cause water to flow into his neighbour's premises, so as to make him liable to an action—as for instance, by erecting a mound of earth, and giving it a certain direction, as appears to have been done by the present defendant, before the former action was commenced, in which he paid money into court as compensation; in this case it cannot be said he caused, but that he permitted the water to flow into the plaintiff's mine.

Another case relied on by the plaintiff was *Firmstone v. Wheeley* (12), which also differs from this case in a material particular, namely, that the defendant had removed from the plaintiff's mine, by trespass, a barrier of coal, which, had it existed, would have prevented the water flowing from the defendant's mine to the plaintiff's, and though hardly to be treated as a decision, the Court of Exchequer appear to have thought the defendant, having wrongfully removed the barrier, he was bound to protect the plaintiff's mine against the flowing in of the water; and if this action had been against Evan Jones, who had occupied Avon Eitha, it might have been urged as an authority against him, but if Evan Jones had been sued in trespass for removing the barrier, a second action could not have been maintained against him for the consequential damage: see *Clegg v. Dearden* (13). If no such action could be maintained against him, it would be singular if it could be maintained against a party not in any way connected with him, for consequential damages arising from his act of trespass.

Treating the question as a new one, not governed by the authority of any decided case (for all those referred to are distinguishable), it would seem to be the natural right of each of the owners of the two adjoining coal-mines, neither being subject to servitude to the other, to work his own mine in the most beneficial manner to himself, though the natural consequence may be that some prejudice would accrue to the owner of the adjoining mine, so long as it does not arise from negligent or malicious conduct.

In the present case it could not be disputed that but for the excavation of the plaintiff's coal the defendant would have been entitled to work out his own coal: for if the space which it occupied afterwards became filled with water it would have done no harm to the plaintiff if his own coal actually had not been excavated. If he afterwards excavated his own, and if the water flowed in from the defendant's working his own coal he would not have any right of action for the damage. His

A position would be similar to that suggested by LORD HOLT, in the case before mentioned of *Tenant v. Goldwin* (2), where he says :

“The case indeed might possibly be such that the defendant might not be bound to repair; as if the defendant made a new cellar under the defendant's old privy or in a vacant piece of ground which lay next the old privy before, in such case the plaintiff must defend himself.”

B Though here, however, the working of the two mines had been simultaneous; but then the defendant's mine, not being subject to any servitude, what authority is there for saying that the plaintiff by working his coal could alter or abridge the defendant's right to work his own. It is certainly a reasonable thing that the plaintiff should leave part of his own coal to protect his own working against the influx of water; the plaintiff took that view of the matter and left a barrier; and, C in his opinion, it would have been sufficient for the purpose if it had not been broken through by a wrongdoer, for whose act the defendant is not responsible.

There are many cases in which the principle is recognised that one landowner by altering the condition of his land cannot deprive the owner of the adjoining land of the privilege of using his own as he might have done before; thus, he cannot by D building a house near the margin of his land, prevent his neighbour from excavating his own land, though it may endanger his house, or from working on his own land, though it may subsequently prejudice him, unless, from the lapse of time, the adjoining land has become subject to a right analogous to what it would have been in the case of a qualified servitude: see *Acton v. Blundell* (14), where the subject was very much discussed; and the court held that one landowner, having dug a well E on his own land, could not maintain an action against a party who afterwards sunk a coal-pit in the neighbourhood, which had the effect of draining the water away from the well, the act not being done by the defendant negligently or maliciously, but in a proper manner, for the purpose of winning his own coal. We think the same principle is applicable to the present case. Water is said to be a common enemy (*R. v. Pagham Sussex Sewers Comrs.* (15), per LORD TENTERDEN, C.J., 8 B. & C. at p. 360), against which each man must defend himself. This is in F accordance with the civil law. It was considered that land on the lower level owed a natural servitude to that on the higher level, in respect of receiving and claiming compensation for water naturally flowing down: COMYNS' DIGEST, 39, title 3.

Other points were explained to the court in the Special Case, but of which little was said on the argument—namely, that the defendant, by paying money into G court in the former action, had precluded himself from saying he was not liable to be sued in this action; but, in looking to the declaration, he was charged with turning water into the plaintiff's mine, for which he was responsible; and the admission of that in that action can have no bearing on this. On the whole, we are of opinion that the plaintiff is not entitled to recover, and that the judgment H must be for the defendant.

Judgment for defendant.

COUTURIER AND OTHERS *v.* HASTIE AND OTHERS

[COURT OF EXCHEQUER CHAMBER (Coleridge, Maule, Cresswell, Wightman, Williams, Talfourd and Crompton, JJ.), June 17, 25, 1853]

[Reported 9 Exch. 102; 22 L.J.Ex. 299; 21 L.T.O.S. 289; 17 Jur. 1127; 1 W.R. 495; 1 C.L.R. 623; 156 E.R. 43]

[HOUSE OF LORDS (Lord Cranworth, L.C., and other Lords), June 26, 27, 1856]

[Reported 5 H.L.Cas. 673; 25 L.J.Ex. 253; 28 L.T.O.S. 240; 2 Jur.N.S. 1241; 10 E.R. 1065]

Mistake—Mistake of fact—Contract for sale of cargo of wheat—Cargo not in existence at date of contract—Repudiation by buyer.

H. sold, on del credere commission, a cargo of corn to A., the bought note describing it as of average quality "when shipped," and the price including freight and insurance to a safe port in the United Kingdom. Before the date of the sale the corn had been sold abroad, owing to its having become heated during the voyage. A., on hearing this, repudiated the contract, and H. was sued by his principal for the price.

Held: at the date of the contract the parties contemplated that there was in existence a cargo to be bought and sold, but in fact at that date there was no such cargo, and, therefore, A. was entitled to repudiate the contract and consequently the action against H. failed.

Notes. Applied: *Griffith v. Brymer* (1903), 19 T.L.R. 434. Considered: *Bell v. Lever Bros., Ltd.*, [1931] All E.R.Rep. 1. Referred to: *Covas v. Bingham* (1853), 2 E. & B. 836; *Hall v. Conder* (1857), 2 C.B.N.S. 22; *Pritchard v. Merchant's and Tradesman's Mutual Life Assurance Society* (1858), 3 C.B.N.S. 622; *Hare v. Brown* (1859), 5 Jur.N.S. 711; *Ralli v. Universal Marine Insurance Co.* (1862), 4 De G.F. & J. 1; *The John Bellamy* (1870), L.R. 3 A. & E. 129; *Fleet v. Murton* (1871), L.R. 7 Q.B. 126; *Mollett v. Robinson* (1872), L.R. 7 C.P. 84; *Jeffreys v. Fair* (1876), 36 L.T. 10; *Joliffe v. Baker* (1888), 11 Q.B.D. 255; *Robert A. Munro & Co., Ltd. v. Meyer*, [1930] All E.R.Rep. 241; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corpn., The Kingswood*, [1941] 2 All E.R. 165; *Frederick E. Rose (London), Ltd. v. Wm. H. Pim, Junr., & Co.*, [1953] 2 All E.R. 739.

As to consent in general; mistake, see 8 HALSBURY'S LAWS (3rd Edn.) 80-84; and for cases see 12 DIGEST (Repl.) 414 et seq.

Cases referred to:

- (1) *Barr v. Gibson* (1838), 3 M. & W. 390; 1 Horn. & H. 70; 7 L.J.Ex. 124; 150 E.R. 1197; 35 Digest (Repl.) 110, 111.
- (2) *Strickland v. Turner (Executrix of Lane)* (1852), 7 Exch. 208; 22 L.J.Ex. 115; 155 E.R. 919; 12 Digest (Repl.) 414, 3221.
- (3) *Sutherland v. Pratt* (1843), 11 M. & W. 296; 2 Dowl.N.S. 813; 12 L.J.Ex. 235; 7 Jur. 261; 152 E.R. 815; 29 Digest (Repl.) 125, 691.

Also referred to in argument:

- Covas-Jee v. Thompson* (1845), 3 Moo. Ind. App. 422; 5 Moo.P.C.C. 165; 18 E.R. 560, P.C.; 39 Digest (Repl.) 684, 1792.
- Johnson v. Macdonald* (1842), 9 M. & W. 600; 12 L.J.Ex. 99; 6 Jur. 264; 152 E.R. 253; 39 Digest (Repl.) 493, 404.
- Johnston v. Osborne* (1841), 11 Ad. & El. 549; 3 Per. & Dav. 236; 113 E.R. 524; 1 Digest (Repl.) 623, 2071.
- Roux v. Salvador* (1836), 3 Bing.N.C. 266; 2 Hodg. 209; 4 Scott, 1; 7 L.J.Ex. 328; 132 E.R. 413, Ex. Ch.; 29 Digest (Repl.) 307, 2322.
- Owens v. Dunbar*, 12 I.C.L.R. 304.
- Paine v. Meller* (1801), 6 Ves. 349; 31 E.R. 1088, L.C.; 40 Digest (Repl.) 202, 1637.

- A *Cass v. Rudale* (1692), 2 Vern. 280; 1 Eq. Cas. Abr. 25, pl. 8; 23 E.R. 781; 12 Digest (Repl.) 430, 3309.
- Hitchcock v. Giddings* (1817), Dan. 1; 4 Price, 135; Wils. Ex. 32; 146 E.R. 418; 12 Digest (Repl.) 414, 3220.
- Earl of March v. Pigot* (1771), 5 Burr. 2802; 98 E.R. 471; 25 Digest (Repl.) 416, 4.
- B *Vlierboom v. Chapman* (1844), 13 M. & W. 230; 13 L.J.Ex. 384; 8 Jur. 811; 153 E.R. 96; 41 Digest 646, 4777.
- Dickson v. Zizinia* (1851), 10 C.B. 602; 20 L.J.C.P. 73; 16 L.T.O.S. 366; 15 Jur. 359; 138 E.R. 238; 39 Digest (Repl.) 511, 538.

Appeal by the plaintiffs from a decision of the Court of Exchequer Chamber, *infra*, on a bill of exceptions to a ruling of MARTIN, B., in an action for breach of contract.

- C The action was brought by the plaintiffs, merchants at Smyrna, to recover the price of a cargo of Indian corn sold for the plaintiffs by the defendants as factors, the purchase having been repudiated by the purchaser. The cargo in question had been shipped on account of the plaintiffs at Salonica on board a vessel chartered by them, and bound for the United Kingdom. The plaintiffs, through Messrs. Bernoulli, their London agents, employed the defendants as cornfactors, to sell the
- D cargo on a *del credere* commission, which was done on May 15, 1848, one A. B. Callander being the purchaser. A few days afterwards it was discovered by the purchaser that the cargo had, previously to his entering into the contract, been unloaded in consequence of its being in a heated state, and sold on account of the plaintiffs at Tunis. He, therefore, repudiated the contract. The contract was in these terms:

- E “Bought of Hastie and H. a cargo of about 1,180 qrs. of Salonica Indian corn, of fair average quality when shipped from Salonica. Bill of lading dated, . . . Free on board to a safe port in the United Kingdom . . .”

- At the trial before MARTIN, B., no evidence was given to show that the language used in the contract meant any other than its ordinary meaning, except that the
- F words “free on board” meant that the goods were on board the vessel. The judge directed the jury that the meaning and construction of the contract with Callander was, that Callander, as purchaser, was to take on himself all risks from the date of the shipment of the corn; and that the meaning and construction of the contract was that the purchaser bought the cargo if it existed at the date of the contract, but that, if it had been damaged or lost, he bought the benefit of the insurance, but
- G no more; and that, by selling the cargo, the vendor undertook that the purchaser should have it if it existed, and that the vendor had not sold it before to another. The judge further ruled that, if the jury believed the evidence, the sale of the cargo at Tunis in this case by the agent of the plaintiffs was not such a sale as to defeat the contract, and that it was rendered necessary in consequence of sea damage, and was made merely to prevent the loss being so great as it would
- H otherwise necessarily have been. He, therefore, directed a verdict for the defendants.

- The case was afterwards argued in the Court of Exchequer (8 Exch. 40) before POLLOCK, C.B., PARKE and ALDERSON, BB., when the learned judges differed in opinion, and a rule was drawn up directing that the verdict found for the defendants should be set aside on all the pleas except the sixth, and that on that plea judgment
- I should be entered for the plaintiffs, *non obstante veredicto*, and that the defendants should be at liberty to treat the decision of the court as the ruling at *nisi prius*, and to put it on the record and bring a bill of exceptions. This was done, and the Lord Chief Baron sealed the bill of exceptions, adding, however, a memorandum to the effect that he did so as the ruling of the court, but that his own opinion was in opposition to such ruling.

Butt (*Bovill* with him) for the defendants.

Cowling for the plaintiffs.

June 25, 1853. **COLERIDGE, J.**, delivered the following judgment of the court.—The case was originally tried before **MARTIN, B.**, who, in directing the jury, ruled that the contract imported that, at the time of the sale, the corn was in existence as such, and capable of delivery, and a verdict was found for the defendants, the plaintiffs having leave to move to enter a verdict in their favour on all the issues except those on the fifth and sixth pleas, and on those pleas for judgment non obstante veredicto. The case was argued before **POLLOCK, C.B.**, and **PARKE** and **ALDERSON, BB.** The Lord Chief Baron agreed in the opinion expressed by **MARTIN, B.**, at nisi prius; but the other learned barons differed from him, and made the rule absolute; whereupon it was agreed that the question should be brought before this court on a bill of exceptions, as if the Lord Chief Baron had directed the jury in conformity with the opinion of **PARKE** and **ALDERSON, BB.** B

The case, therefore, comes before us without any great preponderance of authority in favour of the plaintiffs. Nor do we find in the arguments of counsel, or in the judgment of the court below, any case referred to upon which that judgment was founded. It turned entirely on the meaning of the contract made between the parties, which was in these terms: C

"Bought of **Hastie & Hutchinson** a cargo of about 1,180 quarters of Salonica Indian corn of fair average quality when shipped per the 'Kezia Page,' Captain Page, from Salonica, bill of lading dated Feb. 22, at 27s. per quarter, free on board, and including freight and insurance to a safe port in the United Kingdom, the vessel calling at Cork or Falmouth for orders, measure to be calculated as customary, payment at two months from this date, or in cash, less discount at the rate of £5 per cent. per annum for the unexpired time upon handing shipping documents." D

An attempt was made to explain this document by evidence, but failed. There is, indeed, an expression in the bill of exceptions, "that the meaning of free on board is, that the goods are on board which taken literally, may import that they are on board at the time when the words are used; but it was not contended for the defendants that such is the true meaning. The case, therefore, is not affected by that statement and the question depends upon the words of the contract, unexplained by any evidence. E

For the defendants it was contended that the parties plainly contracted for the sale and purchase of goods, that the price to be paid was for goods, and that for the price the purchaser was to have the benefit of a contract to carry them and a policy of insurance; that a vendor of goods undertakes that they exist, and that they are capable of being transferred, although he may not stipulate for their condition; and that as the goods in question had been sold and delivered to other parties before the contract in question was made, there was nothing on which it could operate; and *Barr v. Gibson* (1) and *Strickland v. Turner (Executrix of Lane)* (2) were cited. F

On the other hand it was argued, that this was not a mere contract for the sale of an ascertained cargo, but that the purchaser bought the adventure, and took upon himself all risks from the shipment of the cargo. It was said that the mention of the condition of the cargo at the time of shipment was a proof of the intention of the parties that the buyer should take all risks from that time; that its condition at the time of sale, or the fact of its existence, could not then be ascertained, and therefore the purchaser must be supposed to have taken the risks; that if it had existed, however much deteriorated, the purchaser must have taken it, although the loss had been all but total, and therefore there was no reason for excluding total loss from the risks that he was to bear; that if it had ceased to exist the consideration would not fail, for the purchaser would have the shipping documents. It was further argued that the stipulation for payment, which would probably have to be made before the arrival of the cargo, indicated an intention that the purchaser was in all events to pay for it, on account of the inconvenience that would ensue G

A if he might have to reclaim the money back. It was not disputed that *Barr v. Gibson* (1) and *Strickland v. Turner (Executrix of Lane)* (2) were well decided.

It appears to us that the contract in question was for the sale of a cargo supposed to exist, and to be capable of transfer, and that, inasmuch as it had been sold and delivered to others by the captain before the contract in question was made, the plaintiffs cannot recover in this action. With regard to the description of the cargo as "of fair average quality when shipped," we think that, if those words had not been introduced, it must have been held that the purchaser of a cargo on a voyage would take upon himself the chance of what its condition at the time of purchase might be, and that this clause was introduced for his benefit, by enabling him to object, if the fact were so, that the cargo was bad when shipped. If, in *Barr v. Gibson* (1), there had been a stipulation that the ship, when she sailed on the voyage during which she was sold, was seaworthy, that would not have made the purchaser liable, if a total loss had occurred before the contract was entered into. It has been said, that if the loss had been all but total, if the cargo had become all but worthless, yet, if it existed in specie, the purchaser must unquestionably have been bound, and, therefore, there is no reason for holding that he was not also to take the risk of a total loss. The same argument would have applied in *Strickland v. Turner (Executrix of Lane)* (2). If the annuitant, at the time of the sale of the annuity, had been in extremis, and had died the next hour, the purchaser would have been bound and could not have recovered the purchase-money, but was held to be so entitled, the annuitant having died before the sale. Again, it has been supposed that there is an inconsistency in saying that, if the cargo had sustained sea-damage, constituting an average loss covered by the policy, it would pass to the purchaser so as to secure to him an indemnity, but would not pass in the event of a total loss. This seems to depend upon the same point, and not to be attended with any real difficulty.

If the contract for sale of the cargo was valid, the shipping documents would pass as accessories to it; but if, in consequence of the previous sale of the cargo, the contract failed as to the principal subject-matter of it, the shipping documents would not pass. Although we cannot find any decision in point, there is *Sutherland v. Pratt* (3), where this subject was mentioned. In that case, the plaintiff had bought goods on a voyage, and effected an insurance, lost or not lost. They had sustained sea damage before the sale, and the purchaser sued on the policy. The underwriters pleaded that the goods were damaged before the plaintiff had acquired any interest in them. On demurrer, it was held that the plea was bad, but the very learned counsel who argued for the plaintiff admitted, in answer to a question put by PARKE, B., that, if the goods had been totally lost before his contract of purchase was made, there would not have been an insurable interest, as a person cannot buy a thing that has been totally lost.

For these reasons, it appears to us that the basis of the contract in this case was the sale and purchase of goods, and that all the other terms in the bought note were dependent upon that, and that we cannot give to it the effect of a contract for goods lost or not lost. The consequence is that the judgment of the court below must be reversed, and entered for the defendants according to arrangement between the parties.

The plaintiffs appealed to the House of Lords.

I The following judges attended the House upon the argument. ALDERSON, B., WIGHTMAN, CRESSWELL, ERLE and WILLIAMS, JJ., MARTIN, B., CROMPTON and WILLES, JJ., and BRAMWELL, B.

Sir Frederick Thesiger, Q.C., and *J. Wilde, Q.C.*, for the appellants.

Butt, Q.C., and *Bovill, Q.C.*, for the respondents, were not called on to argue.

At the conclusion of the appellants' argument the House put the following question to the learned judges: Whether looking at this record judgment should be given for the appellants or the respondents? The learned judges delivered their opinion by

ALDERSON, B.—Her Majesty's judges are unanimously of opinion that the judgment of the Exchequer Chamber was right, and that the judgment of the Court of Exchequer was wrong; and I am myself now of the same opinion, having been one of the judges before whom the cause was argued in the court below. A

LORD CRANWORTH, L.C.—That being so, I have no hesitation in advising your Lordships, and at once moving that the judgment of the court below should be affirmed. It is hardly necessary, and it has not ordinarily been usual, for your Lordships to go much into the merits of a judgment which is thus unanimously affirmed by the judges who assist the House in forming its judgment. B

I may state shortly that the whole question turns on the construction of the contract which was entered into between the parties. I do not mean to deny that many plausible and ingenious arguments have been pressed by both counsel who have addressed your Lordships, showing that there might have been a meaning attached to that contract different from that which the words themselves import. C If this had depended not merely on the construction of the contract, but on evidence which, if I recollect rightly, was rejected at the trial, of what mercantile usage had been, I should not have been prepared to say that a long-continued mercantile usage interpreting such contracts might not have been sufficient to warrant, or even compel your Lordships to adopt a different construction. D But, in the absence of any such evidence, looking to the contract itself alone, it appears to me clearly that what the parties contemplated—those who bought and those who sold—was that there was an existing something to be sold and bought, and if sold and bought, then the benefit of insurance should go with it.

I do not feel pressed by the latter argument which has been brought forward very ably by counsel for the appellants, derived from the subject of insurance. E I think the full benefit of the insurance was meant to go as well to losses and damage that occurred previously to May 15 as to losses and damage that occurred subsequently, always assuming that something passed by the contract of May 15. F If the contract of May 15 had been an operating contract, and there had been a valid sale of a cargo at that time existing, the purchaser would have had the benefit of insurance in respect of all damage previously occurring. The contract plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased. No such thing existing, I am of opinion, that the Court of Exchequer Chamber has come to the only reasonable conclusion on it, and consequently that there must be judgment for the respondents.

Appeal dismissed.

ALLEN v. MADDOCK

[PRIVY COUNCIL (The Rt. Hon. Dr. Lushington, T. Pemberton Leigh, Sir Edward Ryan and Sir Cresswell Cresswell), February 19, July 8, 1858]

[Reported 11 P.C.C. 427; 31 L.T.O.S. 359; 6 W.R. 825;
14 E.R. 757]

Will—Evidence—Evidence to explain and identify reference in codicil to previous document—Invalid will—Validation—Republication by and incorporation in valid codicil.

A testamentary paper which, owing to its not having been duly attested as required by s. 9 of the Wills Act, 1837, is not a valid will, can, provided it is capable of identification, be rendered valid by a codicil which clearly refers to it and is itself duly executed. Parol evidence is admissible to establish in a court of construction the meaning of the reference in the codicil to the earlier document and the identity of that document. In effect, the earlier document is validated by being incorporated in or republished by the codicil.

In 1851 the testatrix signed a document commencing: "This is the last will and testament of Mrs. A. F.," but one witness only attested it, and, therefore, it did not constitute a valid will. In 1856 F. executed a codicil beginning: "This is a codicil to my last will and testament," and this codicil was duly attested and valid. The testatrix died, leaving no other will than the document first mentioned, which was found in a drawer in her bedroom in an envelope endorsed "Mrs. A. F.'s will."

Held: parol evidence was admissible to prove the identity of the document referred to by the codicil, so as to incorporate it.

Notes. Considered: *In the Goods of Greves* (1858), 1 Sw. & Tr. 250. Distinguished: *Newton v. Newton* (1861), 5 L.T. 218. Applied: *Van Straubenzee v. Monk* (1862), 3 Sw. & Tr. 6; *In the Goods of Brewis* (1864), 3 Sw. & Tr. 473; *In the Goods of Luke* (1865), 34 L.J.P. & M. 105; *In the Goods of Watkins* (1865), 34 L.J.P. & M. 14; *In the Goods of Sunderland* (1866), L.R. 1 P. & D. 198. Considered: *Anderson v. Anderson*, [1861-73] All E.R.Rep. 161. Applied: *In the Goods of Heathcote* (1881), 6 P.D. 30; *Durham v. Northern*, [1895] P. 66; *University College of North Wales v. Taylor*, [1908] P. 140. Considered: *Re White, Knight v. Briggs*, [1924] All E.R.Rep. 630. Referred to: *In the Goods of Almosnino* (1859), 1 Sw. & Tr. 508; *In the Goods of Truro* (1866), 35 L.J.P. & M. 89; *In the Goods of Reid* (1868), 38 L.J.P. & M. 1; *Falle v. Godfray* (1888), 14 App. Cas. 70; *In the Goods of Rendle* (1899), 68 L.J.P. 125; *Re Trotter, Trotter v. Trotter*, [1899] 1 Ch. 764; *In the Goods of Smart*, [1902] P. 328; *Re Jones, Jones v. Jones*, [1942] Ch. 328; *Re Edward's Will Trusts, Dalglish v. Leighton*, [1947] 2 All E.R. 521.

As to the doctrine of republication and the admissibility of evidence in the construction of will see 39 HALSBURY'S LAWS (3rd Edn.) 904-907 and 955-973 respectively. For cases see 44 DIGEST 370 et seq., and 613 et seq.

Cases referred to:

- (1) *Smart v. Prujean* (1801), 6 Ves. 560; 31 E.R. 1195, L.C.; 44 Digest 238, 645.
- (2) *Wilkinson v. Adam* (1813), 1 Ves. & B. 422; 35 E.R. 163, L.C.; 44 Digest 1251, 10,786.
- (3) *Barnes v. Crowe* (1792), 1 Ves. 486; 4 Bro.C.C. 2; 29 E.R. 747; 44 Digest 374, 2086.
- (4) *Pigott v. Waller* (1802), 7 Ves. 98; 32 E.R. 40; 44 Digest 371, 2054.
- (5) *Doe d. Williams v. Evans* (1832), 1 Cr. & M. 42; 3 Tyr. 56; 2 L.J.Ex. 39; 159 E.R. 307; 44 Digest 887, 2215.
- (6) *Guest v. Willasey* (1826), 3 Bing. 614; 12 Moore, C.P. 2; 5 L.J.O.S.C.P. 101; 130 E.R. 650; 44 Digest 880, 2149.

- (7) *Gordon v. Lord Reay* (1832), 5 Sim. 274; 58 E.R. 339; 44 Digest 380, 2150. A
- (8) *Utterton v. Robins* (1834), 1 Ad. & El. 423.
- (9) *Radburn v. Jervis*, *Hare v. Hill* (1840), 3 Beav. 450; 49 E.R. 177; 44 Digest 1009, 8670.
- (10) *Aaron v. Aaron* (1849), 3 De G. & Sm. 475; 13 L.T.O.S. 545; 14 Jur. 125; 64 E.R. 568; 44 Digest 381, 2155.
- (11) *Hitchings v. Wood*, *Wood v. Hitchings* (1841), 2 Moo.P.C.C. 355; 12 E.R. 1041; sub nom. *Wood v. Goodlake*, 1 Notes of Cases, 144, P.C.; 44 Digest 238, 647. B
- (12) *Shortrede v. Cheek* (1834), 1 Ad. & El. 57; 3 Nev. & M.K.B. 866; 3 L.J.K.B. 125; 110 E.R. 1129; 26 Digest (Repl.) 105, 723.
- (13) *Hodges v. Horsfall* (1829), 1 Russ. & M. 116; 39 E.R. 45, L.C.; 12 Digest (Repl.) 181, 1229. C
- (14) *Clinan v. Cooke* (1802), 1 Sch. & Lef. 22, 33; 12 Digest (Repl.) 182, *706.
- (15) *Squire v. Campbell* (1836), 1 My. & Cr. 459; 6 L.J.Ch. 41; 40 E.R. 451, L.C.; 42 Digest 562, 1286.
- (16) *Smee v. Bryer* (1848), 6 Moo.P.C.C. 404; 13 E.R. 739, P.C.
- (17) *In the Goods of Smith* (1841), 2 Curt. 796; 1 Notes of Cases, 1; 163 E.R. 588; 44 Digest 390, 2239. D
- (18) *In the Goods of Sotheron* (1841), 2 Curt. 831; 1 Notes of Cases, 73; 163 E.R. 600; 44 Digest 237, 627.
- (19) *In the Goods of Claringbull* (1844), 3 Notes of Cases, 1; 44 Digest 260, 875.
- (20) *Countess De Zichy Ferraris and Croker v. Marquis of Hertford* (1843), 3 Curt. 468; 2 Notes of Cases, 230; affirmed sub nom. *Croker v. Marquis of Hertford* (1844), 4 Moo.P.C.C. 339; 3 Notes of Cases, 150; 8 Jur. 863; 13 E.R. 334; sub nom. *In the Goods of Marquis of Hertford*, 3 L.T.O.S. 257, P.C.; 44 Digest 373, 2075. E
- (21) *Ingoldby v. Ingoldby* (1846), 4 Notes of Cases, 493; 6 L.T.O.S. 499; 44 Digest 390, 2240.
- (22) *In the Goods of Phelps* (1849), 6 Notes of Cases, 695; 44 Digest 390, 2242.
- (23) *Haynes v. Hill* (1849), 1 Rob. Eccl. 795; 7 Notes of Cases, 256; 14 L.T.O.S. 295; 13 Jur. 1058; 163 E.R. 1217; 44 Digest 378, 2124. F
- (24) *In the Goods of Countess Dowager of Pembroke* (1856), Dea. & Sw. 182; 2 Jur.N.S. 526; 164 E.R. 542; 44 Digest 239, 655.

Appeal from an order of the judge of the Prerogative Court of Canterbury admitting to probate two papers as a will and codicil (Dea. & Sw. 325).

On Dec. 1, 1851, Anne, the wife of Joseph Emanuel Allen, who was separated from her husband and had assumed and was known by the name of Foote, drew up in her own handwriting, and signed and sealed a paper of that date, described in its commencement as "the last will and testament of Mrs. Anne Foote, of Bath, which I make and publish for all my worldly substance." By this instrument she gave several legacies, and appointed executors, but made no disposition of the remainder of her property. She had a power, under the settlement made on her marriage, to make a will, but the paper in question was attested by only one witness, and was, therefore, not valid. On Sept. 13, 1856, being then on her deathbed, she executed a codicil headed: "This is a codicil to my last will and testament." By the codicil she gave to her servant Eliza Baker the sum of £100, "with as much of my furniture as, in the opinion of my executor, will be sufficient to furnish a sitting-room and a bedroom." The codicil appointed no executor, and contained no other reference to the will. On Sept. 14, the testatrix died. On her death search was made for her testamentary papers by Sir H. Maddock, who was one of the executors appointed by the paper described as her will, and to whom, in pursuance of the testatrix's direction, a letter announcing the event had been sent immediately upon her death. The codicil was found in a chest in her bedroom, and the disputed paper was found in another chest which had been, shortly before her death, removed from her bedroom into an adjoining room. This paper was enclosed

A in a sealed envelope, on which were written the words—"Mrs. Anne Foote's will." No other testamentary paper of any description was found. The two papers mentioned were admitted to probate by the judge of the Prerogative Court, and against this sentence the present appeal was brought as regards the will.

Sir Fitzroy Kelly and Dr. Jenner for the appellant.

B *Dr. Phillimore, Q.C., and Dr. Deane, Q.C., for the respondent.*

C **The Rt. Hon. T. PEMBERTON LEIGH.**—The objection relied on is that there is no such distinct reference to this paper in the codicil as to enable the court to receive parol evidence in order to identify it; that it is not identified by the description of a will, for that, in truth, it is not a will; that it is not identified either by date or by any reference to its contents, or by annexation to the codicil, so as to distinguish it from other papers of a like description, if more than one were found; and that to admit this paper to probate on the ground that no other is produced to satisfy the description would be to incorporate the will in the codicil merely by parol evidence and not by the effect of the reference contained in the codicil itself.

D It becomes necessary to examine, with some minuteness, the rules of law and the decided cases applicable to this subject. Before the Wills Act was passed in 1837 no formalities of any kind being necessary in the execution of a will or codicil as to personal estate, the effect of a well-executed testamentary instrument upon one not well executed could hardly come before a Court of Probate. But such questions arose very frequently in the temporal courts, with respect to the disposition of real estate, and the statute alluded to having placed wills, as to real and personal property on the same footing, it should seem that the authorities upon this point with respect to real estate, whether before or since the statute in the courts of law, are now equally applicable to the Court of Probate, with regard to personalty. E In considering them, however, it is necessary to bear in mind this distinction between cases before the Act and subsequent cases, viz., that before the Act a testamentary paper not executed so as to affect real estate was valid as to personalty, was really a will or codicil, and might, therefore, strictly answer that description in a subsequent reference to it by that name, whereas since the Act came into operation no paper not properly executed and attested, can, in strictness, be for any purpose a will or codicil. It is necessary also to remember the distinction between the admissibility of evidence to prove a testamentary paper and of evidence to explain its meaning—that direct evidence of intention, declarations of the testator by word or in writing, and other testimony of a similar character, are admissible when the will is disputed, but that no such evidence can be received in order to explain the expressions which he has used. Still, in construing his will, the court is entitled and is bound to place itself in the situation of the testator with respect to his property, the objects of his bounty, and every other circumstance material to the construction of the will, and for this purpose to receive, if occasion require it, parol evidence of these circumstances, and to expound his meaning with reference to them. F G H

I In the celebrated treatise of SIR JAMES WIGRAM (*EXTRINSIC EVIDENCE IN AID OF THE INTERPRETATION OF WILLS*) these rules are stated, discussed and explained in a manner which has excited the admiration of every judge who has had to consult it. After collecting and stating the effect of the several authorities, SIR JAMES WIGRAM sums up (as it appears to us with perfect accuracy) the result in these terms (prop. 5, para. 96):

"Every claimant under a will has a right to require that a court of construction, in the execution of its office, shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare. It follows that, if with the light which that situation alone affords, the testator's meaning can be determined by a court, the court which so determines does in effect declare that the testator has expressed his intention with certainty, or, in other words, that his will is free from ambiguity."

It may be said that on the present occasion, the Court of Probate is, to a certain extent, a court of construction, for it has to determine what is the meaning of the reference made by the testatrix in her codicil to her last will and testament (the executor under which is to determine upon one of the gifts in the codicil), and whether any, and, if any, what, instrument found at her death is thereby referred to. This question is one of fact which obviously must be explained, and can only be explained by parol evidence. A

At first sight there is no difficulty; there is no ambiguity whatever in the expression by which the reference is made. Parol evidence must necessarily be received to prove whether there is or is not in existence at the testatrix's death any such instrument as is referred to by the codicil. For this purpose, inquiry must be made and evidence must be offered to show what papers there were at the date of the codicil, which could answer the description contained in the codicil, and, the court having by these means placed itself in the situation of the testatrix, and acquired, as far as possible, all the knowledge which the testatrix possessed, must say, upon a consideration of those extrinsic circumstances, whether the paper is identified or not. If the will in question had been properly executed, there can be no doubt that it would have been treated as the instrument referred to by the codicil; yet it must, in that case, have been proved or assumed that there was no later will revoking it. This last fact is one which is in truth a necessary foundation of the establishment of every testamentary paper. That a description in a will may be applied to a subject inaccurately described in it, if it should be shown by parol evidence that there is no subject to which it applies with accuracy, can admit of no doubt. B C D

"If the description in the will is incorrect, evidence that a subject having such and such marks upon it exists, must be admissible, that the court may determine whether such subject, though incorrectly described in the will, be that which the testator intended": E

WIGRAM, prop. 5, para. 64.

Is then the evidence in this case sufficient to identify the paper propounded as the will? No other paper has been found to which the description can apply. Here is a paper kept by the testatrix up to the time of her death in her own possession, to which, according to her view of that paper, it does apply with the strictest accuracy. If we are to read the codicil with the knowledge of what the testatrix knew—viz., that she had this testamentary paper and that she had no other—can it be doubted that this is the paper referred to? It is said, however, that this is merely the effect of parol evidence, and that there may be other wills, and that if there were two there is nothing in this codicil to distinguish which was the will referred to. Unless there were two, both imperfectly executed and both of the same date (not a very probable event), the question could not arise. As we have already observed, the efficacy of every will, as a last will, depends upon the fact that there is none later. The proof of this must, in all cases, be negative, and necessarily of very different weight, sometimes amounting almost to certainty, as when the will is made on the death-bed; sometimes open to great doubt, as when the will has been made many years before the death; but in every case the court admitting the instrument to probate must be satisfied that it is the last will. Supposing the paper propounded as a will in this case had been executed a few hours before the codicil, and that there was positive proof that the testatrix signed no other paper till she signed the codicil, the objection which is now made would, in law, be precisely of the same force. It has not been disputed that, if the codicil had identified the paper, by describing it as containing certain bequests, such reference would have been sufficient to let in the proof, yet in such case the proof would equally depend on the assumption that there was no later will which contained similar bequests. No doubt the rule of law is as stated by LORD ELDON in *Smart v. Prujean* (1) (6 Ves. at p. 565) that F G H I

A "an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is which is meant to be incorporated."

For this purpose it is necessary that it should be so described as to leave no doubt in the mind of the judge, on the circumstances as they actually existed and are proved before him, that the paper referred to is the paper propounded. In *Smart v. Prujean* (1) the testator directed by his will the proceeds of his real estate to be applied to such purposes as he should appoint by a private letter, which he stated in his will he intended to leave with the abbess of a convent named or her successor. This will, according to the statement of it in the report, does not seem necessarily to have referred to any particular paper then in existence. The letter which he declared his intention to leave might be either one which he had already written or one which he intended to write. In point of fact the testator never deposited any letter in the custody mentioned in his will, but at his death two papers were found in an envelope, which enclosed also his will, one being a letter addressed to his executors, and another a letter addressed to the abbess in question, both documents bearing date some months before his will, and one of them mentioning that he had devised his worldly estate and effects to trustees upon the uses mentioned in the letter. The letter, therefore, in terms, referred to a will already made, and could hardly be construed to refer to the will actually produced, which was dated many months afterwards. Nor had the letter been delivered over to the abbess, which LORD ELDON thought, by the terms of the will, was an essential part of the condition to give it validity. He, therefore, very naturally asked, if other letters had been proved, how could these be distinguished from them? He did not on this occasion express any doubt that parol evidence might be received, provided the reference in the will was to a paper already existing and sufficiently identified.

In a subsequent case, however, if LORD ELDON's observations are accurately reported, he appears to have intimated some doubt whether a paper antecedently existing, and clearly and undeniably referred to, could be made part of the will: *F Wilkinson v. Adam* (2), 1 Ves. & B. at p. 445; but, if any such doubt was ever thrown out, later decisions removed it, and completely established the rule that, before the Wills' Act, 1837, a paper distinctly referred to by a will might be incorporated in it. A reference by a testator to his last will is a reference in its own nature to one instrument to the exclusion of all others; if so, the description identifies the instrument. It is not like a general reference to codicils of which there may be several. In the numerous cases to be found on the subject of republication of a will by a codicil duly executed, and which, in effect, is equivalent to a re-execution of the former instrument, it has never been held necessary that the codicil should refer to the particular paper containing the will, so as to distinguish it from all other wills.

G In *Barnes v. Crowe* (3) LORD COMMISSIONER EYRE observes (1 Ves. at p. 497):

H "The testator's acknowledgment of his former will considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself, because, by the nature of it, it supposes a former will, refers to it, and becomes part of it, and, being attested by three witnesses, his implied declaration and acknowledgment seem also to be attested by three."

I It was decided in that case that the republication of a will by a codicil was not only a recognition of the will, but had the effect of a re-execution, so as to make the will speak as from the date of the codicil, and to give a different meaning to a general devise of lands from that which it previously had.

To this doctrine SIR WILLIAM GRANT, though he felt himself obliged to yield to authority, was much opposed, and when he had to consider *Barnes v. Crowe* (3) in *Pigott v. Waller* (4), he urged very strong reasons against the principle of that decision; but that a codicil to a will, though not referring to it, recognises a

preceding will, and amounts to a republication, he does not intimate any doubt. His words are (7 Ves. at p. 118):

"A direct republication, or re-execution, is an unequivocal act, making the will operate precisely as if it was executed on the day of republication. But a reference to the will proves only that the deviser recognises the existence of a will, which the act of making a codicil necessarily implies; not that he means to give it any new operation, or do more by speaking of it than he had already done by executing it."

He afterwards observes (*ibid.* at p. 120):

"The Lords Commissioners, in *Barnes v. Crowe* (3), appear to have held that every codicil, duly attested, ought to be held a republication. Their opinion seems to be that the codicil was incorporated with the will. The general proposition referred to by LORD COMMISSIONER EYRE is that the execution of a codicil should, in all cases, be an implied republication."

In *Doe d. Williams v. Evans* (5), a testator prepared a will which he did not sign, and about a fortnight afterwards duly executed a codicil on the same sheet of paper, commencing with these words: "Codicil. I, David Evans, make a codicil to the foregoing will"; and it was held that the codicil operated to incorporate and establish the will. BAYLEY, B., in giving judgment, observes (1 Cr. & M. at p. 45):

"The will was written on a sheet of foolscap paper, and the codicil was written on the same sheet. Now, if the codicil had not referred to the will, I should have thought that it did not set up that instrument, but if the codicil do refer to the will, then I am of opinion that it does set it up. The language is 'Codicil: I, David Evans, make a codicil,' which word implies an addition to a former instrument. It proceeds—'a codicil to the foregoing will.' The testator, by executing this codicil, appears to me at that time, in as plain terms as possible, to have set up, not only the codicil, but the will."

In this case there was a distinct reference to the particular paper referred to in such a manner as to exclude all doubt of the instrument intended; but in *Guest v. Willasey* (6), this circumstance was wanting. A testator there made his will, duly attested. On the back of this will he wrote three codicils, two unattested, and the last attested. The last codicil revoked the appointment of an executor made by the second codicil, but did not otherwise refer either to the will or codicil. The court was of opinion that the last codicil operated as a republication, not only of the will and of the second codicil, but also of the first.

It is true that in both these cases the several writings were all upon the same sheet of paper, but when the difficulty arises from an absence of the ceremonies required by the Statute of Frauds, this circumstance does not seem of much importance. It may greatly facilitate the identification—it may make the evidence more conclusive, but it can hardly make it more admissible. Accordingly, it does not seem to have been thought necessary in subsequent cases. In *Gordon v. Lord Reay* (7), a testator made his will, dated Aug. 17, 1812, duly executed and attested, by which he devised £10,000 to the plaintiff, charged on certain estates. He afterwards made a codicil, unattested, dated April 8, 1814, by which, reciting that he had sold the estates so charged, he ordered that the legacies should be paid out of and charged on his other real estates. On Aug. 13, 1818, he made a second codicil, duly executed and attested, by which he confirmed the provisions made by his will bearing date Aug. 17, 1812, in favour of the plaintiff, but took no notice of the codicil of April 8, 1814; yet it was held that a codicil being in law a part of a will, the second codicil, by confirming the will, established the first codicil so as to charge the £10,000 legacy on the real estates.

This case was decided in 1832. In the subsequent case of *Utterton v. Robins* (8), which was argued before the Queen's Bench on a case sent from Chancery in 1834, a question of the same kind arose. In that case the testator made a will dated Sept. 12, 1823, properly executed and attested, and after devising a house to his

A daughter, Mrs. Utterton, gave the residue of his real and personal estate to trustees. By a memorandum in pencil in the margin of his will, dated Aug. 6, 1825, signed, but not attested, the testator, reciting that he had sold the house given by the will to his daughter, gave her instead of it a house in Portugal Street. He afterwards signed another unattested codicil, dated Aug. 9, 1825, to the same effect, and afterwards made several codicils properly executed and attested for the purpose of including in the operation of his will after-purchased estates. The last of these codicils was dated Feb. 5, 1830, and was in these words :

"I, John Robins, do make this fourth codicil to my will, which bears date Sept. 12, 1823. I give and devise all real estates and hereditaments purchased by me since the date and execution of my said will to the trustees therein named, their heirs and assigns, to the uses and upon the trusts in the said will expressed and declared, of and concerning the residue of my real estates."

C The house in Portugal Street had been purchased between the date of the will and of the codicil of Aug. 9, 1825, and the question for the consideration of the court was to whom the house in Portugal Street passed, it being contended, on the part of Mrs. Utterton that the last codicil, though not referring to any instrument but the will, operated as a republication of all the codicils, whether attested or unattested, and that the house in Portugal Street passed to Mrs. Utterton. *Gordon v. Lord Reay* (7) was not cited, and the court did not decide whether such codicil would or would not establish the unattested codicils not referred to, though PARKE, B., may be considered to have intimated an opinion against giving to the codicil what he terms "that immense effect in republication which Mrs. Utterton's counsel ascribed to it"; but the court held that, supposing the codicils in favour of Mrs. Utterton to have been duly attested, the last codicil would have revoked them, and devised the estate in question to the trustees under the will. The learned judges had no doubt that any testamentary paper unattested, sufficiently referred to by a duly executed and attested codicil, would be established by such codicil, though the two instruments were not only not on the same paper, but were not even in the same country. This is the result which we collect from the observations which fell from the judges in the course of the argument, though they contented themselves with sending a certificate of their opinions to the Court of Chancery as to the effect of the devise without assigning any reasons.

F In *Radburn v. Jervis* (9), decided by LORD LANGDALE, *Guest v. Willasey* (6), *Gordon v. Lord Reay* (7), and *Utterton v. Robins* (8), were all cited, and his Lordship was of opinion that a codicil duly executed and attested, though referring only to the will, operated to establish and republish all previous codicils, whether duly executed or not. The testator there made a will giving various legacies, and charging his real estates with all legacies thereby given. He made many codicils, some duly executed and attested, and some not, and by one of the latter class he gave a legacy to Mr. Brundrett. His eleventh codicil was duly executed and attested, and began in these words : "This is a further codicil to the last will and testament of me, Sir Thomas Clarges, Bart., made this 10th of April, 1828." The codicil was confined to revoking the appointment of two gentlemen named in the will as trustees and the legacies given to them, and to appointing Brundrett an executor and trustee in their stead. LORD LANGDALE held that the legacy to Brundrett was not charged on the real estates, because the codicil did not so charge it and the will charged only the legacies thereby given, but he was clearly of opinion that the last codicil operated as a republication of all the preceding codicils as well as of the will, though none of the codicils was referred to. His language is (3 Beav. at p. 460) :

"The object of the last codicil, which was duly executed and attested, was to revoke the appointment of trustees and executors named in the will and the bequests given to those trustees, and to appoint Mr. Brundrett to be executor and trustee, and though, in effect, it operated as a republication of the will and former codicils, and might have extended any prior general devise to lands subsequently acquired before the date of the last codicil, and have subjected

such subsequently acquired lands to a general charge contained in the will; yet, considering it as a republication of the will and all the preceding codicils, I do not think the effect is to charge on the land legacies which by those codicils were not so charged."

Aaron v. Aaron (10), before KNIGHT-BRUCE, L.J., recognises the rule of law as established in *Gordon v. Lord Reay* (7), and treats it as not inconsistent with the decision in *Utterton v. Robins* (8), and his Lordship observes: "It can make no difference whether the codicil be written on the same paper with the will or not."

The cases to which we have referred all turned upon instruments anterior to the Wills Act, 1837, but they show that before that Act, in order to give validity against real estate to a testamentary instrument previously ineffectual for the purpose, such a general reference was sufficient as, when compared with the evidence produced, would enable the court to identify the document; that a codicil would operate as a republication of the will, and that a republication of a will would amount to a republication of whatever antecedent papers might answer the description of codicils, leaving it to be ascertained by parol evidence what might be the particular papers answering the description of either will or codicil. This doctrine was very much discussed in *Hitchings v. Wood* (11) before the Judicial Committee in 1841, and many valuable observations bearing upon this question were made by LORD LYNTHURST, though, as the case arose before the Act of 1837, and related only to personal estate, it has not the authority of a decision on the point in controversy. As to the certainty of the reference required by the law in the incorporating instrument, there does not seem to be much distinction under the Statute of Frauds between a will and any other instrument. In either case it is necessary, and it is sufficient that the description should be such as to enable the court, when the evidence is produced, to say what is the instrument intended.

In *Shortrede v. Cheek* (12), a guarantee in writing referred to "the promissory note," and evidence was offered of a particular promissory note, alleged to be the one in question. It was objected that the writing did not specify what promissory note was meant; that there might be more than one. But the opinion of the court was that, although, if there had been more than one, there would have been difficulty in admitting parol evidence to prove which note was meant, yet as only one was proved, and there was no evidence of any other, the description was sufficient. PARKE, J., observed, in answer to the argument, that there might be other notes (1 Ad. & El. at p. 60):

"Even if the note had been fully described, you might say that it was possible there might have been another note, and that the contrary should have been shown."

The same doctrine was carried still further by LORD LYNTHURST in *Hodges v. Horsfall* (13). A contract in writing was made, one of the terms of which related to the execution of certain buildings "as per plan agreed upon." In that case several plans had been drawn out, and discussed at different times, and it was doubtful which was the plan meant. LORD LYNTHURST, in a bill for specific performance of the contract, held, on the authority of *Clinan v. Cooke* (14), that parol evidence was admissible to prove which of the plans was intended, but he thought that the evidence was insufficient to identify the one insisted on, and on that ground dismissed the bill. It has been supposed that this case is open to criticism, on the ground that the contract did not of necessity refer to any writing, and that to ascertain, by parol evidence, which, of several documents, all answering the description, was intended, is going further than any former case, and is contrary to the opinion, or inclination of the opinion, of the judges in *Shortrede v. Cheek* (12): WIGRAM, prop. 7, para. 165, p. 127, n.

For the present purpose it is quite immaterial to consider the value of these objections. In the present case it is clear that the thing referred to is a writing; that it is in its nature a single instrument; and that only one document is found to answer the description. *Shortrede v. Cheek* (12) and *Hodges v. Horsfall* (13)

A are referred to by LORD COTTENHAM in *Squire v. Campbell* (15) (1 My. & Cr. at p. 480), as only establishing a principle which he seems to consider as settled, that when an agreement refers to some other document the identity of the thing referred to may be established by parol evidence. A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular, but the authorities seem clearly to establish that where there is a reference to any written document, described as then existing in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is whether the evidence is sufficient for the purpose.

C Supposing the evidence to be admissible as the case would have stood under the Statute of Frauds, has the Act of 1837 altered the general law upon the subject? There are no words in the Act by which any such intention is declared. It has altered the mode in which the instrument containing the will is to be executed, but it has left untouched, as it appears to us, the question what papers are to be held included in the instrument so executed. The Statute of Frauds enacted that all devises of lands should be in writing and signed by the devisor, or by some other person in his presence and by his express directions, and should be attested and subscribed in his presence by three or four credible witnesses, or else they should be void. The Wills Act, 1837, provides that no will shall be valid unless it be in writing and signed at the foot or end thereof by the testator, or some other person in his presence and by his direction, and such signature shall be made or acknowledged in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. The ceremonies necessary to authenticate the instrument are altered, but no alteration is made in the effect to be given to words used in it.

F It would seem that a paper which would have been incorporated in a will executed according to the Statute of Frauds must now be incorporated in a will executed according to the new Act. In those instances in which the legislature was of opinion that the construction put by decided cases upon the Statute of Frauds as to the execution of wills, or the rules applied to devises contained in them, required alteration, provisions for that purpose were introduced into the Act. The incorporation of unattested documents by reference in an attested will was a subject of very great importance that had excited much attention, and the propriety of which had been sometimes doubted, at least to the extent to which it had been carried. It can hardly be supposed that, if it had been intended to introduce so great an alteration in the law, it would not have been introduced by express declaration. But to have introduced any such declaration would have occasioned, in many cases, great inconvenience and injustice. The only circumstance of which we are aware from which any colour can be given to the argument that the Act had the operation now suggested is the construction put upon it by this committee, in *Smee v. Bryer* (16) where it was held that the signature must be so affixed at the end of the will as to leave no blank space for any interpolation between the end of the will and the signature, and it might be said that such a security against fraud could not be afforded if a paper only referred to in the will could be admitted as part of it. But this construction was found to produce such extensive injustice that by the Wills Act Amendment Act, 1852, s. 1, the legislature interfered to alter the law so established, and this Act passed before the codicil in this case was executed.

I It was not contended in this case, nor, as far as we are aware, has it been contended in any case since the Act of 1837, that no reference, however distinct, is now sufficient to incorporate another testamentary paper in the paper duly executed as a will or codicil, but the question has always been what reference in the valid paper is sufficient to let in evidence to identify the invalid paper. Upon this point the important distinction has been introduced by the Act to which we have already alluded, viz., that whereas before the Act a paper not duly executed might be a codicil as to personal estate, and might, therefore, be referred to by that description,

no such paper can now be properly so designated. That, with this exception, the law on this subject remains as it was before the statute, appears from an examination of the authorities, although in deciding on the question what is or is not a sufficient description to let in evidence, cases of great nicety are to be found. A

In April, 1841, the question now raised came before the Prerogative Court in *In the Goods of Smith* (17). In that case the testator, in May, 1838, made a codicil to his will, signed but not attested. In August, 1840, he made a further codicil, signed and duly attested. This was written on the second side of the paper on which the former codicil was written, and the deceased described it as "a second codicil to my last will and testament." SIR HERBERT JENNER FUST decreed probate of both codicils, observing: "The latter codicil being duly executed, referring to the former is an execution of the former codicil also." In *In the Goods of Sotheron* (18), the same learned judge recognised the rule as laid down in *In the Goods of Smith* (17) but held the reference in the will not to be sufficient to let in evidence of the paper propounded. In January, 1843, in *In the Goods of Claringbull* (19), SIR HERBERT JENNER FUST again acted on the rule laid down in *In the Goods of Smith* (17). B C

In the course of the same year he had to determine the important case of *Countess De Zichy Ferraris and Croker v. Marquis of Hertford* (20). The testator had there made a will and twenty-nine codicils. Some of the codicils were made before the Act of 1837, and required no attestation; others were made after the Act, some of them being attested and others not. One codicil, made at Milan in October, 1838, was unattested. He made a further codicil dated in April, 1839, duly executed and attested, and thereby declared "that he ratified and confirmed his will and codicils." The question was whether the Milan codicil was thereby established, and it was decided by SIR HERBERT JENNER FUST that it was not, and upon the principle that it was not a codicil, that it was not distinctly referred to as such, that there were other papers which were codicils and would satisfy the words of the instrument referring to them, and that the court could not, therefore, extend the words of reference to an instrument not answering the description. In June, 1844, the case on Lord Hertford's testamentary papers came before the Judicial Committee by way of appeal from the decision of SIR HERBERT JENNER FUST (*Croker v. Marquis of Hertford* (20)), and the decision was affirmed. DR. LUSHINGTON, in delivering the judgment of the committee, observed very strongly upon the inconvenience which might result from admitting papers to probate neither properly executed nor distinctly identified, but he also relied on the ground of the judgment in the court below, viz., that, there being no reference to the particular paper except under a general description of codicils, and there being instruments which properly answered the description of codicils, the words could not be extended to an instrument not properly answering the description. This was the case mainly relied on by the appellant in the argument before us. It is a decision on every ground entitled to the utmost respect, and we not only hold ourselves bound by its authority, but entirely assent to its principle. We can find, however, in it nothing inconsistent with the rule adopted in *In the Goods of Smith* (17) and *In the Goods of Sotheron* (18), which applied under the new Act the principles adopted under the old. D E F

The question came again before SIR HERBERT JENNER FUST in *Ingoldby v. Ingoldby* (21), in 1846. In that case the testator made an unattested codicil to his will, and afterwards made a second, properly attested, with the words, "this is another codicil to my will." On his death, these two codicils only were found, and SIR HERBERT JENNER FUST admitted them to probate. The learned judge observes (4 Notes of Cases, at p. 497): G H I

"I think the circumstances of this case are sufficient to distinguish it materially from the *Marquis of Hertford's case* (20). There is only one paper here which comes under the description of a codicil. It is not, indeed, a codicil, because it is not duly executed; but is clear that the testator intended it to be a codicil, not only from the paper itself, but from the endorsement; and it was attached

- A to the will by sealing-wax, without a seal. He describes the second paper as 'another codicil,' evidently referring to what he believes to be in existence. I apprehend there are cases in which a testator has bequeathed property to his children, and there being no legitimate children to answer the description, illegitimate have taken. So here, there being no duly executed codicil, the words may have reference to an unexecuted codicil."
- B The learned judge then adverts to the circumstance that there was a reference in the second codicil to a bequest contained in the first. He adverts to it as a not immaterial circumstance, but does not make it the ratio decidendi.
- C The same question again came before the court in 1849, in *In the Goods of Phelps* (22). There the testator made his will, duly executed, and afterwards made a first codicil on the same sheet of paper, attested by only one witness. He then executed a second codicil, duly attested, by which he referred to and confirmed the will, but took no notice of the first codicil. SIR HERBERT JENNER FUST held that the first codicil was not established by the second, for the instrument in question was not a codicil, and, therefore, the confirmation of the will did not amount to a confirmation of the codicil. In *Haynes v. Hill* (23), the point once more arose in August, 1849. In that case a testator made his will and several codicils, the last of which only was attested. The last codicil confirmed the will, but said nothing of the codicils. The question was in truth the same as had arisen in *In the Goods of Phelps* (22), and the same decision was pronounced. SIR HERBERT JENNER FUST went very fully into the doctrine, and held, as it seems on the most satisfactory grounds, that the case was governed by *Marquis of Hertford's* case (20), there being no reference to anything but the will, and the unattested codicils not being part of it. These cases, when compared with *Gordon v. Lord Reay* (7), clearly illustrate the distinction introduced by the Wills Act, 1837, to which we have already adverted. In *In the Goods of Countess Dowager of Pembroke* (24), SIR JOHN DOPSON, from whose decision the present appeal is brought, followed the decision of SIR HERBERT JENNER FUST in *In the Goods of Sotheron* (18), but his subsequent decision in the present case shows that he did not mean to infringe upon the rules to which we have referred.
- F The result of the authorities both before and since the Act of 1837, appears to be that when there is a reference in a duly executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that in the existing circumstances there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified. As in this case the only question is whether there is sufficient evidence to identify the paper propounded as the will, it is not necessary to consider whether any evidence was received in this case, to which objection might be made.
- G The facts on which we rely are, beyond all question, admissible in evidence, viz., that the paper in question was written by the testatrix and was found locked up in her possession at her death in a sealed envelope on which there was an endorsement describing it as her will; that after diligent search no other paper has been found answering the description; and that the only trace of any other testamentary paper in the evidence, is the proof of an earlier will, which the testatrix destroyed.
- H Their Lordships, therefore, are of opinion that the sentence complained of must be affirmed, and they think that the costs of all parties must come out of the estate.
- I Their Lordships cannot properly refer to the extra-judicial opinion of any individual, however eminent, as an authority for their decision, but it is satisfactory to them to observe that, in a work which, though it professes to be written only for the unlearned, may often be consulted by the most learned with advantage. LORD ST. LEONARDS treats as clear a point which, from its extreme importance, they have thought it advisable to examine at so great a length. In the *HANDBOOK ON PROPERTY LAW* (6th Edn.) p. 151, we find the following passage :

"So a will or codicil not duly executed may be rendered valid by a later codicil duly executed and referring clearly to it, or in such a manner as to show the intention. Therefore, if you were to begin your codicil, 'This is a codicil to my last will,' and there was only one will, those words would set up the will, although not duly executed."

The very learned author then points out the distinction where there are several wills and codicils, and refers to the decision in *Marquis of Hertford's* case (20), which he understands as we do.

Appeal dismissed.

BURRELL v. EARL OF EGREMONT

[ROLLS COURT (Lord Langdale, M.R.), December 8, 16, 18, 19, 1843, April 17, 1844].

[Reported 7 Beav. 205; 13 L.J.Ch. 309; 3 L.T.O.S. 72; 8 Jur. 587; 49 E.R. 1043]

Settled Land—Tenant for life—Incumbrance created by settlor—Payment off of charge by tenant for life—Right to have charge raised out of estate—Presumption against exoneration of estate.

If a tenant for life pays off a charge on the estates, in the same transaction merging the security by taking an assignment connecting it with the legal estate, that *prima facie* puts an end to the charge. A simple payment of the charge without more is sufficient to establish the right of the tenant for life to have the charge raised out of the estate. He has no obligation or duty to make a declaration or do any act demonstrating his intention. He may, if he thinks proper, exonerate the estate, but the presumption is that he pays the charge for his own benefit and not for the benefit of the persons entitled in remainder. This presumption, however, can be rebutted by evidence establishing a contrary intention on his part.

Limitation of Action—Charge—Recovery of money secured on charge on settled estates—Charge paid off by tenant for life—Right to charge as against remaindermen.

Where a tenant for life had paid off a charge of £25,000 on the settled estates and so was entitled to the charge for his own benefit,

Held: the Real Property Limitation Act, 1833, s. 40 [now s. 18 (1) of the Limitation Act, 1939], did not apply to a case where there was no assignable person liable to pay a charge on settled estates, no person who by delay could be induced to suppose that the charge was abandoned or merged, and where the rent out of which the interest of the charge ought to be paid was receivable by and belonged to the same person as was entitled to the interest, and, although twenty years had elapsed before the death of the tenant for life without anything being paid on account of the charge or any acknowledgment being given, his representatives were entitled to the charge as against the remaindermen.

Notes. Explained: *Topham v. Booth* (1887), 35 Ch.D. 607. Considered: *Patten v. Bond* (1889), 60 L.T. 583; *Re England, Steward v. England* (1895), 65 L.J.Ch. 21. Applied: *Re Harvey, Harvey v. Hobday*, [1896] 1 Ch. 137. Followed: *Gifford v. Fitzhardinge*, [1899] 2 Ch. 32. Considered: *Manks v. Whiteley*, [1912] 1 Ch. 735. Referred to: *Spickernell v. Hotham* (1854), Kay, 669; *Byam v. Sutton* (1854), 19 Beav. 556; *Roddam v. Morley* (1856), 2 K. & J. 336; *Knight v. Bowyer* (1857), 23 Beav. 609; *Burrowes v. Gore* (1858), 6 H.L.Cas. 907; *Lord Kensington v. Bowverie* (1859), post p. 304; *Re Allen, Bassett v. Allen*, [1898] 2 Ch. 499; *Whiteley v.*

- A *Delaney*, [1914] A.C. 132; *Re Welch, Mitchell v. Willders*, [1916] 1 Ch. 375; *Re Hall, Holland v. A.-G.*, [1941] 2 All E.R. 358; *Bowring-Hanbury's Trustee v. Bowring-Hanbury*, [1943] 1 All E.R. 48.

As to the discharge of encumbrances by a tenant for life, see 34 HALSBURY'S LAWS (3rd Edn.) 641-643; and for cases see 40 DIGEST (Repl.) 758, 759. As to limitation of actions to recover money secured by mortgage or charge, see 24 HALSBURY'S LAWS 264 et seq.; and for cases see 32 DIGEST (Repl.) 468 et seq. For Limitation Act, 1839, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to in argument:

Crowder v. Clowes (1794), 2 Ves. 449; 30 E.R. 719; 44 Digest 1221, 10,562.

Reade v. Litchfield (1797), 3 Ves. 475; 30 E.R. 1113, L.C.; 23 Digest (Repl.) 505, 5692.

C *Bootle v. Blundell* (1815), 1 Mer. 193; 19 Ves. 494; 35 E.R. 646, L.C.; 23 Digest (Repl.) 505, 5697.

Kirke v. Kirke (1828), 4 Russ. 435; 6 L.J.O.S.Ch. 143; 38 E.R. 868; 44 Digest 301, 1329.

Shipperdson v. Tower (1842), 1 Y. & C. Ch. Cas. 441; 6 Jur. 658; 62 E.R. 961; 44 Digest 607, 4341.

D *Williams v. Bishop of Landaff* (1786), 1 Cox, Eq. Cas. 254; 29 E.R. 1153; 38 Digest (Repl.) 788, 61.

Jones v. Bruce (1840), 11 Sim. 221; 4 Jur. 1055; 59 E.R. 859; 44 Digest 299, 1312.

Forbes v. Moffatt (1811), 18 Ves. 384; 34 E.R. 362; 20 Digest (Repl.) 534, 2444.

E *Drinkwater v. Combe* (1825), 2 Sim. & St. 340; 3 L.J.O.S.Ch. 178; 57 E.R. 376; 20 Digest (Repl.) 540, 2503.

Trevor v. Trevor (1833), 2 My. & K. 675; 39 E.R. 1102; 20 Digest (Repl.) 540, 2505.

Earl of Buckinghamshire v. Hobart (1818), 3 Swan. 186; 36 E.R. 824, L.C.; 20 Digest (Repl.) 539, 2502.

F *Corbett v. Barker* (1796), 1 Bli. 136, n.; 3 Anst. 755; 145 E.R. 1029; 32 Digest (Repl.) 547, 1417.

Raffety v. King (1836), 1 Keen, 601; 6 L.J.Ch. 87; 48 E.R. 439; 40 Digest (Repl.) 755, 2420.

Brocklehurst v. Jessop (1835), 7 Sim. 438; 58 E.R. 906; 32 Digest (Repl.) 456, 751.

G *Brooksbank v. Smith* (1836), 2 Y. & C. Ex. 58; Donnelly, 11; 6 L.J.Ex. Eq. 34; 160 E.R. 311; 32 Digest (Repl.) 597, 1830.

Denys v. Shuckburgh (1840), 4 Y. & C.Ex. 42; 5 Jur. 21; 160 E.R. 912; 32 Digest (Repl.) 598, 1831.

Ancaster v. Mayer (1785), 1 Bro.C.C. 454; 28 E.R. 1237, L.C.; 23 Digest (Repl.) 505, 5690.

H *Brummel v. Prothero* (1796), 3 Ves. 111; 30 E.R. 921; 23 Digest (Repl.) 504, 5685.

Lord Inchiquin v. French (1745), 1 Cox, Eq. Cas. 1; Amb. 33; 29 E.R. 1034; sub nom. *Lord Inchiquin v. O'Brien*, 1 Wils. 82; sub nom. *O'Brien v. Inchiquin*, Ridg. temp.H. 230, L.C.; 23 Digest (Repl.) 508, 5722.

Samwell v. Wake (1782), 1 Bro.C.C. 144; 2 Dick. 597; 28 E.R. 1043, L.C.; 23 Digest (Repl.) 510, 5736.

I *Tower v. Lord Rous* (1811), 18 Ves. 132; 34 E.R. 267; 23 Digest (Repl.) 505, 5696.

M'Clelland v. Shaw (1805), 2 Sch. & Lef. 538; 23 Digest (Repl.) 510, *1244.

Webb v. Jones (1786), 2 Bro.C.C. 60; 1 Cox, Eq. Cas. 245; 29 E.R. 33; 23 Digest (Repl.) 507, 5708.

Action by the legal representatives of a tenant for life for a declaration that they were entitled to recover, as against remaindermen, the amount of charges upon the estate which had been paid off by the tenant for life.

By the marriage settlement of Charles Earl of Egremont, dated Feb. 26, 1750, A
a term of 600 years was vested in trustees for the purpose of raising out of an estate
in Yorkshire, by mortgage or sale, the sum of £25,000 for the portions of his
younger children. By his will, dated July 31, 1761, Charles Earl of Egremont,
appointed this £25,000 for the portions of his younger children as follows: £10,000
each to his daughters, Lady Elizabeth and Lady Frances, and £2,500 to his sons
Percy Charles and Charles William. He gave directions as to the payment of B
interest and the time of payment, and provided that if any younger son should
become an eldest son, or if any younger son or daughter should die without issue,
before the time of payment, his or her portion should sink into the inheritance
charged therewith, and not be raised or paid. He then devised his estates in
Somerset, Dorset, and Cornwall (subject in the first place to the raising and paying
the annuities and sums of money then affecting the same, or thereafter charged C
thereon by that his will, or any codicil he should thereafter think fit to add thereto),
unto his eldest son George, and his assigns, for life, with various remainders over,
under which the defendant, the present Earl of Egremont, had become entitled to
the estates in possession. He then gave as follows:

"I give and bequeath to my daughters Elizabeth and Frances the sum of
£10,000 a-piece, and to my sons Percy Charles and Charles William £2,500 D
a-piece, which several portions I will shall be in augmentation of, and as an
addition to, the portions already provided for them by my said marriage settle-
ment, and hereinbefore appointed to be paid to them as aforesaid, and shall be
raised and paid to my said sons and daughters respectively, at such times, and
under such conditions, and subject to such contingencies, and with such interest, E
as I have before directed and appointed their original portions to be raised
and paid by this my will. And I do hereby subject and charge my manors,
etc., and hereditaments in the several counties of Somerset, Dorset, and Corn-
wall hereinbefore by me devised to my eldest son, with the raising and paying
the said portions and sums of money to my said sons and daughters respectively,
at the times and in the manner aforesaid."

After gifts of the mansion houses, and of an annuity of £300, and of certain personal F
estate as heirlooms, the testator gave certain pecuniary legacies, which he directed
to be exclusively paid out of certain particular parts of his personal estate. Then
he gave all the residue of his personal estate, after payment of his debts and
funeral expenses, and the legacies aforesaid, to his eldest son, George, and he
added a proviso that if his personal estate should not extend to pay such of his G
debts as should not be charged on his real estate, and his said funeral expenses
and legacies, then he charged his estates in Somerset, Dorset, and Cornwall, in aid
and to make good any deficiency that might happen in his said personal estate.
For that end and purpose he empowered the trustees to raise by sale or mortgage
of the estate and pay

"not only the sums of money and portions thereinbefore by him charged and H
secured on the said premises, for his younger children, and such deficiency as
should happen in his personal estate to pay his debts and legacies,"

but also such sums of money as should be necessary for the other purpose in his
will mentioned.

Earl George attained the age of twenty-one in 1772 and became the sole legal
representative of his father, Earl Charles and in May, 1773, he, out of his own I
monies, paid the original and additional portions of his sister Lady Elizabeth, and
on that occasion the real and personal estate of Earl Charles were released. In
1776 Earl George, out of his own monies, paid the original and additional portions
of Lady Frances, and obtained a release, as heir of the body and executor of his
father. In 1778 and 1781, he in like manner paid the original and additional
portions of Percy Charles, and Charles William, who thereupon executed releases.
During his life Earl George did not indicate whether he intended the additional
charges paid off by him to merge for the benefit of those entitled in remainder or

A not. Earl George died in 1837. By his will he, among other things, devised his hereditaments in the counties of Wilts, Somerset, Devon, Dorset, and Cornwall to the defendant Earl George Francis, and the heirs male of his body, and in default of such issue, unto the persons, and for such estates, as the estates in the same counties were, by the will of Charles Earl of Egremont, devised, after failure of the heirs male of his body. The bill in the present action was filed by the legal personal

B representatives of George Earl of Egremont, seeking to have the £25,000 bequeathed in addition by the will of Earl Charles to his younger children, which had been paid by George Earl of Egremont to his brothers and sisters, raised out of the real estates of which he had been tenant for life, and to which estates the present Earl had now become entitled. The defendant resisted this claim on three grounds. First, he said that the sum of £25,000 was a mere legacy, primarily charged on the

C personal estate of Charles Earl of Egremont, admitted by all parties to have been sufficient for its payment, and that as it was charged on the real estate as an auxiliary security only, and had been properly paid out of the personal estate, the residuary legatee had no right to a reimbursement. Secondly, that, even if it were primarily charged on the real estate, still George Earl of Egremont did not intend, when he paid it off, to keep it alive, but to have it released, and that it

D had been released accordingly. Thirdly, that, if the right claimed by the plaintiffs ever existed, it was now barred by the Statute of Limitations.

Pemberton Leigh, Turner, Lee and Piggott for the plaintiffs.

Kindersley, Tinney and Lloyd for the defendant.

Cur. adv. vult.

E April 17, 1844. LORD LANGDALE, M.R.—This bill is filed by the legal personal representatives of the late George Earl of Egremont against the present earl, and it prays that an account may be taken of the principal money and interest alleged to be due to the plaintiffs in respect of a sum of £25,000 charged on certain estates in the counties of Somerset, Dorset and Cornwall, by the will of Charles

F Earl of Egremont, the father of the late Earl George and the grandfather of the defendant, and that the amount of what shall be found due may be raised by sale or mortgage of a sufficient part of the estates, and paid to the plaintiffs.

His LORDSHIP stated the facts, considered the terms of Earl Charles' will, and continued: Taking the whole of this will into consideration, I am of opinion, that the effect of it is to make the additional portions given to the younger children, a primary, if not an exclusive, charge upon the estates in Somerset, Dorset, and

G Cornwall, devised to the eldest son for life.

We have next to consider the effect of the several acts done by Earl George with reference to the payment of the several portions to his brothers and sisters. If a tenant for life pays off a charge on the inheritance, he is *prima facie* entitled to that charge for his own benefit, but he may, if he think proper, exonerate the

H estate. In the absence of evidence the presumption is that he pays the charge for his own benefit, and not for the benefit of the persons entitled in remainder, but evidence may show the contrary conclusion to be true.

The Lady Elizabeth Alicia Maria was married to Mr. Henry Herbert in the year 1771, and upon that occasion two instruments were executed, and an account stated. By one of the instruments it was recited that the Lady Elizabeth was, by virtue

I of the settlement executed before the marriage of the late Earl Charles, and by his will, entitled to two sums of £10,000 each, amounting together to £20,000 for her fortune or portion, and that the said two sums of £10,000 and £10,000 were charged upon and to be paid out of the real and personal estates of Earl Charles; and by the other of the instruments, after reciting the settlement and the will of Earl Charles, it was further recited, that upon the treaty for the intended marriage, it had been proposed, and agreed, that the several principal sums of £10,000 and £10,000 the original and additional portions of the Lady Elizabeth, so charged upon and payable out of the real and personal estates of Earl Charles, should be assigned

as therein mentioned; and by the account then stated it appeared that the interest of one sum of £10,000 was paid by the guardians of Earl George, and that the interest of the other sum of £10,000 was paid by the countess, the executrix of the late Earl Charles. Earl George attained the age of twenty-one years on Dec. 18, 1772; and on May 11, 1773, he paid the sum of £20,000, pursuant to an arrangement made on the marriage of his sister the Lady Elizabeth to Mr. Herbert; and upon that occasion, a deed was executed by and between Mr. Herbert and the Lady Elizabeth of the first part, the Earls of Pembroke, Ashburnham, and Thomond, and Charles Herbert, of the second part, the Countess Dowager of Egremont and the Earl of Aylesford, of the third part, and George, Earl of Egremont, therein described as the eldest son and heir and executor of the will of his father Earl Charles, and also residuary legatee in the same will named, of the fourth part; and thereby, after reciting, among other things, that Earl George had attained the age of twenty-one years, and thereupon became entitled in possession to, and soon afterwards entered upon, the real estates limited and devised to him by the settlement and will of Earl Charles, and upon which, or upon part of which, the principal sum of £10,000, the original portion of the Lady Elizabeth, stood charged, and that the said Earl George, also, upon attaining the age of twenty-one years became entitled to the residuary personal estate of his father, which had been accounted for and satisfied to him by his guardians; and that he, having entered upon his real estates and possessed himself of his father's residuary personal estate, was desirous to pay off and discharge the several sums of £10,000 and £10,000, being the amount of the original and additional portions of his sister Lady Elizabeth, it was witnessed, that under the circumstances and for the reasons therein mentioned, the Earls of Pembroke, Ashburnham, and Thomond, and Charles Herbert, assigned the said two sums of £10,000 and £10,000 to Henry Herbert, and appointed Earl George, as executor, residuary legatee, and heir to his deceased father, and in every other right and capacity him thereunto requiring, to satisfy the same sums of £10,000 and £10,000 to the said Henry Herbert, and the same were accordingly paid; and the said Henry Herbert acknowledged the receipt thereof, in full satisfaction of the original and additional portions of the Lady Elizabeth, and of all claims and demands in respect thereof, upon the estates real and personal of Earl Charles, or upon the dowager countess, and the Earl of Thomond, or either of them; and Henry Herbert released them, and all and singular the estates real and personal of Earl Charles, from the same, and covenanted to do any other act required for further releasing the same and better extinguishing the same sums of money and all claims of Henry Herbert and Lady Elizabeth by reason thereof, or upon the estates of Earl Charles.

In the same month of May, 1773, and by deed, dated May 11, and made between Earl George, described as the eldest son and heir of Earl Charles, of the one part, and the dowager countess and the Earl of Thomond and John Drummond, of the other part, after reciting, among other things, that there was standing in the names of the Earl of Thomond and John Drummond, the capital yearly sum of £2,186 7s. 5d. consolidated long annuities which had been purchased out of the surplus produce of the real and personal estates of Earl George during his minority and were his absolute property in his own right, and that the portions of Lady Elizabeth had been paid, and that the Lady Frances, being in the eighteenth year of her age, and her portions being payable at her age of twenty-one years or day of her marriage, Earl George, in order to exonerate as well the residuary personal estate of his late father of and from the payment of the additional portion, legacy, or sum given to the Lady Frances by her father's will, and also the settled estates, and all other the estates real and personal of Earl Charles, of and from the original portion or like sum of £10,000 provided for Lady Frances by the settlement, and to secure and provide for the more immediate payment of the several portions or sums of money when and as the same should respectively become payable, had proposed and agreed that the yearly sum of £784 6s. 3d. Long Annuities, part of the yearly sum of £2,186 7s. 5d. Long Annuities before mentioned, should be appropriated and set

A apart to answer and pay the several portions of the Lady Frances, when the same should become payable; and after reciting that for the same purposes Earl George had proposed and agreed, that the yearly sum of £392 3s. 2d. Long Annuities should be appropriated and set apart to answer and pay the portions and additional portions, by the settlement and will of Earl Charles provided for his younger sons Percy Charles, and Charles William. It was, by the said deed, witnessed, that the same

B Long Annuities should be appropriated and set apart for the purposes of the recited arrangement. By another deed, also dated May 11, 1773, after reciting the matters aforesaid, Earl George allowed the accounts of his mother and guardians, and released his claims as residuary legatee. On July 9, 1776, the Lady Frances attained the age of twenty-one years. Soon afterwards, the Long Annuities set apart to answer her portions were transferred into her name, and thereupon, by

C deed poll dated August 29, 1776, she acknowledged that she accepted the same in full satisfaction of her portions under the settlement and will of her father, and she released Earl George, as well in his own right, as in his character of heir of the body and executor of his father.

Percy Charles attained the age of twenty-one years on Sept. 27, 1778, and Charles William attained that age on Oct. 8, 1780. At these times the Long Annuities

D provided to answer the portions were insufficient for the purpose, the sums required to make up the deficiencies were supplied by Earl George, and the younger sons, Percy Charles and Charles William, upon receiving the Long Annuities and the sums to make up the deficiencies, i.e., upon receiving their whole portions, executed releases dated, as to one of them, on Dec. 25, 1778, and as to the other of them, on Jan. 31, 1781.

E We cannot now know what Earl George might have said or done if he had been told that the charge of the additional portions exclusively or primarily affected the estates in Somerset, Dorset, and Cornwall, that he was under no obligation to pay the same out of his own money, and that, paying the same, he would be or was personally entitled to the benefit of the charge. Under the circumstances, it is possible, perhaps not improbable, that he might have desired and declared his intention to exonerate the estate, but, after a careful consideration of the deeds which were executed on the several occasions on which the portions of the younger children were provided for and paid, I am of opinion that the question was never brought to his attention. The original portions were known to be charged on the York estates, and were so treated, and there are expressions in the deeds which are to be explained with reference to them, and to the estates on which they were

G charged, but it seems to be clear that Earl George conceived himself, as executor and residuary legatee, bound to pay the additional portions out of his own money or the personal estate of which he was the residuary legatee. He was ignorant that the additional portions were properly and primarily chargeable on the real estates, of which he was tenant for life, and the nature of the charge being unknown, and unalluded to in the deeds, they contain no indication whatever of intention either

H to continue the charge or to exonerate the estate.

A tenant for life paying off a charge upon the estate, in the same transaction merging the security by taking an assignment connecting it with the legal estate of inheritance, *prima facie* puts an end to the charge, but something is required to manifest an intention to exonerate the inheritance. A simple payment of the charge without more is sufficient to establish the right of the tenant for life to have the

I charge raised out of the estate. He has no obligation or duty to make a declaration, or to do any act demonstrating his intention. The burden of proof is upon those who allege that, in paying off the charge, he intended to exonerate the estate. In the present case there is no evidence whatever except that which may be derived from the execution of the several deeds which have been stated, and as it does not appear from those deeds that Earl George knew his rights, it cannot be collected from them that he intended to waive, or in any way relinquish, his rights. The words of the deeds are fully satisfied, and are explicable only on the supposition that he did not know that he had any right to have the additional portions raised

out of the devised real estate, and that he did understand it to be his obligation to pay them out of the personal estate or his own money. If it had been necessary to show, otherwise than by legal presumption, that Earl George intended to continue the charge, it would have been impossible to prove it, because it does not appear that he knew there was a primary charge, and the plaintiffs could not have proved that he intended to continue a charge, the existence of which, as a primary charge, was unknown. A

The difference between the situation of the plaintiffs and that of the defendant is that there is a presumption in favour of the plaintiffs and not in favour of the defendant. In the relation which subsisted between Earl George and the estate the law presumes that in paying off the sum charged he did not intend to exonerate the estate. It may be true, that if Earl George had known the nature of the charge and that he might have raised it for his own benefit, he might have thought fit to exonerate the estate, but this is no more than conjecture, and, in the absence of sufficient evidence, it cannot countervail a legal presumption, and I am under the necessity of concluding, that Earl George did not, by his acts, upon payment of the portions, exonerate the estates from the additional portions charged thereon by the will of Earl Charles, and that after the payment of the portions in 1781, Earl George was entitled to have the amount raised for his own benefit. B C D

With respect to the Statute of Limitations, it was argued for the defendant, that the right, if any, of Earl George to the charge on the land in respect of the portions, accrued, at the latest, on Jan. 31, 1781, when the last portion was paid. Releases having been given, it is said that the trustees could not have raised the portions at their own discretion upon the demand of Earl George; that if he had desired to avail himself of the charge, and have it raised for his own benefit, he must have filed a bill against the trustees and the remainderman; and that his right in this respect accrued sixty years before the present bill was filed. Earl George, it is said, if he had any right, was to be considered as in possession of an estate exonerated, with a right to re-impose the charge, and his right to re-impose the charge is lost by neglect, non-claim, and lapse of time under the statute. This argument, however, assumes, that the estate was exonerated, which is the point in question, but it is further said that there is no pretence that any rent was ever applied, or intended to be applied, in payment of interest, so that Earl George, if he ever was entitled to the charge, received no interest upon it; that he received the rents and applied them to his own use without any regard to the charges; and that his acts in that respect ought not to be qualified for the benefit of his executors. E F

The Real Property Limitation Act, 1833, s. 40 [now Limitation Act, 1939, s. 18 (1)] enacts that no suit shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless, in the meantime, some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent. It is undoubted that the right of Earl George to receive the charge accrued to him in the year 1781, that no subsequent acknowledgment of his right thereto was ever made, and that more than twenty years after the right accrued expired in the lifetime of Earl George. But it is argued for the plaintiffs that the clause in the statute cannot be held to apply to cases which do not admit of the qualification referred to in the same clause, and that, under the circumstances of this case, Earl George ought to be deemed to have kept down the interest on this charge. G H I

The clause of the act assumes that there is not only a person capable of giving a discharge or release, but also an assignable person by whom the charge is presently payable, or who is capable of paying the principal or interest of the charge, or of making an acknowledgment of the right thereto, but, in this case, there was a charge upon the estate which no assignable person was then liable to pay, and in

A respect of which no person was capable of making an acknowledgment that it was due, as, during the life of Earl George, it was necessarily uncertain who, at the time of his death, would be the person to take in remainder subject to the charge. It is further argued that the statute can only apply to cases where one person is entitled to receive and give a discharge, and another person is entitled to pay or capable of giving an acknowledgment of the right to the charge; and that, if the

B statute were held to apply to a case like the present, it would apply to a case where the tenant for life had expressly declared his intention to keep the charge alive, or had procured a term to be vested in trustees for the purpose of keeping it alive, unless he had gone through the ceremony of paying money to the trustees for the purpose of receiving it back from them under the name of interest on the charge. On the whole, it appears to me that the statute cannot be applied to a case where there

C is no assignable person liable to pay the charge, no person who, by the delay, could be induced to suppose that the charge was abandoned or merged, and where the rent out of which the interest of the charge ought to be paid is receivable by and belongs to the same person as is entitled to the interest.

Before the charge was paid to the younger children, it was the duty of Earl George to pay or account for the interest to them, and to prevent any accumulation against the remainderman. After the portions were paid (supposing Earl George to have become entitled to the charge for his own benefit), it was still his duty to prevent accumulation of interest against the remainderman. Nothing is more common than for a man to have, with reference to the same property, a right to receive the income and a duty to apply the income or to make payments out of it in a certain manner. If the property producing the income be absolutely his, subject only to a charge in respect of which it is his duty to make payments of interest out of the income and he becomes owner of the charge, there is an end of the duty to make the payments, but the duty to make the payments may not be a simple duty owing to the person entitled to receive interest. Where the estate in the property charged is limited, as in the case of a tenant for life, the duty of paying interest to the person entitled to receive it, may be connected with the further

E duty of preventing the accumulation of interest against the remainderman, and where the owner of the rent has become owner of the charge, if the duty to prevent accumulation of interest upon the charge against the remainderman continues, this court will hold a tenant for life, owner of a charge on the inheritance, to have discharged that duty. It is presumed to be done, first, on the ordinary principle, that this court will assume to be done that which the party might and ought to have

G done; secondly, to prevent any prejudice arising to the remainderman by the accumulation of interest; and, thirdly, to prevent multiplicity of suits, and relieving the remainderman, compelled to pay an accumulation of interest, from the necessity of suing the representatives of the tenant for life, whose duty it was to pay the interest, for reimbursement.

It was contended that if the duty to pay comprised no duty to any one but the

H party entitled to receive, the court would not interfere or in any way qualify the acts of the tenant for life, for the purpose of deeming the duty to be satisfied or not. I agree to that; but in the case of a tenant for life, owner of a charge on the inheritance, it is not merely with reference to the party himself that the duty of paying the interest arises. He receives the income and is entitled to the interest payable thereout, and when he has received the income he is deemed to have

I paid or kept down the interest, not because of any duty which he owes to himself, but because he has a duty to another, i.e. to the remainderman, to prevent the accumulation of interest against him. If you suppose the charge to be a subsisting charge, there being no express payment of interest, no act by which the payment of interest can be proved, there would be an accumulation of interest against the remainderman if the law did not presume a duty to prevent it, and also a satisfaction or performance of that duty by the person who received the income by the due application of which the duty ought to have been performed. It is not, I think, necessary, to assume as a fact (though this has been done), that the tenant for life

must have received the interest of the charge at the times when he received the rents of the estate. It is sufficient that by a rule of law the tenant for life of an estate who is also the owner of a charge on the inheritance must, in favour of the remainderman, be deemed to have kept down the interest of the charge out of the rents received, and I think that the remainderman in whose favour this rule has been established cannot be permitted to contend that the interest, thus for his benefit deemed to have been kept down and paid, was, in fact, not paid, for the purpose of enabling him to say, that, under the Statute of Limitations, the right to sue for the charge is lost. Under these circumstances, I think that the case does not come within the purview of the Statute of Limitations.

For the reasons I have stated, it appears to me that the plaintiffs are entitled to the relief which they pray. I declare, that, according to the true construction of the will of Earl Charles, the additional portions, amounting to £25,000 thereby given to the younger children therein named constitute a primary charge on the estates by the will devised to the testator's eldest son for his life, and that Earl George, the tenant for life of those estates, having paid the same additional portions to the persons entitled thereto, out of his own monies, became and was, and up to the time of his death continued to be, entitled to the same charge for his own benefit, and that the plaintiffs, as his legal personal representatives, are now entitled thereto, as part of his personal estate.

Order accordingly.

LORD KENSINGTON v. BOUVERIE AND OTHERS

[HOUSE OF LORDS (Lord Campbell, L.C., Lord Brougham, Lord Cranworth, Lord Wensleydale and Lord Chelmsford), July 1, 11, 12, 25, 1859]

[Reported 7 H.L.Cas. 557; 29 L.J.Ch. 537; 34 L.T.O.S. 16;
6 Jur.N.S. 105; 11 E.R. 222]

Settled Land—Tenant for life—Charge on estate—Payment of interest by tenant for life—Insufficiency of rents and profits to meet interest—Intention not to create charge for deficiency—Mortgage of charge—Death of tenant for life—Right of mortgagees to charge for deficiency.

A tenant for life in possession of an estate subject to a charge received the rents and profits and paid the interest on the charge during his life, but he gave no notice that the rents were insufficient to pay the interest or that he intended the excess above such rents, which he paid out of other moneys of his own, to be a charge on the estate. After his death the mortgagees of the charge sought to charge the estate with the deficiency between the rents and interest.

Held by LORD CAMPBELL, L.C., LORD BROUGHAM, and LORD CHELMSFORD, LORD CRANWORTH and LORD WENSLEYDALE dissenting: the conduct of the tenant for life in paying the interest amounted to a declaration either that the rents and profits were sufficient to meet the interest or that he did not mean to create any charge on the estate for the deficiency; after his death his legal personal representatives could not be permitted to set up a claim for an alleged deficiency and demand an account of the rents and profits during the encumbency of the tenant for life; the mortgagees were in no better position; and, therefore, their claim failed.

Per LORD CAMPBELL, L.C.: The smallest demonstration by the tenant for life, by act as well as by words, that in paying off a charge he meant to discharge the estate is sufficient.

A Notes. Considered: *Re Warwick's Settlement Trusts, Greville Trust Co. v. Grey*, [1938] 1 All E.R. 639. Referred to: *Howlin v. Sheppard* (1870), 19 W.R. 253; *Mayer v. Murray* (1878), 8 Ch.D. 424; *Noyes v. Pollock* (1886), 32 Ch.D. 53.

As to the discharge of encumbrances by the tenant for life see 34 HALSBURY'S LAWS (3rd Edn.) 641-643, and for cases see 40 DIGEST (Repl.) 758, 759.

Cases referred to:

- B** (1) *Jones v. Morgan* (1783), 1 Bro.C.C. 206; 28 E.R. 1086, L.C.; 40 Digest (Repl.) 758, 2443.
 (2) *Tracy v. Hereford* (1786), 2 Bro.C.C. 128; 29 E.R. 75, L.C.; 40 Digest (Repl.) 754, 2409.
 (3) *Burrell v. Earl of Egremont* (1844), ante p. 296; 7 Beav. 205; 13 L.J.Ch. 309; 8 Jur. 587; 49 E.R. 1043; sub nom. *Barrell v. Earl of Egremont*, 3 L.T.O.S. 72; 40 Digest (Repl.) 758, 2444.
- C**

Also referred to in argument:

Copis v. Middleton (1823), Turn. & R. 224; 2 L.J.O.S.Ch. 82; 37 E.R. 1083, L.C.; 26 Digest (Repl.) 124, 870.

Baldwin v. Baldwin (1856), 6 I.Ch.R. 156; 40 Digest (Repl.) 756, *463.

D *Amesbury v. Brown* (1750), 1 Ves. Sen. 477; 27 E.R. 1152, L.C.; 40 Digest (Repl.) 752, 2386.

Caulfield v. Maguire (1845), 2 Jo. & Lat. 141; 40 Digest (Repl.) 756, *469.

Earl of Clarendon v. Barham (1842), 1 Y. & C.Ch. Cas. 688; 62 E.R. 1073; sub nom. *Earl of Clarendon v. Dowager Lady de Clifford*, 6 Jur. 962; 35 Digest (Repl.) 705, 3756.

E *Whitbread v. Smith* (1854), 3 De G.M. & G. 727, 741; 43 E.R. 286, 292, L.C. & L.J.J.; 40 Digest (Repl.) 754, 2407.

Sherwin v. Shakspear (1854), 5 De G.M. & G. 517; 2 Eq. Rep. 957; 23 L.J.Ch. 898; 24 L.T.O.S. 45; 18 Jur. 843; 2 W.R. 668; 43 E.R. 970, L.J.J.; 40 Digest (Repl.) 92, 697.

Revel v. Watkinson (1748), 1 Ves. Sen. 93; 27 E.R. 912, L.C.; 40 Digest (Repl.) 755, 2421.

F **Appeal** from a decision of the lords justices (KNIGHT-BRUCE and TURNER, L.J.J.), reported 7 De G.M. & G. 134, reversing an order of SIR JOHN ROMILLY, M.R. (19 Beav. 39).

In 1832 the Kensington estate was mortgaged for £60,000 to the respondents, Lord Kensington covenanting to pay the said sum. In 1833, by the marriage settlement of Lord Kensington, the estate was conveyed, subject to the above charge, to him for life, with remainder to his son (the appellant), etc., in tail male, with a power to Lord Kensington to charge the estate to the extent of £20,000. By an indenture of Feb. 4, 1835, Lord Kensington, in exercise of that power, charged the estate with £20,000, and by deed dated Jan. 27, 1842, he mortgaged this charge to some of the respondents for debts amounting to £14,227 6s. 2d. Down to 1845

H Lord Kensington was in possession of the rents and profits of the estate, and from 1846 to his death in 1852 a receiver applied the rents in keeping down the interest due on the £60,000 and the residue towards paying the interest on the £20,000. All the interest due on the latter sum was paid and satisfied during Lord Kensington's life, but not entirely out of the residue, which was insufficient to pay it, but out of other moneys of Lord Kensington. Lord Kensington died in 1852, and his will contained no direction as to the charge of £20,000, or the interest that had accrued thereon. The appellant was entitled as tenant for life under the settlement of 1833, and wished to pay off £5,722 13s. 10d., the portion of the charge of £20,000 due to the respondents. He filed a bill in Chancery praying to be allowed to redeem the estate from the charge of £20,000 on payment of what should be due of principal and interest. The Master of the Rolls made a decree accordingly, and directed an inquiry to whom the amount of principal and interest was due. Afterwards it was declared that Lord Kensington was entitled to redeem on payment only of the principal of the charge of £20,000 and of the interest which accrued

thereon since Lord Kensington's death in 1852. The lords justices, on appeal, reversed this order, and declared that he could not redeem except also on paying so much interest as accrued during Lord Kensington's life which the rents and profits were insufficient to pay. The appellant appealed to the House of Lords. A

Sir Richard Bethell, Q.C., and Eddis for the appellant.

Lloyd, Q.C., Elmslie, Q.C., Shapter and Southgate for the respondents. B

Their Lordships took time for consideration.

July 25, 1859. The following opinions were read.

LORD CAMPBELL, L.C.—After an anxious consideration of this case, I adhere to the opinion I had formed upon it at the conclusion of the argument—that the decree of the Master of the Rolls ought to be affirmed. I do not proceed on the ground that if a tenant for life in possession of an estate subject to a charge bearing interest pays the interest although the rents and profits are insufficient to enable him to do so, he may not make himself an encumbrancer for the excess of his payments beyond the amount of the rents and profits. But it seems to me that if, remaining in possession, he receives the rents and profits and regularly pays the interest upon the charge during his lifetime, having given no intimation that the rents and profits were not sufficient to enable him to do so, or that he means to consider any excess of his payments beyond the rents and profits a charge upon the inheritance, his legal personal representatives cannot be permitted to say that such a charge exists. The controversy in this case is substantially between the present Lord Kensington and the legal personal representatives of his father. If the charge cannot be claimed by them, I think I can easily show that the mortgagees are in no better situation. C D E

We may begin by considering how it would have been if the late Lord Kensington had created the charge, and without mortgaging it, had continued in possession till his death, without any intimation that the rents and profits were not equal to the interest on the charge. Upon his death could his representatives have claimed that he had a charge upon the estate for an alleged excess of the amount of the interest beyond the amount of the rents and profits, and upon a bill filed by the remainderman to redeem the charge have insisted on an account of the rents and profits of the estate from the creation of the charge to the death of the tenant for life, for the purpose of showing whether there was any and what deficiency? I apprehend that under such circumstances they would have been told that there was a presumption that the rents and profits were equal to the interest on the charge, and that they could not be let in to rebut this presumption. Lord Kensington having mortgaged the charge, I think his position became the same as it would have been if he had become tenant for life, the charge having been previously created in favour of third persons. F G

I rather wonder that any question has been made as to his power to create the charge for the £20,000 and interest, or as to such charge having actually been created. I cannot doubt that the corpus of the estate was effectually charged with the £20,000 and interest, and that all that we have to consider is the third question made by TURNER, L.J.: "whether, the estate being so charged, the charge is subsisting so far as the rents and profits have been insufficient to answer the interest?" Whether a court of equity ought or ought not to hold that this charge is still subsisting, I think we must consider that in point of fact the interest upon the £20,000 was regularly paid by Lord Kensington. Let us then consider the general question, if a tenant for life of an estate subject to a charge, he being bound, so far as the rents and profits furnish him with the means, to keep down the interest upon it, remains in possession and during his life regularly pays the interest without any intimation that the rents and profits are insufficient, or that he has any intention of charging the corpus of the estate with any deficiency, can his legal personal representatives be permitted to set up a claim for an alleged deficiency, and to demand an account of the rents and profits during the whole encumbrance? H I

A of the tenant for life? If the tenant for life had entirely paid off the charge, most undoubtedly, as far as the principal sum is concerned, he would have a charge on the corpus of the estate, because the annual rents and profits could not be considered as supplying a fund from which the principal could be paid. But with regard to the interest, the annual rents and profits in the vast majority of cases do, and in all may be presumed to, supply a fund from which the interest may be paid.

B With regard to the principal, it cannot be reasonably supposed that the tenant for life means to make such a present to the remainderman, and the claim of a charge to the amount of the principal may be made effectual without any account being taken, whereas with respect to any deficiency in the means to pay the interest, the tenant for life may reasonably be supposed to waive any right he might have to make it a charge upon the estate, he being allowed to remain in undisturbed possession, and in the comfortable expectation that when he is dead and gone, no inquiry will take place into his management of the property, nor any attempt be made to charge his representatives with wilful neglect which might be imputed to him. It is said that this is a question of intention, and that there should be some evidence of intention. But LORD THURLOW said :

D "The smallest demonstration is enough to show that the tenant for life means to take the debt upon himself."

E Surely this demonstration may be by acts as well as by words, and a continued system of a tenant for life paying the interest upon a charge which he is bound to keep down so far as the rents and profits will permit may amount to a declaration (which he cannot afterwards gainsay) that the rents and profits are sufficient, or that he does not mean to bring any charge upon the inheritance for the deficiency.

F The most alarming inconveniences would arise from the doctrine that in every case where a tenant for life of an estate under a charge, the interest of which he ought to keep down from the rents and profits, pays the interest regularly during his lifetime, he is to be considered as silently making himself an encumbrancer on the estate for any excess, large or small, of the payments for interest above the rents and profits. In the first place an account must be taken extending over the whole encumbrancy of the tenant for life, which may be above seventy years, and the inquiry must be not only as to the rents and profits which he did actually receive, but as to such as by reasonably good management he might have received, the whole management of an estate, consisting perhaps of many thousands of acres, must be inquired into, and the result may be that there is a balance of 6s. 8d. in favour of the representatives of the tenant for life. The Master of the Rolls perhaps went too far in saying that such an account could hardly be taken, but he might have said truly that the cost of taking such an account would generally greatly exceed the benefit to be expected from it. Then see the injustice done to the remainderman. It being important to him to know whether the interest is kept down by the tenant for life, he may be supposed to inquire into the fact. If he finds that the interest has not been kept down, he may well suppose that the rents and profits have been misapplied by the tenant for life, and he may apply for the appointment of a receiver. Finding that the interest is regularly paid as it becomes due, he gives himself no further thought, but upon the death of the tenant for life he hears with surprise and dismay that a charge upon the inheritance is claimed by the representatives of the tenant for life, and he is to be involved in a Chancery suit, which may last for years, to ascertain the amount of the encumbrance. A further hardship to the remainderman would be, that he would be deprived of the benefit of the Statute of Limitations, passed in contemplation of the death of witnesses and the destruction of written documents.

I A still more serious evil would arise from the uncertainty as to this new-fashioned circumstance created by a comparison between the amount of the interest paid and the amount of the rents and profits which might have been realised during the encumbrancy of the tenant for life. Upon a sale of the remainder, the abstract must

not only show what encumbrances there are upon it, and that the interest upon the encumbrances has been kept down, but also that the rents and profits have been sufficient to keep down the interest, so that the representatives of the tenant for life will have no claim upon the inheritance to interest which he has paid, beyond the amount of the rents and profits. The charge is constantly shifting from year to year, and the actual amount of the burden cannot be ascertained till the death of the tenant for life. But if the rule I have proposed be adopted, I am not aware of any inconvenience or any injustice which it can occasion. In the absence of any authority that such a claim can be sustained I must come to the conclusion that where there are no circumstances to counteract the effect of the interest being regularly paid by the tenant for life in possession, the claim is unsustainable. Great reliance has been placed in the present case upon the fact that the tenant for life was under a personal covenant with the mortgagees to pay them this interest. But how can the question between the representatives of the tenant for life and the remainderman be affected by a covenant between the tenant for life and the mortgagees? And if the interest has actually been paid without the reservation of any claim against the corpus of the estate, why should the covenant prevent the estate from having the benefit of the payment? The tenant for life voluntarily entered into that covenant after the charge had been created.

Reliance is next placed upon a supposed expression of intention by the late Lord Kensington to make the interest he had paid a charge upon the inheritance because by his will he disposes of the £20,000 "and interest." But supposing that any intention expressed by him in a document not meant to be read nor to operate till after his death could be availing for this purpose, the words of this bequest are fully satisfied by the interest that would become due on the £20,000 after the remainderman has entered and before the charge is redeemed. It was likewise argued that Lord Kensington's manifest desire to increase his personal estate ought to lead to the conclusion that he paid the interest for the benefit of his younger children, not of his eldest son. But if we are to guess at his intentions on this point when he executed the settlement containing the power of charging, my belief is that he never contemplated that under the power the estate should be charged with more than £20,000 during his own life, he remaining in possession and paying the interest, and with interest after his death till the charge should be redeemed. If he had been asked what his intentions were in covenanting with the mortgagees to pay the interest and paying it from funds other than the rents and profits, he would probably have said: "I mean that at my death I may have the £20,000 bearing interest to be divided among my younger children, and that subject to this charge and the charges previously created, my eldest son shall take the Kensington estate."

It now only remains to be considered whether the mortgagees in resisting the redemption of the charge can be in a better situation than "representatives of the tenant for life." In the first place it is argued on behalf of the appellant that the re-claim is clearly barred by the following proviso in the deed of Jan. 27, 1842:

"Provided always and it is hereby agreed and declared between and by the parties to these presents, and the true intent and meaning of the parties further is, that until default shall be made in payment of the said principal sums, or the interest thereof, or any part thereof at the time mentioned for payment thereof in the said covenant for payment by the said William Lord Kensington, and the true intent and meaning of these presents is, that it shall and may be lawful to and for the said William Lord Kensington, his heirs and assigns, peaceably and quietly to have, hold and enjoy the said premises hereby charged as aforesaid, and the said hereditaments and premises hereby granted, released and conveyed, with their appurtenances, and receive and take the rents, issues and profits thereof, and the interest of the said sum of £20,000 expressed and intended to be hereby assigned as aforesaid, to and for his and their own use, without any let, suit, trouble, interruption or disturbance whatsoever of, from,

A or by the said Edward Bouverie, Richard Lord Bishop of Oxford and Phillip Pleydell Bouverie, their heirs, executors, administrators or assigns, or any or either of them, or of, from, or by any other person or persons whomsoever lawfully or equitably claiming or to claim by, from, or under, or in trust for them or any of them."

B Default never was made in payment of the interest stipulated for according to the true intent and meaning of the indenture. Therefore, Lord Kensington alone had a right to the interest of the £20,000 assigned as a security to the mortgagees. Besides, the interest of the £20,000 appears substantially to have been paid to the mortgagees, although the payment was nominally made under the covenant, and as they have actually once had the benefit of the security, it would not be equitable that they should again claim it as an unsatisfied charge upon the inheritance.

C There seems to be even less colour for the claim of the mortgagees than for the claim of the representatives of the tenant for life, for, although the interest had been paid to the mortgagees by the tenant for life, he possibly might have continued to make it a charge upon the inheritance as between him and the remainderman. But if the interest which became due in the lifetime of the tenant for life has been paid to the mortgagees, they have so far realised their security, and as to them the estate is relieved from liability. But, at all events, the mortgagees cannot be entitled to more than the mortgagor was entitled to, and if the interest had ceased to be a charge upon the inheritance in the lifetime of the tenant for life by payment of interest to the mortgagees, the mortgagees, who claim under him, cannot support this charge against the remainderman. For these reasons I am of opinion that the decree of the lords justices ought to be reversed.

E **LORD BROUGHAM.**—I have come to the same conclusion as my noble and learned friend, and, generally speaking, for the reasons which he has given. It will be unnecessary for me to go into this case beyond what my noble and learned friend has done. There is one exception that I have to make, as to the difficulty, delay and expense of taking an account. My noble and learned friend seemed to think that the Master of the Rolls had stated it to be almost impossible. In the former part of his judgment he leans to that view, but in the latter part of it he does not say that it is impossible, but he talks of the difficulty, expense, and delay of taking such an account, which he says would be enormous, and he does not see how it could be done except as against a mortgagee in possession. Upon the whole, the reasons given by the Master of the Rolls, coinciding with the view which has been taken by my noble and learned friend, appear to me quite satisfactory, and I, therefore, agree that the decree of the Master of the Rolls ought not to have been reversed by the lords justices.

G **LORD CRANWORTH.**—In this case I have the misfortune to differ from my noble and learned friends who have preceded me.

H I need not go into the facts of the case—they are familiar to your Lordships—and I merely remark that, under the settlement of the present lord in the lifetime of his father, his father having the power of charging the estates with £20,000 (and I concur with my noble and learned friends that it is clear upon the construction of the settlement that that meant £20,000 and interest), that power was exercised by a deed executed by the late lord on Feb. 4, 1835, whereby he charged the estate with

I £20,000, and created a term in a trustee of the name of Whittaker to secure that sum. Afterwards we learn by the recitals in the deed under which the respondents claim that there had been previous charges by the late lord in favour of the original mortgagees, Lord Braybrooke and others, for the sum of £14,227 6s. 2d., part of this £20,000, and then in consideration of a large sum of £17,600 due from Lord Kensington to Bouverie and others upon other mortgages of other property and the sum of £6,900 advanced by them to the late lord, he covenanted to pay the whole of those two sums amounting to £24,500, and he assigned to them his charge of £20,000, subject to the prior assignment which he had made to secure £14,227 6s. 2d.

That was the state of the rights of these parties and their liabilities to one another. A
 From the time of the execution of this deed Lord Kensington regularly paid interest
 on the whole of the debt due from him to Lord Braybrooke and others, which
 included the £14,227 6s. 2d., and I will assume that he did so (I do not think that
 it quite clearly appears, but I will assume that he did so) also on the £24,500 due
 from the respondents.

Lord Kensington died in August, 1852. Then, his son William, having become B
 Lord Kensington, filed a bill against Bouverie and others to redeem the Kensington
 mortgage on payment to them of the sum of £5,772 13s. 10d., with interest, from
 the death of his father, that being the balance of the £20,000, after deducting the
 £14,227 6s. 2d. due to Lord Braybrooke and others, the first mortgagees. The
 question is: On what terms he is entitled to redeem. The respondents contend C
 that the sum due for the settled estate on account of the £20,000 is the principal
 sum of £20,000, with interest from the date of the charge (Feb. 4, 1835),
 deducting only from the interest the amount of the rents received by the late lord,
 or accrued due in his lifetime subsequently to Feb. 4, 1835. The present Lord
 Kensington contends that no interest can be claimed during the lifetime of his father,
 as it was all paid by him to the mortgagees from time to time as it became due. D
 Lord Braybrooke and others, the first mortgagees of the £20,000, were made co-
 defendants, but they do not wish to be redeemed, nor do they raise any question
 in the suit. They are, I understand, satisfied with their security. The Master
 of the Rolls, by whom the cause was heard, took the same view of the case as the
 appellant, and directed an account of what was due for principal, interest and costs
 in respect of the £20,000, and an account, on the other hand, of what was due from
 the respondents, who had taken possession as mortgagees on the death of the late E
 lord, in respect of rents received by them, or which, without their wilful default,
 they might have received. The chief clerk took this account, calculating interest
 on the £20,000 only from Aug. 10, 1852, the day of the death of the late lord,
 and the Master of the Rolls, when the matter was brought before him, upheld the
 chief clerk's certificate. There was an appeal to the lords justices, who took a
 different view of the case. They held that all the interest on the charge for F
 £20,000 which had accrued due in the lifetime of the late lord, subsequently to the
 date of the charge, was still due, except so far as he had received rents sufficient
 to liquidate it, and they varied the decree on that principle.

It is between these conflicting views of the case that we are now called on to
 decide. It is clear that Bouverie and the others were entitled by virtue of their
 security to a charge for interest as well as principal, and the only question is whether G
 the interest has been so paid as to discharge the estate from the burden. I will
 assume that interest was duly paid on the whole mortgage debt of £24,500, for which
 the £20,000 subject to the prior claim on it was made a security. But the argument
 of the respondents was that whatever interest was paid by the late lord was paid
 by him, not in his character of mortgagor, not as tenant for life of the mortgaged
 estate, but by reason of his covenant to pay his own debt of £24,500 and interest, H
 which imposed on him a personal obligation to pay the interest as it became due;
 that he, if he were alive, or his executors now that he is dead, would, but for the
 mortgage, have had a right against the corpus of the estate for all interest on the
 £20,000 when the rents had failed to satisfy; and that the mortgagees have now
 the same rights which he or his representatives would have had if there had been I
 no mortgage.

To arrive at a just conclusion on this subject we must look to principle, and
 proceed in our reasoning by steps. First, it is clear that any person entitled to an
 equitable charge, and filing a bill to have that charge raised, has a right against the
 corpus of the property charged for interest no less than for principal, supposing, of
 course, that it is a charge bearing interest. His right to the whole principal and
 interest, unless barred by the Statute of Limitations, is available after any number
 of successive life-estates. This cannot be disputed. Suppose the charge to be a
 charge in the name of a third person as trustee for a tenant for life, on the death

A of the tenant for life his executor might file a bill to have the charge raised, and prima facie the sum to be raised would include interest as well as principal. It would, however, be a good answer to the demand for interest that as tenant for life he had, since the creation of the charge, been in receipt of the rents which were the primary fund to discharge it, and if, on taking the account, it should appear that rents had been received sufficient to cover the interest, no further claim could be
B made on that head. It was, I am aware, contended that a tenant for life cannot under any circumstances become an encumbrancer on the remainder for interest accrued due during his tenancy. But for this proposition I can discover no foundation either in principle or authority. Suppose the security to be one which during the tenancy for life produces no profit; suppose, for instance, that it is a mere reversion, or that it is a mine unproductive, or that prior mortgagees are in possession
C exhausting the whole annual income, I can see no reason why, when the reversion falls into possession, or the mine becomes productive, or the prior mortgagees, being satisfied, withdraw, the representative of the tenant for life should not have precisely the same rights against the corpus which certainly a stranger would have had.

If this is so, then it cannot make any difference in principle that the security had
D by any of the means I have suggested become productive during the life of the tenant for life. In such a case, indeed, his representatives seeking to raise the charge must against their demand for interest give credit for what he had received on account of rents and profits, but in other respects their rights under their security will remain unchanged. These considerations lead, I think, necessarily to the conclusion that in every case of a tenant for life or his representatives
E raising a charge out of the corpus of the estate charged, the question as to how far he or they may add the interest or principal depends on how far the interest has been satisfied by means of rents and profits. Under the head of "rents and profits" I include the benefit of personal occupation or enjoyment in any mode authorised by the deed or will creating the tenancy for life, in respect of which the tenant for life must be charged with an occupation rent in the usual manner. If this is the
F right of the tenant for life or his representatives, it follows that persons claiming under him as mortgagees (which is the position of the respondents Bouverie and others in this case) must have the same right—that is, that the assignee of the charge may raise out of the corpus so much of the interest due on the security as has not been covered by rents and profits received by the tenant for life. It will hardly be disputed that this is a necessary consequence of the rights of the tenant
G for life, if the interest has not been paid to the mortgagee who is seeking to make the charge available.

The question is: What are the rights of the mortgagee of the charge if the tenant for life has during his life regularly kept down the interest? I do not think that such payment can of itself and alone make any difference in the rights of the tenant for life, or by consequence in the rights of mortgagees claiming under him, at all
H events where, as in this case, the tenant for life has come under personal obligations, binding him to pay the interest. Suppose that he had come under such an obligation by a simple borrowing without assigning his charge by way of security—by bond or covenant for instance—payment of interest would in that case have had no effect on his rights on the settled estate by virtue of the charge. How is the case altered by the circumstance that for security of the lenders he has assigned to them
I all his rights under the charge? What the rights are must remain the same, whether they continue vested in the tenant for life or his representatives, or have been assigned to others. The only ground on which payment of interest can affect the right of his representatives against the corpus must be, that it manifests an intention to discharge the estate from the burden of the interest. But this would not, I think, be a just inference, unless there is something beyond the mere fact of payment. I can hardly think that, even where a tenant for life under no personal obligation keeps down the interest, that alone indicates an intention to exonerate the estate in favour of the remainderman. But, if such intention might

under those circumstances fairly be assumed, surely the inference cannot be extended to the case where the payment is made by a person bound to pay, whatever may be his wishes or intentions. If he is under no personal obligation it may be argued—I do not say whether successfully or not—that by voluntarily paying what he was not bound to pay he showed an intention to benefit someone, and that the person intended to be benefited must have been the owner of the corpus. But I cannot understand how any inference of intention as to the nature of a particular payment can be drawn from the mere fact of payment, when the payment itself was one which could not be avoided. In such a case, if any inference arises, it must be from the fact that the tenant for life enters into a covenant binding himself to pay principal and interest. After he has once entered into the covenant he is no longer a free agent; he is bound to pay the interest whatever may be his intentions towards those who are afterwards to enjoy the inheritance.

It was argued that the doctrine contended for by the respondents, and affirmed by the decree of the lords justices, might operate hardly on a remainderman, for that, where the interest is regularly paid, he must naturally suppose that the tenant for life has received rents sufficient to enable him to make the payment, and so will abstain from taking proceedings to secure due payment of the interest by obtaining a receiver. I do not feel much force in this argument. What the remainderman is interested in is to take care that the interest is not allowed to fall into arrear, for if it be allowed to fall into arrear, then, whatever rents may have been received by the tenant for life, however sufficient may have been their amount, the remainderman may become liable to satisfy the arrears. To prevent that injustice, he may in a proper case obtain a receiver at the expense of the estate. But if the interest is regularly paid, the inheritance can never be burdened with it except so far as it has been paid in excess over the rents and profits, and if there be such excess—that is, if the rents and profits were not sufficient to keep down the interest—the appointment of a receiver would have been of no avail; he could only have taken care that the rents were duly applied so far as they would extend; and if the tenant for life, or his representatives, seek to charge the inheritance with any excess of payment in respect of interest, due credit must be given in taking the account for all which the tenant for life received in respect of his tenancy for life.

If he regularly paid the full interest for any considerable number of years, that might be fairly contended as amounting to *prima facie* evidence that the rents received were equal to the interest so as to cast on the tenant for life or his representatives the burden of proving that there was a deficiency. Be that however as it may, the argument amounts to no more than this, that, in order to do justice, it may be necessary to take accounts of considerable length and complexity. I cannot feel that this raises any substantial difficulty. In the present case there are no circumstances that I can discover to qualify or explain the payment of interest which the late lord under his covenant was bound to make, and I find nothing to exclude the right of his mortgagees to insist on having all the interest of the £20,000 raised in the same manner as Lord Kensington or his executors might have done if he had not mortgaged the charge, except so far as the interest has been satisfied by rents received by the late lord.

Several authorities were referred to in argument, but none of them appeared to me to support the proposition of the appellants. Great stress was laid on *Jones v. Morgan* (1). There William Morgan, who, under his father's will, succeeded to the devised estates during his minority, came of age in March, 1746, and in the following month of April he took up a bond of his father held by Lock for £1,876, which was a charge on the settled estates. He gave a fresh bond for the same sum. William, the devisee, paid interest on this new bond until 1761, when he paid it off, and in 1763 he died. In 1776, thirty years after the father's bond had been paid off, William's administratrix filed her bill seeking to charge the inheritance with the amount of the bond and interest. But LORD THURLOW held that the circumstances manifested an intention on the part of William to discharge the estate even if he had been only tenant for life. It was unnecessary to decide any such point.

A inasmuch as it was held that William was tenant in tail. But the circumstances there were very different from those in the present case. William need not have made himself personally responsible for the bond, and, therefore, in doing so, and afterwards paying it off, he might be considered as showing that he did not intend to retain any charge on the inheritance. In the case now under consideration, the late Lord Kensington did not discharge any previously existing debt. He exercised B a power of burdening the inheritance, and in order to obtain the benefit conferred on him by the power he was obliged to enter into a covenant binding himself personally to pay the interest on the sums advanced to him, for security of which he assigned (*inter alia*) the benefit of the charge. I cannot see how either the entering into such a covenant, without which he could not have obtained the loan of the money, or the subsequent payment of interest, which he could not avoid paying, C can be taken to indicate any intention whatever as to the inheritance. They were acts showing the intention of Lord Kensington to secure to himself the benefit of the £20,000, but showing nothing more.

In *Tracy v. Hereford* (2), what was decided first by SIR LLOYD KENYON and afterwards by LORD THURLOW was that a tenant for life is bound, as between himself and the inheritance, to keep down the interest of an encumbrance accruing during D every part of his tenancy for life, though during the first part of that tenancy the rents may have been insufficient for the purpose—that is, that the excess of rents received by him in the latter part of his life are applicable to make good any prior deficiency in relief of the inheritance. This case seems to me rather to support than to impugn the doctrine contended for by the respondents. I do not go through the other cases which have been cited. None of them appears to me to be at E variance with what, but for the high authority of those who differ from me in this case, I should have considered to be the well-established doctrine of the Court of Chancery, namely, that where the tenant for life keeps down the interest of a charge on the inheritance, he becomes himself an encumbrancer on the inheritance for the amount of what he pays so far as the payments exceed the rents and profits accruing during the tenancy for life, and that this right is not varied by the circumstance that he either originally was, or during his tenancy for life becomes, himself F entitled to the charge. It is hardly necessary to add that circumstances may show, either as regards the principal or interest, that the tenant for life intended to exonerate the estate. But I do not think that the mere fact that he has regularly paid the interest is sufficient to raise such a presumption—certainly not where, as in this case, all which was paid was paid under the personal obligation of a covenant G to pay. The consequence is, that I think the decree of the lords justices was right, and that the appeal ought to be dismissed with costs.

LORD WENSLEYDALE.—The question in this case is on what terms the appellant is entitled to redeem a charge of £5,722 13s. 10d., part of a sum of £20,000 charged on his Lordship's estate, by virtue of a power contained in his father's H marriage-settlement of Oct. 10, 1833. His father died on Aug. 10, 1852. The appellant contends that he is entitled to redeem on payment of that sum and interest thereon from the time of the death of his father. The respondents insist that they must be paid the principal sum and interest which accrued in the lifetime of the late Lord Kensington, so far as the rents were sufficient to satisfy that after paying the interest of a prior mortgage. The Master of the Rolls took the former I view; the lords justices the latter.

I have had an opportunity of being acquainted with the opinion of some of my noble and learned friends who heard the case and have kindly communicated their reasons to me, and, therefore, have had more than usual means of fully considering it with every light that can be thrown upon it. I am of opinion with my noble and learned friend who last addressed your Lordships, that the decree of the lords justices ought to be affirmed. This question depends, as TURNER, L.J., truly says, on three points: first, whether the late lord had the power, as between himself and the parties entitled in remainder under the settlement, to charge the estate with

the interest on the £20,000 to accrue during his life; secondly, whether he has in fact so charged it; and, thirdly, whether the charge is subsisting so far as the rents have been insufficient to satisfy the interest. Upon the two first points there appears to be no doubt. The only question is on the third. The charge of the £20,000 and interest was made pursuant to the power in the marriage-settlement on Feb. 4, 1835, subject to the mortgage for £60,000 to Lord Braybrooke and others, and soon after the charge was mortgaged to different persons for different sums, amounting altogether to the sum of £14,277 6s. 2d., and then the £20,000 and interest, subject to those prior charges, leaving a balance of £5,722 13s. 10d., was assigned to Messrs. Bouverie, the respondents, on Jan. 27, 1842, together with a great number of mortgages on different properties of Lord Kensington paid off by them, to the amount of £17,600, and in consideration of these sums, and of a further advance of £6,900, making altogether £24,500, Lord Kensington covenanted to pay that sum to the Bouveries, the respondents. All the mortgaged property, including the charge of £20,000 and interest, is made a security for the £24,500 and interest covenanted to be paid by the late lord.

It was supposed in the court below that there was proof of payment of the rents and profits of the estate charged to Messrs. Bouverie and the other mortgagees for their share of interest, and of the remainder of that interest, out of the general moneys of Lord Kensington. I have not been able to find any proof of such payment of interest in the printed documents laid before us. The affidavit of Mr. Tatham states, that from 1846 Messrs. Tennant and Harrison, either out of the rents of the estate or out of money received by them for Lord Kensington, regularly paid the interest on the £60,000 and £14,277 6s. 2d., part of the charge of £20,000, and he believes that interest in respect of the residue of the said sum of £20,000, viz., £5,722 13s. 10d., was duly paid out of moneys belonging to Lord Kensington, and that at the time of Lord Kensington's death there was no arrear of interest. This is not sufficient proof of payment, and I do not find any other. But certainly there is none that the interest of the £20,000 charged on the estate was ever paid on that account specifically. It may be that the interest on the sums advanced on mortgage and covenanted to be paid, and particularly the interest of £24,500, which was covenanted by the late Lord Kensington to be paid to the respondents, Messrs. Bouverie, was paid according to this covenant. For that amount he was personally responsible, and he probably discharged himself from his personal responsibility. All the interest upon the £24,500 may, therefore, be presumed to have been paid, and though at first sight it would appear that the interest upon the £5,722 13s. 10d., part of the £20,000, and forming part of the security for the £24,500, was, therefore, paid, I think that it does not follow.

I was much struck with the argument of counsel for the respondents that the payment of interest on the £24,500 did not involve payment of the interest charged on the estate of the £5,722 13s. 10d., part of the £20,000. I think their argument is correct. The charge on the estate of £20,000 and interest from the date of the charge (in effect a charge of £20,000 and an additional charge of £1,000 per annum till paid) is (subject to the prior charges, leaving a balance of £5,722 13s. 10d.) with many other securities made a security for £24,500 and interest covenanted to be paid—not the principal of the £20,000 (subject as aforesaid) for the principal, and interest for the interest, but principal and interest together for the whole debt. After the receipt of interest by the mortgagees on the principal sums due to them by covenant and by Messrs. Bouverie in particular on the £24,500 covenanted to be paid to them, there was nothing to prevent any of the mortgagees applying their share of the interest charged on the estate, which was a security for their whole debt, respectively to pay off a part of their principal debts with it. It might happen to become necessary to do so, in order to pay that principal in full. The receipt of the interest of the debt itself, therefore, by no means affects the rights of the mortgagees to pay a portion of the principal money of these debts by means of this charge of interest on the land, and, therefore, does not amount of itself to the payment of interest, part of the charge, and is not equivalent to a specific

A payment of that interest. If the interest had been paid and received specifically on account of the interest of the charge, the land would have been pro tanto exonerated and the charge to the extent of that interest satisfied, but not if the interest was paid on the whole debt of £24,500 in discharge of the covenantors' personal liability, any more than if a bond had been given to secure the debt and the interest on that bond paid.

B I think, therefore, that, in effect, no part of the interest of the £5,722 13s. 10d., part of the £20,000 charge, has been paid, and, not having been paid, the whole remains due, less the rents and profits, and Messrs. Bouverie have a right to demand all the share of the debt mortgaged to them—viz., £5,722 13s. 10d. and interest, which the rents and profits of the estate were insufficient to satisfy. If the interest has not been paid, no question arises as to the intent with which Lord Kensington paid the balance, and whether it was a charge on the inheritance or not. Though this argument was pressed in the court below, the court did not give effect to it, but decided upon a different ground. They assumed that the interest had been paid in the charge itself, and in exoneration of the estate; and the Master of the Rolls held that Messrs. Bouverie were not entitled to have the interest paid prior to the death of Lord Kensington. The lords justices held that they were, so far as the rents and profits were sufficient. On the assumption that the interest on the charges has been regularly paid by the rents and profits and by the moneys of Lord Kensington, I agree with LORD CRANWORTH that the decree of the lords justices is right.

E It is agreed that, if a tenant for life pay off the principal of a charge, he must be taken prima facie to mean to continue the charge for his own benefit. But it is said that there is a difference between the payment of the principal and the payment of interest. I must own I cannot see the distinction. The tenant for life is not bound to pay the interest upon any charge beyond the amount of the rents and profits: the difference is a charge upon the corpus of the estate, and if the tenant for life pays off that charge, I do not see why the presumption should not equally apply to the discharge of that part of the encumbrance which the tenant for life is not bound to pay as well as to the discharge of that part of the encumbrance which consists of principal, and which he is not bound to pay; and if in the one case no notice is necessary to be given to the remainderman of an intention to keep alive the security in order to make it effective, I do not see why any notice should be necessary in the other. The reasoning of TURNER, L.J., is, to my mind, perfectly satisfactory on that point.

G If I rightly understand the argument of my noble and learned friend on the Woolsack, he considers this case as substantially between the present Lord Kensington and the legal personal representatives of his father, and that, if this charge could not be lawfully claimed by them, the mortgagees could not be in a better position; and he thinks that the representatives would be told that there was a presumption that the rents and profits were equal to the interest, and they would not be let in to rebut that presumption. It is the latter part of this proposition only that appears to me, with deference, incorrect. I am not aware that there is generally such a presumption. It must depend upon the circumstances of each particular case. Where a property has been recently mortgaged there may be such a presumption for persons do not commonly lend except when the rents considerably exceed the interest of the money advanced; but when an estate is charged to the extent that this is, I cannot agree with my noble and learned friend that a presumption exists. I On the contrary, the appellant, if claiming under the marriage settlement by which the Kensington estate appears to have been charged with the interest of the mortgage for £60,000 an annuity of £156 and the interest of the charge of £20,000, must be taken to have known the extent of all the encumbrances, and, of course, he would have known the annual value of the estate which is stated in the schedule to that deed to have been about £2,914, and he would not be presumed to have believed that the rents and profits would be sufficient to pay the interest. He must have known to the contrary from the first, and must have understood that the interest

was paid (if it really was paid, on which I have already said enough) in a great measure from the private funds of the tenant for life. There has been no concealment from him by the tenant for life, no deceit, actual or constructive, by him, no disregard of any known duty, and I cannot see how the appellant's position as remainderman has in any way been altered by the conduct of the tenant for life. A

Upon the whole, then, it seems to me, on the assumption that the charge of interest has been paid off, that this is the ordinary case of a tenant for life paying off a charge on the corpus of the estate, which, as between him and the remainderman, he was not bound to pay. And I concur with my noble and learned friend (LORD CRANWORTH) that the judgment of the lords justices was right. B

LORD CHELMSFORD.—The whole question in this case is whether the appellant is entitled to redeem a charge of £20,000 upon his estate on payment of the principal and the interest which has become due since the death of the late Lord Kensington his father or whether he is bound in addition to pay certain arrears of interest which accrued during the life of the late lord, and which were unpaid at his death. The power under which the charge was created, and the terms of the deed by which it was raised have been fully stated, and I may, therefore, put the question in a more general form. Where a tenant for life in possession has power to creat a charge in his own favour, and he exercises the power and afterwards mortgages the charge, if the rents and profits of the estate are insufficient to keep down the interest of the charge, and the tenant for life regularly pays from year to year all the interest which becomes due upon the mortgage, do the arrears of interest upon the charge beyond what the rents and profits will satisfy become at once a charge upon the estate to which either the representative of the tenant for life is entitled, or of which the mortgagee of the charge can claim the benefit in satisfaction of the principal of his mortgage? C D E

There is no doubt that if a tenant for life pays off a charge upon the estate without more, he is presumed to have meant to leave the charge upon the estate, and he becomes a creditor for the sum which he so pays. A simple payment of the charge is sufficient to establish his right to have the charge raised out of the estate. He has no obligation or duty to make a declaration to that effect, or to do any act demonstrating such an intention, but, of course, any declaration by him, or, as LORD THURLOW says in *Jones v. Morgan* (1), F

“the smallest demonstration that he meant to pay off the charge will prevent his representative coming for the money.”

A different presumption, however, may not unreasonably be considered to arise where the tenant for life pays the interest upon a charge beyond what the rents and profits will satisfy. It is his duty to keep down the interest to the extent to which the rents and profits will enable him to do so, and the remainderman is only interested in ascertaining that this duty is performed. If it is neglected the remainderman may file his bill to make the rents answerable—but if the interest is regularly paid he need not concern himself further. I do not go the length of saying that it ought to be presumed in such a case that the rents and profits are sufficient to enable the tenant for life fully to keep down the interest, but I do think that it is the duty of the tenant for life, if he intends that the surplus interest shall be a charge upon the estate, to make some declaration, or to do some act demonstrating this intention. This appears to have been the opinion of LORD THURLOW, for he says in *Jones v. Morgan* (1): G H I

“He paid interest much beyond what the profits of the estate would have discharged, which is a demonstration *prima facie* that, though tenant for life, he meant to discharge the estate.”

It may, perhaps, be too much to assert that the mere payment of interest beyond the profits will be sufficient to raise the presumption of an intention to exonerate the estate, as it would thus arise immediately upon such over payment. But as it appears that even in the case of paying off an encumbrance any demonstration

A that it was not to continue to be a charge on the estate will be sufficient to exonerate it, where a tenant for life goes on year after year applying the rents and profits as far as they will go in keeping down interest upon a charge, and paying the deficiency out of his own funds without any notice or claim, may it not reasonably be presumed from his conduct that he means what he has done in exoneration of the estate, more especially where the estate is in settlement, and the person
B entitled in remainder is his own son? If a different rule were to prevail, very inconvenient and serious consequences might result to the remainderman. For thirty or forty years payments might be going on which he might reasonably suppose were only in performance of the duty of the tenant for life, and at the end of that long period a heavy accumulated charge might suddenly be thrown upon the estate. If he is ignorant of the insufficiency of the rents and profits to keep
C down the interest, he may fairly assume from the silence of the tenant for life that they are sufficient for the purpose. If he knows that the rents and profits are not sufficient, he may well believe that it is the intention of the tenant for life to exonerate the estate. So in dealing with the reversion, great embarrassment and difficulty might arise from holding that a charge was created by the mere payment of interest beyond the profits, as inquiry would in all such cases be necessary, not
D only whether the interest had been paid, but also how it had been paid, that is, whether out of the rents and profits, or by the funds of the tenant for life. And as, according to the opinion of TURNER, L.J., upon the authority of *Burrell v. Earl of Egremont* (3), the Statute of Limitations would not apply to this case, the state of things suggested in argument may be conceived to arise, that for ten years or more the tenant for life might have gone on paying interest beyond the amount of the rents and profits, and afterwards for twenty years they may have been sufficient to meet the interest, and then at the death of the tenant for life his representative would have a right to claim the excess of interest on the ground of a charge
E silently imposed so many years before.

It appears to me that the argument was a good deal embarrassed by considering the payments made to the mortgagees as being made with reference to the rents and profits, and so entitling the mortgagees to stand in the place of the representative of the tenant for life. The correct view of the case is that the receipt of the rents and profits by the tenant for life was virtually a receipt for so much interest upon the charge of £20,000. The payment of interest upon the mortgages under the personal obligation of the tenant for life was a matter wholly distinct and collateral. The rents and profits were not specifically applied to the payment of the
F interest on the mortgages, and, therefore, the assertion which was made during the argument that no part of the interest on the charge of £20,000 had been paid because the rents and profits had been applied as far as they would go to the interest due to the mortgagees was a misapprehension and only tended to confusion. The tenant for life is bound to keep down the interest of the charge to the extent of the rents and profits. He is bound by his personal covenant to pay the interest upon
G the mortgage, not out of the rents and profits specifically, but out of his own funds generally. He pays the interest on the charge of £20,000 pro tanto, by his receipt of the rents. He pays the interest of the mortgage in full out of his own funds. The mortgagees cannot complain, for they have received their full interest; nor, as long as the interest is paid, have they anything to do with the receipt or the application of the rents and profits. This is expressly provided for by their mortgage-
H deed in the clause read by my noble friend on the Woolsack. They can have no case unless they can establish that the rents and profits being unequal to the payment of the interest on the charge of £20,000, so much as was thus deficient must be regarded as unsatisfied interest, and as continuing to be a portion of their security for payment of the principal of their mortgage. But even as between them and the tenant for life or his representative, as long as their interest was paid, the tenant for life might deal with the interest of the £20,000 as he pleased. He might have expressly discharged the estate by acknowledging the receipt of the whole interest upon the charge, or by an express declaration that he would exonerate the
I

estate from it. He might have acted so as to make his conduct amount to a demonstration that this was his intention. A

It appears to me that the circumstances of the case are sufficient evidence that he meant to exonerate the estate. How, then, came his representative after his death to repudiate this intention, or the mortgagees to insist upon a charge which they could not have compelled the tenant for life to create in their favour, and which by his acts he had disclaimed? The mortgagees can have no right at all, unless it can be derived through the existence of a charge in favour of the tenant for life, for the interest which the rents were unequal to pay. I think they have entirely failed to prove that such a charge exists, and that the appellant is entitled to redeem the encumbrance of £20,000, on payment of the principal and interest which has accrued since the death of the late Lord Kensington. The decree of the lords justices must, therefore, be reversed, and that of the Master of the Rolls affirmed. B C

Appeal allowed.

ROBINSON v. WOOD

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), July 1, 1858]

[Reported 27 L.J.Ch. 726; 31 L.T.O.S. 311; 4 Jur.N.S. 625;
4 W.R. 728]

Will—Gift over—Avoidance—Defeasance of vested estate on happening of event—Divesting of original devise.

A testator devised lands in fee, but declared, in effect, that, if the devisee died under twenty-one years of age and without issue, the lands should go over. The ultimate devise after the gift over was to a charity, and void under the Charitable Uses Act, 1735 [repealed by the Mortmain and Charitable Uses Act, 1888]. The devisee died under age and without issue. F

Held: the rule in *Lassence v. Tierney* (ante p. 47) did not apply and the original devise in fee was divested. G

Notes. The law of mortmain, which imposed restrictions on assurances of land for charitable purposes, was repealed by the Charities Act, 1960, s. 38 (40 HALSBURY'S STATUTES (2nd Edn.) 168). However, this case is reported as it illustrates a wider principle, namely, that when there is a gift over purporting to divest a prior estate in fee simple and the devise over fails, it must be taken that it was the intention of the testator to divest the estate which was given in the first instance. H

Considered: *Hurst v. Hurst*, [1881-5] All E.R.Rep. 903; *Re Deacon's Trusts*, *Deacon v. Deacon*, *Haggard v. Heath* (1906), 95 L.T. 701. Referred to: *Re Pratt's Settlement Trusts*, *McCullum v. Phipps-Hornby*, [1943] 2 All E.R. 458; *Re Rooke's Will Trusts*, *Taylor v. Rooke*, [1953] 2 All E.R. 110.

As to effect of failure of gifts, see 39 HALSBURY'S LAWS (3rd Edn.) 946-950; and I for cases see 44 DIGEST 432-433.

Cases referred to:

- (1) *Doe d. Blomfield v. Eyre* (1846), 3 C.B. 557; 16 L.J.C.P. 64; 136 E.R. 223; affirmed (1848), 5 C.B. 713; 18 L.J.C.P. 284; 10 L.T.O.S. 525; 136 E.R. 1058, Ex. Ch.; 44 Digest 432, 2597.
- (2) *Jackson v. Noble* (1838), 2 Keen, 590; 7 L.J.Ch. 133; 2 Jur. 251; 48 E.R. 755; 44 Digest 433, 2601.

A Also referred to in argument :

Leeming v. Sherratt (1842), 2 Hare, 14; 11 L.J.Ch. 423; 6 Jur. 663; 67 E.R. 6; 44 Digest 1137, 9839.

Arnold v. Congreve (1830), 1 Russ. & M. 209; Tambl. 347; 8 L.J.O.S.Ch. 88; 39 E.R. 80; 44 Digest 767, 6256.

B **Action** in which the plaintiff, as heir-at-law of Ann Dales Allison, claimed the estate of the testator, John Dales Allison, under his will, and the defendants, the trustees of the testator, claimed that, on the death of Ann Dales Allison, the estate was undisposed of by his will.

C The testator, John Dales Allison, by his will, dated Sept. 3, 1840, gave and devised certain lands to trustees, upon trust, after the decease of John Dales, to sell a part for payment of debts and a legacy, and subject thereto upon trust that they, his trustees and trustee for the time being of his will, should receive and take the rents, income and profits of all the remaining part of his freehold and other real estates as the same should arise and become due and payable, and upon receipt thereof pay and apply the same for the maintenance, education and bringing up of the testator's daughter Ann Dales Allison, until she should attain the age of twenty-one years, and when and as his daughter should attain the age of twenty-one years, upon further trust to convey, assign, transfer and assure the residuary freehold and other real estates and property (subject as aforesaid) unto and to the use of his daughter, her heirs and assigns for ever, and he gave, devised and bequeathed the same unto his daughter, her heirs and assigns accordingly.

E He further provided that in case his daughter should die under the age of twenty-one years leaving lawful issue her surviving, then his trustees and trustee for the time being of his will should stand and be seised and possessed of his residuary, freehold and other real estates and property, upon trust for the absolute use and benefit of such issue, his, her or their heirs and assigns as tenants in common, if more than one; but in case his daughter should die under the age of twenty-one years without leaving lawful issue her surviving, then upon trust that his trustees and trustee for the time being of his will should receive and take the rents, income and profits of his residuary, freehold and other real estates and property as and when the same should arise and become due and payable, and upon receipt thereof pay and equally divide the same unto and between the testator's wife, if she should at that time remain his widow and unmarried, and Mary Allison, or their respective assigns, share and share alike, during their joint natural lives, and his wife remaining his widow and unmarried during such time; but if his wife should at that time be dead or married again, or should at any time afterwards die or marry again, leaving Mary Allison her surviving, then should pay the whole of such rents, income and profits unto Mary Allison or her assigns during her natural life. In case Mary Allison should at that time be dead, or should at any time afterwards die leaving his wife unmarried her surviving, then should pay the whole of such rents, income and profits unto his wife or her assigns during her natural life, if she should so long remain his widow and unmarried.

H And from and after the decease of his wife and Mary Allison, and of the survivor of them, or the decease of Mary Allison and second marriage of his wife, upon trust that they, the said John Wood and Stephen Hill, or the survivor of them, or the heirs of such survivor, should, as soon as conveniently might be thereafter, sell and absolutely dispose of the residuary freehold and other real estates and property, and the fee-simple and inheritance thereof, either by public auction or private contract, and either together or in lots, as should be thought fit, and make and execute all such contracts, conveyances and assurances, as should be necessary for carrying such sales into effect. And the testator declared that the money arising from such sales of such property, after deducting all incidental costs, charges and expenses, should be paid to the treasurer of the Primitive Methodist Society, to be applied by him for the general use and benefit of the said Primitive Methodist Society, according to the direction of the general annual conference of such society.

I

The testator died in 1840, and John Dales the tenant for life died in 1840. The testator's wife and Mary Allison died in the lifetime of Ann Dales Allison, who died in 1856 under the age of twenty-one years and unmarried. The testator was illegitimate and had no issue. It was not disputed that the devise over to the Primitive Methodist Society was void under the Mortmain Act. The trustees thereupon claimed the estate as undisposed of. The plaintiff, as heir-at-law of Ann Dales Allison filed his bill claiming the estate.

Baily and *Hobhouse* for the plaintiff.

Swanston and *Kay* for the defendants.

KINDERSLEY, V.-C.—This case raises two questions, one of which is upon the construction of a will and is a pure question of common law without a single ingredient of equity in the case, except that the devise is to trustees, and, therefore, the interests are equitable. But whatever construction a court of law would put upon the will would be put by a court of equity.

The question is, first, whether there is by the prior part of the will an estate in fee simple given to the testator's daughter? So far as it is necessary, I am of opinion (though I think I should like a little more time for consideration before deciding) that it is a vested interest in fee-simple in the daughter in the first instance, liable of course to be divested. But the decision in this case does not turn upon that point. I do not expressly decide it, but it is merely my first impression which I may alter. It is sufficient to say that I assume in favour of the plaintiff that the daughter did take the estate in fee-simple in the first instance.

The only other question is whether that estate is divested by virtue of the subsequent clause? The gift is in the first instance to trustees. I have already said that I will assume in favour of the plaintiff, that that gave an estate in fee-simple to the daughter. Then came two clauses, both of them providing for divesting; one in the event of her leaving issue, the other in the event of not leaving issue; and the question is whether that latter clause divests the estate. Of course, if this is a gift to a charity, it is void, and by the terms of the Charitable Uses Act, 1735, the whole gift is void. The statute directs that no lands shall be given in trust or for the benefit of any charitable uses whatever, except in a particular manner; and then comes s. 3, that all gifts of any lands, tenements or hereditaments to or in trust for any charitable uses whatsoever, which shall be made otherwise than in that particular manner, shall be absolutely and to all intents and purposes null and void.

It might be well argued that the effect of this is to make the whole gift over void, and that there is nothing to divest the estate in this gift over, and I confess I should feel it very difficult to get over that reasoning. But if I find that the precise question has been brought before the Court of Common Pleas and the Court of Exchequer Chamber, and that the Court of Exchequer Chamber has come to the conclusion that in such a case, if the devise fails for any reason, the intent is that still the devise over operates to carry the estate over, it would not be for me in the exercise of my functions, whatever opinion I may entertain, to overturn that decision. It appears to me that not only is every particular as to a charity precisely the same as in this case; but the reasons in *Doe d. Blomfield v. Eyre* (1), are entirely adverse to the claim of the plaintiff; and I must assume that that principle is not merely to be taken as the expression of that particular judge, but as the expression of the opinion of the whole Court of Exchequer Chamber. The effect of that decision is that, when there is a gift over purporting to divest a prior estate in fee-simple and the devise over fails, it must be taken that it was the intention of the testator to divest the estate which was given in the first instance. And I must come to the conclusion that, if the case now before me were to be decided by the same learned judges, they would come to a similar decision.

Then, how can I take upon myself to say that the decision is wrong? If I found several decisions the other way, of course I could weigh one against the other. But what are the cases upon the subject which are suggested as adverse to this

A decision? First of all I will refer to a case of a testator giving a share of property to his children as an absolute gift, and then directing that that share shall be settled; but these do not bear upon the present case—they do not turn upon whether the divesting was upon a contingency. The testator says: “I wish my daughter to have the absolute interest but modified, seeing that if she has children her children shall have it, but leaving it to her if she has no children”; it is not defeating or divesting an absolute gift, but making a modification. It is a desire to let in the children quite consistent with the original design. Those cases do not bear upon the question, and the only other case cited is *Jackson v. Noble* (2). I confess that *Jackson v. Noble* (2) is very difficult to reconcile with *Doe d. Blomfield v. Eyre* (1); and when we look to *Jackson v. Noble* (2), the ground of the decision was that the contingency had never happened at all, and of course a decision founded upon that ground does not touch the question at all. The court decided that the contingency had never happened. At all events the decision is not adverse to *Doe d. Blomfield v. Eyre* (1), and whatever opinion I may have, without any special authority directly adverse, I cannot say that the decision in *Jackson v. Noble* (2) is directly adverse. Whatever opinion I may have, that case being so decided, I feel myself bound to come to the same conclusion as that court to which, if I were not precluded by law, I should have sent a case under the old practice. But having regard to the nature of the question, I think that in dismissing the bill it ought to be without costs.

RANGER v. GREAT WESTERN RAIL. CO.

[HOUSE OF LORDS (Lord Cranworth, L.C., and Lord Brougham), May 31, June 3, 6, 7, 9, 10, 13, 14, 16, 17, 1854]

[Reported 5 H.L.Cas. 72; 24 L.T.O.S. 22; 18 Jur. 795;
10 E.R. 824]

G *Building Contract—Payment—Certificates of principal engineer of building owner—Impartiality—Principal engineer shareholder in owner company—Duty of principal engineer in calculating sums due—Right to deduct sums as liquidated damages for delay in doing work—Failure by contractor to proceed to satisfaction of building owner—Forfeiture of tools and materials—Remedy for wrongful forfeiture—Action for damages—Right to account of value of things taken.*

H By contracts under seal dated in 1836 the appellant, a contractor, undertook to do certain work for the respondents, a railway company, to the approval of the principal engineer of the company. The company agreed to advance to the appellant during the progress of the work sums of money from time to time certified by the principal engineer, and it was further agreed that during the progress of the works the decision of the principal engineer with respect to the amount, state, and condition of the works executed and as to every other matter or thing relating thereto should be final and not subject to appeal. The principal engineer was a shareholder in the company. There was a clause in each contract providing that if the appellant should delay in completing the work or not proceed to the satisfaction of the company, after notice given to him by the company all the tools and materials on the ground for the purpose of the work would become the property of the company. As the appellant did

not proceed with the works to the satisfaction of the company they gave him the requisite notice and later took possession of the tools and materials.

Held: (i) the whole tenor of the contracts showed that it was never intended that the principal engineer should be an impartial arbitrator, but that, in coming to his decisions, he would act as an agent of the company, and, therefore, the fact that he was a shareholder in the company did not render him incapable, as being an interested party, of validly discharging the duties imposed on him by the contracts; (ii) the principal engineer performed his duty under the contracts if, in calculating the sums due to the appellant he acted bona fide and with the intention of proceeding according to the exigency of the terms of the contracts, and it was not necessary to institute any minute enquiry as to how far his calculations were accurate; (iii) in paying the amounts from time to time certified as due to the appellant the company were entitled to deduct sums specified in the contracts as liquidated damages to be payable by the appellant in respect of delays in completing certain parts of the work; (iv) even if the company had wrongfully taken possession of the works, the appellant was not entitled to treat the contract as abandoned, his remedy being an action for damages; on taking possession the company did not become absolute owners of the tools and materials, and must account for their value in settling their accounts with the appellant.

Notes. Approved: *Re Royal British Bank, Ex parte Nicol* (1859), 3 De G. & J. 387. Considered: *New Brunswick and Canada Rail. Co. v. Conybeare* (1862), 9 H.L.Cas. 711. Explained: *Hill v. South Staffordshire Rail. Co.* (1865), 11 Jur.N.S. 192. Considered: *Wildes v. Russell* (1866), Har. & Ruth. 689; *Western Bank of Scotland v. Addie* (1867), L.R. 1 Sc. & Div. 145. Approved: *Mackay v. Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394. Applied: *D.P.P. v. Kent and Sussex Contractors, Ltd.*, [1944] 1 All E.R. 119. Referred to: *Waring v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1849), 7 Hare, 482; *South Wales Rail. Co. v. Wythes* (1854), 1 K. & J. 186; *Re London, Birmingham and Buckinghamshire Rail. Co., Ex parte Curzon* (1857), 6 W.R. 141; *Scott v. Liverpool Corp'n.* (1858), 3 De G. & J. 334; *Thornhill v. Neats* (1860), 8 C.B.N.S. 831; *Phillips v. Eyre* (1870), 10 B. & S. 1004; *Stegmaun v. O'Connor* (1899), 81 L.T. 621; *Taff Vale Rail. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426; *Lodder v. Slowey*, [1904] A.-C. 442; *Panamena Europea Navagacion Compania Limitada v. Frederick Leyland & Co.*, [1947] A.C. 461.

As to certificates for payment, payment, and forfeiture by contractors, see 3 HALSBURY'S LAWS (3rd Edn.) 458 et seq.; and for cases see 7 DIGEST (Repl.) 359 et seq., 386-388, 420 et seq.

Cases referred to:

- (1) *Dimes v. Grand Junction Canal Proprietors* (1852), 3 H.L.Cas. 759; 8 State Tr.N.S. 85; 19 L.T.O.S. 317; 17 Jur. 73; 10 E.R. 301, H.L.; 16 Digest (Repl.) 426, 2273.
- (2) *Astley v. Weldon* (1801), 2 Bos. & P. 346; 126 E.R. 1318; 17 Digest (Repl.) 150, 495.
- (3) *Charrington v. Laing* (1829), 6 Bing. 242; 3 Moo. & P. 587; 8 L.J.O.S.C.P. 50; 130 E.R. 1273; 17 Digest (Repl.) 157, 545.

Also referred to in argument:

- Kirk v. Bromley Union Guardians* (1848), 2 Ph. 640; 11 L.T.O.S. 429; 12 Jur. 85; 41 E.R. 1090; 7 Digest (Repl.) 396, 232.
- Homersham v. Wolverhampton Waterworks Co.* (1851), 6 Exch. 137; 6 Ry. & Can. Cas. 790; 20 L.J.Ex. 193; 155 E.R. 486; 7 Digest (Repl.) 391, 207.
- Cope v. Thames Haven Dock and Rail. Co.* (1849), 3 Exch. 841; 6 Ry. & Can. Cas. 83; 18 L.J.Ex. 345; 154 E.R. 1085; 13 Digest (Repl.) 297, 1137.
- Diggle v. London and Blackwall Rail. Co.* (1850), 5 Exch. 442; 6 Ry. & Can. Cas. 590; 19 L.J.Ex. 308; 15 L.T.O.S. 208; 14 Jur. 937; 155 E.R. 193; 13 Digest (Repl.) 298, 1144.

A *Ludlow Corpn. v. Charlton* (1840), 6 M. & W. 815; 10 L.J.Ex. 75; 4 Jur. 657;
151 E.R. 642; 13 Digest (Repl.) 197, 172.

Appeal by the plaintiff in the action against a decree of the Vice-Chancellor of England, in a suit instituted by a railway contractor in which he alleged fraud and asked for an account. The respondents (defendants in the action) denied liability.

B The appellant was a railway contractor, who was employed by the respondents in the years 1836, 1837, and 1838 to execute some extensive and important works, forming portions of the line of their railway. The respondents, when they set about making their line from Bristol to London, divided the whole distance into two portions, that beginning at Bristol and proceeding eastward to Reading was described as the Bristol or B line; that from Reading to London as the London or L line. The respondents were incorporated by an Act of Parliament passed in the year 1835, and in the following year the appellant entered into three different contracts with them for forming three several portions of the line of railway. The first contract bore date Mar. 19, 1836, and was a contract for forming the line along about two miles and three quarters, beginning at or near the Bristol docks, and running eastward, to a particular field in the parish of Keynsham. The second contract was dated May 9, 1836, and was for a distance of somewhat more than two miles, beginning at Keynsham, at the point where the other contract terminated, and running eastward. These two contracts were designated respectively as the 1 B contract and the 2 B contract. The third contract bore date Aug. 30, 1836, and was for a portion of the line beginning at the Caversham Road, near Reading, and running eastward for nearly six miles. This was called the 8 L contract. Besides the works thus designated, the appellant also executed some works to the westward of the 1 B contract, which were described as the 1 B extension works. The appellant, after the date of each of these three contracts, proceeded in the execution of the works to which they related, and received large sums of money on account, but on July 2, 1838, the respondents took possession of all the works comprised in the 1 B and 2 B contracts, including the 1 B extension, and seized all the plant, tools, and materials thereon belonging to the appellant, alleging that he had made default in duly proceeding according to his engagements, and that they had, by express stipulations contained in the contracts, a right to seize the whole as forfeited.

G The appellant, on July 21, 1838, filed his bill against the respondents and others, praying, among other things, that the respondents might be restrained by injunction from proceeding to complete the works of which they had so taken possession. The bill was afterwards amended several times, and the object of it, as so amended, was, in effect, to show that the appellant must be considered to have been fraudulently led into signing the contracts, that, at all events, the respondents had, by their conduct in taking possession of the works, put an end to the contracts, and that he was entitled to be paid for what he had done, irrespective of the stipulations contained in them, as on a quantum meruit. The prayer in the bill, as it was ultimately amended, did not ask for an injunction. The respondents, during the progress of the works not only paid the appellant large sums of money on account, but also advanced to him sums to the amount of £28,000 on mortgage of the plant and materials employed. The bill alleged that at the time of these mortgages the respondents were indebted to the appellant on account of the works he had executed, and it, therefore, insisted on the right to charge the respondents with interest on the sums so due. The prayer of the bill as ultimately amended was in substance for a general account of what was due to the appellant at fair prices for the works he had executed, disregarding the contracts, and charging the respondents with interest on all sums due to him at the dates of the mortgages, and also charging them with the value of the plant and materials of which they had taken possession. On Nov. 21, 1839, the respondents put in their answer, denying all the allegations of fraud, insisting on the contracts, and justifying their conduct in seizing the plant, tools, and materials, as being warranted by the express terms of the contracts.

Very soon after the filing of the original bill, namely, on Aug. 10, 1838, the respondents seized and took possession of the appellant's stock and plant employed in the third or 8 L contract, claiming to be entitled so to do under its provisions by reason of the neglect and misconduct of the appellant. They then proceeded to finish the whole of the works themselves, and prevented the appellant from any further interference. On Mar. 5, 1840, the appellant filed a bill of revivor and supplement, stating the seizure of the plant and materials on the line comprised in the 8 L contract, and praying in substance relief as to the works comprised in that contract, similar to that which he had in the first bill asked as to the other contracts. The respondents answered this bill on June 9, 1840. On Sept. 15, 1841, the appellant filed another supplemental bill, alleging that since the filing of the former bills he had discovered errors in the accounts on which payments had been made to him, inasmuch as certain work he had done under the three contracts had been treated as common or coarse rubble masonry, whereas it was in fact Ashlar masonry for which he was entitled to a much higher rate of payment than he had in fact received, and the bill prayed that in taking the accounts asked by the former bills, this error might be rectified. The respondents answered the last bill on Mar. 4, 1842. Issue being joined, witnesses were examined on both sides, and a great deal of documentary evidence was put in, consisting chiefly of very numerous letters and notes which had passed between the appellant or his agents and the engineers and servants of the company during the progress of the works. The causes were heard by SIR LANCELOT SHADWELL, V.-C., who, on July 13, 1844, made the decree now appealed from.

Sir Fitzroy Kelly, Q.C., Roundell Palmer, Q.C., and Twells for the appellant.
Sir Richard Bethell, Q.C., and Stevens for the respondents.

Their Lordships took time for consideration.

May 26, 1854. The following opinions were read.

LORD CRANWORTH, L.C., stated the facts and continued: Before I proceed to call your Lordships' attention to the grounds on which the appellant rests his title to relief, and to consider how far that title is well founded, it is necessary shortly to advert to the terms of the contracts. They are all nearly alike, and I will for the present confine myself to the first or 1 B contract. It is a deed under seal, made between the railway company, of the one part, and the appellant, of the other part. It recites that a specification and plan of the 1 B portion of the line had been prepared by Mr. Brunel, the principal engineer of the company, that the appellant had agreed to execute the works therein described according to the same, that a copy of the specification with the appellant's tender to execute the works was annexed to the contract, that copies of the same had been signed by the appellant and Mr. Brunel, and were intended to be deposited in the office in Bristol, and that the company had agreed to advance to the appellant during the progress of the works sums of money by way of instalments according to the work from time to time done and certified by Mr. Brunel, and at their completion to pay him what should remain due. It was also stated that the appellant had agreed to secure the due performance of his contract by a bond for £4,000 with two securities, conditioned, among other things, for payment to the company, for every week's delay in the completion of various enumerated portions of the work, certain stipulated sums, increasing as the delay increased. It is then witnessed that the appellant covenanted with the company to execute the works according to the specification, and that they should be commenced within ten days after notice by the engineer to commence, and should be completed within the time mentioned in the specification. There are then various engagements on the part of the appellant to conduct the works as the engineer should approve, the details of which it is not important to consider.

There is then a clause stipulating that, if the appellant should become insolvent or should, from any cause not arising from the act of the company be delayed in

A completing the works, or should not proceed in the works to the satisfaction of the company, it should be lawful for the company to give notice in writing to the appellant, either under their common seal or under the hands of two directors, requiring him to proceed regularly with the works, and if after such notice he should for seven days make default in regularly proceeding, it should be lawful for the company to employ other workmen to complete the works and to pay for the same out of the money then due to the appellant, that the payments then already made to him should be taken by him in full satisfaction of all his claims for work then done, that all the balance of moneys which would have become due to him, and all the tools and materials then on the ground for the purpose of the works, should become the absolute property of the company, and that, if such balance and materials so to become the property of the company should be sufficient to cover the charges of the company, then the appellant should make good the deficiency. There is then after some other stipulations a proviso that all the works referred to in the specification as extra works, which the engineer should require to be executed, should be deemed to be included in the covenants entered into by the appellant, and should be paid for as thereafter mentioned. Further, it was stated that if the company should think fit to make any alteration in or additions to the works D (including the extra works), they might do so upon giving to the appellant written instruction for the purpose, signed by the engineer, and that the same should be paid for according to the schedule of prices signed by the appellant. There follows an agreement that in case of any dispute between the appellant and the resident engineer, the appellant would abide by the decision of the principal engineer, and if the appellant should be in any way delayed in the completion of the work by the act of the company, the principal engineer should determine whether any, and if any, what extension of time ought to be allowed.

The deed contains a covenant by the company to pay the appellant the sum of £68,028 16s., for the completion of the works (exclusive of extra works), in manner following, that is to say, at the end of fourteen days from the commencement of the works four-fifths of the value of the works then executed, to be estimated by F the principal engineer or his assistant resident engineer, having reference as well to the schedule of prices annexed to the tender as to the entire cost of the whole works, the execution of such works to be certified by the principal engineer, and so at the end of every fourteen days until the one-fifth retained should amount to £4,000, and thenceforth would pay the whole amount certified every fortnight, and at the end of the work would pay the whole £4,000 retained as aforesaid, that G is to say, £2,000 at the end of one month, and £2,000 at the end of a year from the final completion. It was further agreed that the company would pay for the extra work in the same manner, according to the schedule of prices, provided, nevertheless, that the appellant should not be entitled to receive any of the said payments until the works, in respect of which they were to be made, should have been certified by the principal engineer. It is lastly agreed that during the progress H of the works the decision of the principal engineer with respect to the amount, state, and condition of the works actually executed, and as to every other matter or thing relating thereto should be final, and without appeal, but if any difference should arise between the company or their engineer and the appellant after the completion of the contract as to any matter of charge or account between the company and appellant, then the same should be settled by arbitration in the manner I there pointed out. These are, I believe, the material parts of the contract or deed itself, which, together with the specification containing in great detail a description of the works to be executed, is set out in the bill, and at the end of it is a copy of the tender which had been made by the appellant to do the works, together with the schedule of prices. The deed was executed as well by the company as the appellant.

The first ground on which the appellant rests his title to relief is that he was induced to enter into the contract I B by the fraud of the company; that the sum at which he agreed to do the works was far below what he would have required

if he had known the real nature of the soil through which the tunnels were to be made, but that on this point he had been misled by the fraudulent contrivance of the respondents. [His LORDSHIP referred to the contentions of the appellant and the evidence, and concluded:] On these grounds I have come, without hesitation, to the conclusion that the appellant has failed to establish any title to relief on this head of fraud. A

The next ground on which he rests his title to relief is that Mr. Brunel, the principal engineer of the company, on whose decision many matters were, by the terms of the contract, made to depend, was incapacitated from acting in the discharge of the duties imposed on him, by reason of his being himself a shareholder in the company. [His LORDSHIP stated the terms of the contract relating to the duties and powers of the principal engineer.] It is not necessary to state the duties of the engineer more in detail. He was, in truth, made the absolute judge during the progress of the works of the mode in which the appellant was discharging his duties. He was to decide how much of the contract price of £63,028 from time to time had become payable, and how much was due for extra work, and from his decision there was no appeal except that, after all should have been completed, the appellant might call in a referee of his own as to any question of the amount, if any, then due beyond what had been certified. The complaint made by the appellant is that the duties thus confided to the principal engineer were of a judicial nature; that Mr. Brunel was the principal engineer by whom these duties were to be performed, and that he was himself a shareholder in the company; that he was thus made a judge or arbitrator in what was, in effect, his own cause; and that, until the month of July, 1838, the appellant was unaware of the fact of Mr. Brunel having any interest in the company, except as their engineer, and so ought not to be bound by any of his decisions. B C D E

This branch of the appellant's argument rests on the principle discussed in this House in *Dimes v. Grand Junction Canal Proprietors* (1), in which your Lordships agreed, or apparently agreed, with the able opinion delivered by the learned judges through PARKE, B., that the decision of a judge made in a cause in which he has an interest is voidable, unless in a case of necessity as where an action was brought against all the judges of the Common Pleas, in a matter on which they had exclusive jurisdiction. I say "agreed, or apparently agreed," for the point did not in the result actually call for the decision of the House. I shall, however, assume that to be (as I believe it is) the law. F

But the question is whether it governs the present case. I think the principle has no application here. A judge ought to be, and is supposed to be, indifferent between the parties; he has, or is supposed to have, no bias inducing him to lean to the one side rather than the other. In ordinary cases it is a just ground of exception to a judge that he is not indifferent, and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent. But here the whole tenor of the contract shows it was never intended that the engineer should be indifferent between the parties. When it is stipulated that certain questions shall be decided by the engineer appointed by the company, this is in fact a stipulation that they shall be decided by the company. It is obvious that there never was any intention of leaving to third persons the decision of questions arising during the progress of the works. The company reserved the decision for itself, acting however, as from the nature of things it must act, by an agent, and that agent was for this purpose the engineer. His decisions were, in fact, their decisions. The contract did not hold out or pretend to hold out to the appellant that he was to look to the engineer in any other character than as the impersonation of the company. In fact, the contract treats his acts and their acts for many purposes as equivalent, or rather identical. G H I

I am, therefore, of opinion that the principle on which the doctrines as to a judge rest wholly fails in its application to this case. The company's engineer was not intended to be an impartial judge, but the organ of one of the contracting parties. The company stipulated that their engineer for the time being, whosoever he might

A be, should be the person to decide disputes pending the progress of the works, and the appellant, by assenting to that stipulation, put it out of his power to object on the ground of what has been called the unindifferency of the person by whose decision he agreed to be bound. It is to be observed that the person to decide was not a particular individual, in whom, notwithstanding his relation to the company, the contractor might have so much confidence as to agree to be bound by his awards, B but any one from time to time the company might choose to select as their engineer. The appellant alleges that he did not know that Mr. Brunel was a shareholder until more than two years after the works had been begun, but he must have known that the company had it in their power to appoint another engineer in Mr. Brunel's place who might hold shares, or that Mr. Brunel himself might purchase shares. C Without the intervention of the engineer, the contract was, as it were, paralysed; nothing could be done under it. It surely can hardly be argued that a person appointed engineer could, by purchasing shares, render the contract practically inoperative. His Honour the Vice-Chancellor of England, when this case was before him, treated it as a matter of notoriety that engineers employed in forming the line of an intended railway were almost universally holders of shares. Without going D that length, it may be safely affirmed that there is nothing to prevent them from purchasing shares. This must have been known to the appellant, and unless, therefore, he can read the word "engineer" in the contract as meaning by necessary implication an engineer not holding shares in the company, or can import into the contract an agreement, on the part of the company, that no person holding shares should ever be appointed to fill, or should continue to fill, the character of engineer, E he must be bound by the terms of his own agreement. According to that agreement, he bound himself on certain points to abide by the decision of the engineer. He knew that engineer might be or become a shareholder. If he meant that in such a case the authority of the engineer should not be exercised, he ought to have provided for such a contingency. He has not done so, and has, therefore, no just ground for complaint.

F This, therefore, brings us to the question whether, independently of these two special heads of fraud, the appellant has shown a title to relief. His object is to obtain payment for work done by him for the company under the several contracts to which I have already referred. In considering the question I will in the first instance confine the inquiry to the first contract, that designated as the contract 1 B. What were the appellant's rights under that contract? He had a right on G executing the works comprised in that contract to recover from the company the sum of £63,028 16s., and also to be paid according to the rates specified in the schedule for all extra works. He was not to wait for payment till the whole should be finished, but he was to be paid at the end of every fourteen days the value of the work then actually completed, the company deducting one-fifth of the amount until the deductions should amount to £4,000. This £4,000 was to be retained H by the company by way of caution or security till the whole work should be finished. The value of the work done at the end of every fourteen days was to be estimated by the engineer of the company, and payment was to be made on his certificate, which during the progress of the work was to be conclusive, but on the completion of the whole any dispute as to any matter of account between the appellant and the company was to be settled by arbitration. In ascertaining the amount of every I fortnight's certificate, the engineer was to have reference as well to the schedule of prices annexed to the contract as to the entire cost of the whole works. This provision was obviously necessary, for some parts of the works, and those of an expensive nature such as the driving of headways through the tunnels, and the formation of coffer-dams, are not mentioned in the schedule of prices though constituting an important part of the work as described in the specification, and though their cost, according to the appellant's exhibit, formed (as indeed it must have formed) an important element in his calculations which led him to make his tender to do the works for a sum of £63,028 16s.

The precise principle on which the engineer in making his fortnightly certificates was to blend together in his calculation the value of the work done, as deducible from the schedule of prices and from the cost of the whole works, is certainly not clearly explained. In making such an estimate it could hardly be expected that anyone would arrive at a perfectly accurate result, but as the payment to be made on these certificates were only payments on account, extreme accuracy was not essential. Both parties seem to have agreed in leaving it to the engineer to frame the certificates as fairly as he could, so that the work done might as far as possible be paid for as it proceeded, the stipulated deduction of £4,000 being kept back till the final completion. This being the right of the appellant, the case he makes by his bill is that from the very outset the sums certified were greatly below what they ought to have been, and this kept him very deficient in funds so that he was unable to prosecute the works with the same vigour with which he might have proceeded if he had not been unduly straitened for want of money. A

In these circumstances he contends that he is entitled to have an account taken of the work actually done according to what the certificate ought to have been; that the respondents are not at liberty to insist on any penalties for the failure in completing the different portions of the work at the stipulated times; and, moreover, that they were not at liberty to seize and take possession of the plant as forfeited by reason of undue delay in prosecuting the works. [His Lordship described the circumstances under which the certificates were given and continued:] It does not, however, appear to me to be necessary to institute any minute inquiry as to how far the calculations of Mr. Brunel were accurate. I think it is quite enough if they were made bona fide, and with the intention of acting according to the exigency of the terms of the contract. The company expressly stipulated that, during the progress of the work, the decision of the engineer as to the value of the work from time to time executed should be final. If the appellant thought this a harsh or oppressive clause, he ought not to have agreed to it. It does not, however, seem to me to have been unreasonable. In the absence of express stipulation, a person contracting to do any work for another is not entitled to demand payment till the whole has been completed. The nature and extent of such a work as that which the appellant was to perform might well induce a modification of what, in the absence of express contract, would have been the rights of the parties. But, at the same time, the company might reasonably feel that the extent to which any claim by the contractor for payment during the progress of the works should be met must be left in a great measure to themselves. It would never do for persons in the situation of these respondents to put themselves in a position in which a question might be raised with them adversely every fortnight as to the extent of their immediate liability to their contractors. If, indeed, there was anything like fraud or unfairness in the case, different considerations might arise, but the evidence wholly fails to establish anything of the sort. The appellant, in the absence of fraud, was, during the progress of the works, bound by the certificates of the engineer, and, on the whole, I think that he has entirely failed to make out that the certificates were not such as he was entitled to have under the provisions of the contract. B C D E F G H

Supposing that the certificates were such as the respondents were bound to furnish, the next question is whether, in paying to the appellant the amount from time to time certified, the respondents were entitled to deduct the amounts due or claimed to be due for penalties. Such deductions were made on two occasions: first, on the certificate given on Nov. 12, 1836, when the headings through the tunnels were completed, and, secondly, on July 3, 1837. On the first of those occasions a sum of £200 was deducted, being five penalties alleged to be due for delay in completing the headways through tunnels No. 1 and No. 3 at the specified time, and on the second occasion a deduction of £20 was made, as a penalty for delay in the works at the Avon Bridge. These penalties had certainly, according to the express language of the deed, been incurred, and, therefore, the point for decision is whether there was anything, either in the nature of the penalty or the I

A conduct of the parties, to prevent the company from insisting on the literal terms of the contract.

There is no doubt that where the doing of any particular act is secured by a penalty a court of equity in general is anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done and not as a sum of money really intended to be paid. On the other hand, it is certainly

B open to parties who are entering into contracts to stipulate that, on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation. Whether a sum so fixed is to be considered as merely in the nature of a security for the actual amount of damage incurred, or as an agreed amount of liquidated damages, is often a question of great nicety and difficulty. I am not sure

C that benefit has, on the whole, resulted from the struggles which courts, both of law and equity, have made to relieve contracting parties from payments which they have bound themselves to make by way of penalty. Such a course may have been very reasonable and useful where the damage resulting from the violation of the contract is capable of being exactly measured, but whenever the quantum of damage is in its nature uncertain and the due performance of it has been secured, or purports to have been secured, by a penalty, it might, perhaps, have been safer and

D more convenient to have always understood the parties as meaning what their language imports namely, that on failure to perform the contract, the stipulated penalty should be paid. But this has not always been the doctrine of the courts. The distinction between a penalty and a sum fixed as the conventional amount of damages is too well established to be now called in question, however difficult it may be to say in any particular case under which head the stipulation is to be

E classed. I shall presently have occasion to state that the sums in this contract, made payable under the name of penalties, are to be treated as liquidated damages, and not as penalties to secure something unliquidated.

The question only arises on two certificates. If the appellant considered that the company had no right to deduct the penalties, he had only to bring an action on the certificates, and (independently of the question arising from the conduct of the

F parties) the point would necessarily have arisen and been decided, at law. The bill cannot, I think, possibly be sustained on the mere ground that the penalties deducted were not intended as more than a mode of securing to the respondents adequate compensation for the damage arising from the appellant's delay. It was argued that, even supposing the penalties are to be treated as sums actually intended to be recoverable, still the conduct of the respondents, and of Mr. Brunel,

G their agent, was such as to preclude them, at all events so far as relates to the £200 deducted in November, 1836, from insisting on the penalties, whether they are to be treated as sums actually due, or as mere security for unascertained damage. Mr. Brunel, it was argued, by the arrangement already referred to, made with the appellant on July 20, 1836, agreed to give him an extension of time for perfecting the headings through the tunnels, and, as they were all finished before

H the end of the extended time, it cannot now be allowed to the company to insist on any penalties for their non-completion at the time originally contemplated. It is not necessary to discuss the question as to the power of Mr. Brunel to vary the rights of the respondents under the contract by any such arrangement as has been suggested, because I am clearly of opinion that no such agreement as that suggested was in fact made. Mr. Brunel found the appellant greatly behind with his works,

I and thought, whether rightly or not is immaterial, that he ought not to sign any more certificates until the headings had been completed. He thought, however, that in spite of the backward state of the works, the headings might be perfected before certain specified days, if the appellant would proceed with greatly increased vigour and diligence; and what he agreed was, that, if the appellant would increase his exertions so as to secure his completing the headings before certain specified days, he would, though he did not feel warranted in signing certificates, induce the respondents to advance large sums on account so as in effect to give the appellant the same benefit as he would have had if certificates had been given. To this

arrangement the appellant acceded. It clearly did not imply necessarily that the rights of the company arising out of the failure to do the particular portion of the work by the days originally agreed on should be affected, and that the appellant did not understand it as having any such meaning must, I think, be inferred from the fact that he accepted payment with notice of the deduction, and made no objection, though in effect, he was invited so to do if he was dissatisfied. Mr. Brunel denies that he ever stated that any penalties would not be enforced, and I am satisfied of the truth of what he so states. This deduction of penalties, does not, therefore, appear to me to afford any ground for sustaining the bill. A B

Being, therefore, of opinion that the appellant has failed to establish any title to equitable relief, grounded either on the alleged insufficiency of the sums certified or of the deductions made for penalties, I come next to consider whether he has made any case for equitable relief by reason of the course taken by the respondents in taking possession of the works on July 2, 1838. The appellant says that he was proceeding duly to complete the works according to the terms of the contract, when, on July 2, 1838, the respondents wrongfully took possession of all his stock of materials, tools, and implements, turned him off the ground, and took the completion of the works into their own hands. This, the appellant contends, was in effect an abandonment or a repudiation of the contract, so that without reference to the agreed sum of £63,028 he is entitled to have an account taken of the work actually done, and of the machinery, tools, materials, etc., taken possession of by the respondents. I do not think that, even if the appellant had made out what he contends for, namely, that in taking possession of the works the respondents were guilty of a wrongful act, and that they did what the contract did not authorise them to do, the consequence would have been to entitle the appellant to the relief which he asks. If, while he was duly proceeding to fulfil his contract, he was wrongfully impeded by the respondents and by them prevented from doing what he had undertaken to do, they would be answerable to him in damages for all the consequences of their wrongful act. Such damages would, of course, be in part calculated on the value of the plant, and other articles of which he had been wrongfully deprived, but the effect would not be to alter the relative position of the parties as to the contract itself, and to entitle the appellant to say there had been no contract or that he was to be paid for what he had done without reference to the contract. That would not be the consequence of the act of the respondents even treating it as wrongful. The right of the appellant would be to recover such an amount of damages as would put him as nearly as possible in the same position as if no such wrong had been committed, that is, not as if there had been no contract, but as if he had been allowed to complete the contract without interruption. This was his legal right, and I can discover nothing entitling him to any relief beyond that resulting from the enforcing of that right—nothing which can enable him to convert a wrongful act which entitled him to damages into an act which entitled him to an account of work already done, to be taken on terms different from those for which he had contracted. I have assumed that the company on taking possession of the works were guilty of a wrongful act—that they did something not warranted by the contract, but this is not admitted by them. They contend that what they did was warranted by the contract, and the appellant has not case of complaint whatever at law or in equity. This question is one partly of law and partly of fact, and it turns on the following clause of the deed : C D E F G H I

“And further that in case the said W. Ranger shall become insolvent, or be declared bankrupt, or shall from any cause whatsoever other than any arising from the act of the said company, their engineer, or authorised agents, be prevented from or delayed in proceeding with and completing the said works according to this present contract, or shall not commence or proceed in the said works to the satisfaction of the said company, it shall be lawful to and for the said company, if they shall think fit, to give or cause to be given, or left with or at the usual place of abode of the said W. Ranger, or his sureties, any or

A either of them, a notice in writing, either under the common seal of the
said company, or signed by two of the directors thereof, requiring him the said
W. Ranger to enter upon and commence and regularly proceed with the said
works; and that in case the said W. Ranger shall for seven days after such
notice given, or less, make default in commencing, or regularly proceeding with
B the said works, it shall and may be lawful to and for the said company to
employ any other respectable workman or workmen, either by contract, or
measure and value, or otherwise, to proceed with the said works, and to com-
plete the same, and pay or cause to be paid to the said workman or workmen,
the amount of his or their charges for the same, and for all necessary materials,
C utensils, engines, and machinery to be found and provided for such completion
out of the money which shall then be remaining due to the said W. Ranger on
account of this contract. And further, that the moneys which, previously to
such default, shall have been paid to the said W. Ranger on account of any
work or materials then already done or executed or provided by the said W.
Ranger, shall be considered as the full value and be taken by the said W. Ranger
in full payment and satisfaction, not only of and for the said work, in respect
D of which payment may have been made, but likewise of and for any other work
and materials which the said W. Ranger shall have done, executed, or provided,
although no such payments may have been previously made in respect thereof.
And, further, that all the balance and moneys whatsoever which then or there-
after would have been or become due or payable to the said W. Ranger under
this contract, if this present clause had not been inserted, together with all the
E tools and materials then delivered for the purpose of the works hereby con-
tracted for, and then being upon or about the site of the said works, shall, upon
such default as aforesaid, become and be in all respects considered as the
absolute property of the said company. And further, that if the said balance,
moneys, and materials so to become the property of the said company as last
aforesaid, shall be insufficient to cover such charges for workmen and materials
as are hereinbefore lastly directed to be paid thereout, and also the charges and
F expenses of keeping such works in repair for the space of one year after the
completion thereof, then the said W. Ranger, his heirs, executors, and adminis-
trators, shall and will make good and pay to the said company such deficiency
on demand."

The first point to be decided on this clause is one of law. What is the construction
G of this contract? In what circumstances would the company have a right under the
contract to take possession of the appellant's tools and materials, and to complete
the works themselves? That a state of circumstances might arise giving to them
such a right is a matter of no doubt. If, for instance, the appellant had deserted the
works in order to prosecute some more profitable engagement elsewhere, there can
be no doubt that in such a case the rights of the respondents stipulated for by the
H clause in question would have arisen. How then was it to be decided, whether such
a right had or had not arisen? This can only be answered by attending to the
precise terms of the clause. The provision is that if the appellant shall not proceed
with the works to the satisfaction of the company, they may give him notice in
writing calling on him to proceed regularly, and then if he shall for seven days
make default in regularly proceeding with the works, the company may employ
I other workmen, and act on the clause in question. The company might give the
notice if they were dissatisfied, reasonably or unreasonably, with the appellant's
rate of progress, or mode of proceeding. They were the sole judges of the necessity
for or expediency of giving such a notice. Their dissatisfaction with the rate or
mode of proceeding was a sufficient reason for such a notice. But when the notice
was given, their right to act on it depended, not on their view of the appellant's
conduct, not on the question whether they were or were not satisfied with him,
but on the fact whether, after receipt of the notice, he did or did not for seven days
make default in regularly proceeding with the works.

This being the nature of the right, the question becomes one of fact. The respondents having given the notice required by the deed, was the appellant's conduct, after receipt of the notice, such as to justify the respondents in what they did? They must, in order to sustain the validity of their acts, establish as a matter of fact, that the appellant did for seven days after receipt of the notice make default in proceeding regularly, which, I take it, means proceeding with reasonable skill and diligence in the prosecution of the works. [His LORDSHIP stated that the evidence showed that the appellant did make such default.] It is not, however, necessary to decide whether the evidence is so clear as to preclude the necessity for further inquiry, for even if any inference on this point is not just—if, in fact, there was no such default as warranted the course taken by the company—still the result was only to confer on the appellant a right of action to recover damages for the wrong inflicted on him, not a right to treat himself as absolved from the contract and as entitled to be paid for the work he had done as if the contract had never existed. So far, therefore, as relates to the contract 1 B the appellant has failed to show any title to the relief which he asks, being, in substance, a right to payment for the work done irrespective of the contract.

[As regards the contracts designated as 2 B and 8 L, His LORDSHIP said that they were in terms the same as the 1 B contract, and the same observations applied to them.]

The bill then prays a declaration that the appellant did not incur any penalties, or if he did, they were waived, or that the appellant is entitled to be relieved from them. I have already stated my opinion that what are in these contracts called penalties are, in fact, fixed sums agreed upon as the conventional amount of damages to be paid by the contractor in the event of his failing to do certain portions of the work before certain defined times. Nothing could be more reasonable than such a stipulation. It was obviously of vital importance to the company that the works should be completed by a stipulated time, and in order to secure the object they made it a matter of positive contract that certain particular portions of the work should be finished by certain specified times, and on failure to fulfil this engagement the contractor bound himself to pay certain stipulated sums, increasing every week as the increased delay might be likely to be more and more injurious to the company. All the circumstances which have been relied on in the different reported cases, as distinguishing liquidated damages from penalty, are to be found here. The injury to be guarded against was one incapable of exact calculation. The sum to be paid is not the same for every default, for that which should occasion small as for that which should occasion great inconvenience, but one increasing as the inconvenience would become more and more pressing, and finally, the payments are themselves secured by the penalty of a bond. This is hardly consistent with the notion that the payments secured were themselves only penal sums to secure something else. For these reasons I think it clear, that these payments, though called penalties, are, in truth, liquidated damages agreed on by the parties, which the company might set off against the demand of the appellant upon them under the contract. I think it abundantly clear, that from the very commencement of the works the appellant had not sufficient strength to prosecute them with the necessary dispatch. It may be—he says it was—that the cuttings were of a much more difficult and laborious character than he had anticipated. But from whatever cause, he certainly did not advance with the rapidity which the engineer required and which he had promised, and I see nothing whatever fixing the blame on any one but the appellant himself. On the whole, therefore, I come to the conclusion that there was nothing to deprive the respondents of the right to fix the appellant with these sums payable by way of liquidated damages according to the contract, and there certainly is nothing to warrant the declaration asked for, that the company ever waived or abandoned their rights.

The bill next prays a declaration that the company were not entitled to give the notice of June 23, 1838, under which, on July 2 following, they took possession of all the plant and works in the contracts 1 B and 2 B, including the 1 B extension.

A and, further, a declaration that they were not justified in taking such possession, and that they may be ordered to account for and pay to the appellant the value of the plant and property of which they so unjustly possessed themselves. The supplemental bill prays a similar declaration and similar relief in respect to the plant and stock on the Reading line, of which the company took possession on Aug. 20, 1838. The right of the company to take possession of these works depends on the question whether, after the giving of the notices, the appellant did or did not make default in regularly proceeding with the works. If he did not, then the company or their servants were trespassers, and so were responsible in damages. This, however, is not the right insisted on by the appellant. The bill, after asking the declarations as to the seizures to which I have referred, goes on to pray for accounts of what is due to the appellant on the footing of there never having been any contracts, or of the contracts having been abandoned, and this is clearly an erroneous view of his rights, whether the seizures were or were not justifiable.

The bill further prays, that in taking the accounts of what is due to the plaintiff, it may be ascertained what was due to him at the several dates of the different advances made to him by way of mortgage, and that those advances may be treated to the extent of the sums then due as being payments and not loans, with the necessary consequential directions. This relief is asked on the notion that the sums to be treated as actually payable from time to time during the progress of the works were not the sums certified by the engineer, but such sums as the master should find to be the real value of the work done, disregarding the contracts altogether. This as I have already explained, is an erroneous view of the appellant's right. The contracts cannot be disregarded, and according to the contracts nothing was payable during the progress of the works except the sums certified, and at the times of the several mortgage advances all these sums had been fully paid. The company, therefore, had a clear right to the full benefit of all the securities given by the appellant for the several advances made by way of loan on mortgage of the plant, the stock, and the reserved fund, and the appellant could not be entitled to an account on any other principle.

F The bill prays, lastly, that an account may be taken of the engines, tools, materials, articles, and things of which the company took possession, and that they may be debited in account with the value thereof, with interest for the same. The right of the appellant to such an account depends on the question whether, according to the true construction of the agreement, the company were, on taking possession of the plant, to become absolute owners of it to all intents and purposes, or whether the possession was only to be for the purpose of enabling them to go on with the works, and to complete them at the risk and cost of the appellant, holding the plant as a security, so far as it would go, for whatever outlay, if any, they might have to make beyond what they would have had to pay under the contract in case the appellant had duly performed his engagement.

The provisions of the contract are very explicit. First, upon the appellant's default after seven days' notice the company were authorised to proceed and complete the works themselves, paying for the same out of the money then remaining due to the appellant on account of the contract. Secondly, the payments then already made to the appellant were to be taken as full satisfaction for all works then already done by him. Thirdly, all money then due, or which would thereafter have become due to him under the contract, and all the tools and materials in and about the works, were to become the absolute property of the company. Fourthly, if the moneys, tools, and materials so to become the property of the company, should be insufficient to cover all their charges in completing the works, then the appellant was to make good the deficiency. I assume that, in taking possession of the plant, the company did no more than, under these clauses, they were warranted in doing. The question is whether, having taken possession, they became absolutely entitled to all they seized, or whether the whole provision is not to be regarded as mere machinery for enabling them to complete the works at the risk and cost of the appellant. I think the latter is the true construction of the clauses.

When I was considering the question whether the penalties for delay were to be treated as mere penalties to secure the due performance of the work or as liquidated damages to be paid for each default, I observed that one argument, leading strongly to the latter conclusion, was founded on the uncertain nature of the damage to be provided against, that is to say, on the impossibility of saying (as matter of mere calculation) how much the company were prejudiced by the fact that a particular portion of the work was delayed for a week, or a fortnight, or a month. This of itself afforded strong ground for construing the clause as meaning to fix the amount of damage, as being intended to make certain what was otherwise uncertain. But this test fails in the clauses now under consideration. The object of these clauses was to enable the company to do, at the cost of the appellant, the work which he had failed, or seemed likely to fail in himself. The amount of their damage was capable of such admeasurement; it was the sum which they should expend in doing what the appellant ought to have done, less the amount payable to the appellant. In such a case, if the property is made available as a fund for indemnifying the company, all the ends of the clauses in question are fully answered.

It is to be observed that the property seized comprised, inter alia, the three reserved sums of £4,000 each. It could hardly have been in the contemplation of the parties that, without reference to what the company should be obliged to spend in completing the works, they should be at liberty to appropriate to themselves three sums of money amounting to £12,000, and that even though the work remaining to be completed might not amount to £1,000. Further, it was clearly contemplated that the company should keep an account, not only of all which they expended in completing the works, but also of all which they made by the tools and materials seized, for the appellant was to make good any deficiency, and the amount of the deficiency could only be ascertained by keeping accounts of all which was realised, and if accounts were to be kept for the purpose of charging the contractor with the deficiency, it can hardly be supposed to have been the intention of the parties that, if there was a surplus, the company should retain it for their own use. Again, it is to be observed, that the right of the company to make the seizure would, in case of seven days' default after notice, arise at any period of the contract—that is, when work to the amount of only £1,000 or £100 remained to be done, as well as when work to the amount of £50,000 was incomplete. The evidence as to the value of the plant is conflicting, but it could hardly be stated on a rough estimate at less than £10,000, in addition to which there were the three reserved sums of £4,000 each.

It could hardly have been intended that the company should be at liberty to appropriate to themselves the whole of this large stock and these sums of money without reference to the amount of what remained to be done; that they should be at liberty to make a profit from the default of the appellant—a profit which should be so much the larger exactly as the default was less inconvenient to the company. There are cases in which the mere fact that the same sum is made payable for a small default as for a large one has been held to prove that the sum so payable was meant merely as a penalty to secure the due performance of the act intended to be provided for, and not as a sum really recoverable. The same principle is applicable here. A default on the part of the contractor might be very injurious at one stage of the works, and very unimportant at another. So long as a large portion of the works remained to be done, a large fund might be necessary to indemnify the company when driven to undertake the prosecution of the works themselves, but when very little remained to be done that which was only a reasonable security in the former case would become excessive. On these grounds I have come to the conclusion that the true meaning of this part of the contract is that the company, though at liberty to seize and appropriate the plant belonging to the appellant, were yet bound to account for its value in settling their accounts with him.

LORD BROUGHAM.—I cannot sufficiently express my admiration of the great clearness of the statements of my noble and learned friend who has so ably gone through the whole particulars of the case, or of the acuteness, only to be equalled

A by the patience, which he has shown in bringing the whole of these matters before the House. It is for me only to address a few observations to your Lordships upon those parts of the case on which I originally entertained some doubt, and I think it better that I should confine myself to those points than that I should endeavour to follow my noble and learned friend over the whole ground.

B The first prayers of this bill refer to fraud and imposition. The first alleged imposition is respecting the fallacious representations which have been made touching the kind of stone through which the railway was to be made; the second is respecting the possession of shares by the engineer, Mr. Brunel, unknown to the appellant. Upon one only of these heads am I about to offer any remarks to your Lordships. I mean the second—that respecting the possession of shares by the engineer. The first, respecting the alleged fallacious misrepresentations made to
C the contractor respecting the nature of the strata, has been so ably discussed by my noble and learned friend upon grounds on which I entirely agree with him that I have only one single remark to make respecting the sandstone which I think he omitted—namely, that there appears from the evidence to be almost as great a difference in the hardness of the sandstone and the consequent difficulty of working through it as of the other kind of strata that were alleged to be in contrast with it.

D We come to the possession of the shares by the engineer, upon which I certainly originally entertained very considerable doubt, but, upon further consideration of the particulars of the relative position of the principal engineer and the company, and also of the relative position of the engineer and the company, on the one hand, and the contractor of the other, under contracts 1, 2, and 8, I have made up my mind to agree with my noble and learned friend in the conclusion that this does
E not, when well and duly considered, support the claim of the appellant. The position of the engineer was such that he really may be said to have, in some respects altogether and in all respects almost altogether, represented the company. He may almost be taken for the company in all respects, but in some respects he must be taken altogether as being the company.

F *Dimes v. Grand Junction Canal Proprietors* (1) is the case of a judge, a person clothed with high judicial functions, being found to have been a party in the case owing to his being interested in the subject-matter which came before him for his decision. We have here a case, not of a judge—not indeed of anything like a judge.

The utmost that he can be said to be is a kind of referee, to whom certain matters were by the agreement of the parties to be referred—I will not say for his arbitration, but rather for his report and acting upon. In some respects it is found that the
G company is often stated in the alternative. It is said:

“If it shall appear to the company, or their principal engineer for the time being, or his assistant resident engineer”;

and,

H “in all cases proper materials to the satisfaction of the said company or their principal engineer.”

Looking at him in regard to those matters in which he may be said more to decide judicially—for example, the estimates, and the certificates which he was to give, I consider that here he was the known officer of the company. He is not named personally as Mr. Brunel, but as “the principal engineer for the time being.”

I Whoever the company appointed as the engineer for the time being was, he was to give these certificates and make these payments. Nay, moreover he is to decide as it were upon appeals from the assistant or resident engineer, for it is provided that the resident engineer differing from the contractor upon certain matters, Mr. Brunel is to decide.

Then, my Lords, was it not known to the contractor, that Mr. Brunel was the engineer of the company, that he was largely interested on the side of the company as their paid servant, and largely profiting by his connection with the company? Was it not known that he might hold shares in the company? Was it not generally

understood among engineers (though I do not go so far as the Vice-Chancellor of England, who said it was notorious that in all instances the engineers were shareholders), and must it not have been very well known to Mr. Ranger, that it was an ordinary case for an engineer to hold shares? He might have made that an exception in the contract, and required that he should not hold shares, but that provision was not made. The interest which he had in shares was trifling compared with his general interest arising out of his connection with the company. Had this proviso been made, the absurdity would happen to which my noble and learned friend has adverted, that, although not possessed of shares at that time, he might any day have purchased them, nay more, he might have inherited them; they might have come to him by descent, and then he would have been put in this position—that he must either have given up what had come to him, or have ceased to be the engineer employed by the company, for if he had continued possessed, either by purchase or inheritance, of a single share, according to the rigour of the argument deduced from *Dimes v. Grand Junction Canal Proprietors* (1), he must have ceased to act under these covenants, and the whole operations of the company must at once have been convulsed. I think, therefore, my Lords, upon the whole, there is no ground for considering that the position in which he was placed was a quasi judicial position. I think it is clear that he was the company; that the contractor considered him as the company; that in all matters the interests of the company and of their engineer were the same; and that with his eyes open, he put himself to a certain degree in the hands of the company, only securing himself by the express stipulations which are made to limit the discretion of the company. I look upon Mr. Brunel, the principal engineer for the time being in this case, as the company itself.

I have known cases in which, in private local Acts of considerable importance, there has been an express provision that certain judicial proceedings shall take place in which a jury shall be impanelled and shall act under one or other of the directors of the company. Although the company is, in fact, the party interested, yet one or other of their directors sits to direct the jury, to dispose of questions of evidence, and to decide upon the admission of one piece of evidence and the rejection of another; and this is the case although the director was the party between whom and the claimant to compensation the whole proceedings were going on. This is found to be a convenient arrangement, and an arrangement of that sort, for the convenience of the work and of both parties, appears to have been voluntarily entered into by the parties to this suit.

[His LORDSHIP dealt with questions of fact which do not call for report and continued:] The last point upon which I have a word to say in addition to the statement of my noble and learned friend, refers to the question of liquidated damages. I greatly lament that the law has been so laid down by cases upon which it is too late to make any comment, as to make the question whether a sum is to be regarded as a penalty or as liquidated damages depend in every case on the intention of the parties. I think this has been lamented formerly by learned judges, and although Lord ELDON very cautiously, as was his wont, expresses himself on this matter, yet it is impossible to read what he said in *Astley v. Weldon* (2), the leading case on the subject, in the Court of Common Pleas during the short time that that most learned judge sat in that court, without seeing that he was dissatisfied with the former current of cases. He expresses the great difficulty which he had often found in making his way through these cases, and I think there can be but little doubt that he lamented the course which the law had taken. But, my Lords, it is now too late to alter this, and we are in every case bound to consider whether we are to grant liquidated damages or penalties according to the principles that those cases had established. According to those principles I have no doubt whatever that, in this case, liquidated damages are due as regards the fourth prayer of the bill—I mean those injuries sustained by the company by the delay where that delay was increasing and in which no specific sum could be apportioned in respect of a particular injury done to the company. I agree with my noble and learned friend that we must consider the sums in question as liquidated damages—

A as a compensation to the company for the loss sustained by the delay. In another instance it is equally clear, upon the principles laid down, both in *Astley v. Weldon* (2), and also in *Charrington v. Laing* (3) that it is to be taken as penalty.

B There can be no doubt that the court from which this appeal comes went as far as possible in setting aside all reference to the intention of the parties, and held, distinguishing between the different matters which were in the consideration of the parties when they entered into the covenant, that one was to be taken as liquidated damages, and another as penalty, although it was perfectly clear, as clear as words could make it, that the parties had intended the whole to be taken as liquidated damages and not as penalty. The learned judge, in giving the decision of the court, says :

C "It is difficult to suppose any words more explicit or express than those used in the agreement; the same declaration not only states affirmatively that the sum of £1,000 should be taken as liquidated damages, but negatively also that it should not be considered as a penalty, or in the nature of a penalty."

Yet, nevertheless, because there were some things that were so specific and others less specific and more general, the court thought they were bound by the current of cases to draw that distinction between the two, and that in spite of the positive and distinct statement of the meaning of the parties, they were bound to consider that the parties did not mean that to be taken as to the whole, but only as to a part, and, therefore, to decide that a part of the sum should be penalty although the parties had said that none should be penalty, and that the other part should be liquidated damages although the parties intended that this character should apply to the whole. The result is as has been stated by my noble and learned friend.

F

SCOTTISH MARINE INSURANCE CO. v. TURNER AND OTHERS

[HOUSE OF LORDS (Lord Cranworth, L.C., Lord Truro and other Lords), February 15, 17, March 3, 1853]

G

[Reported 4 H.L.Cas. 312, n.; 21 L.T.O.S. 10; 17 Jur. 631;
1 W.R. 537; 1 Macq. 334; 10 W.R. 483]

Insurance—Marine insurance—Freight—Constructive loss of ship—Abandonment to insurers of ship—Receipt of freight by owners—Payment over to insurers of ship—Liability of insurers of freight.

H

A ship, valued at £7,500, was insured from Quebec to a port in the United Kingdom, on ship and also, with the appellant insurance company, on freight. During the voyage she encountered an iceberg which damaged her, but she was kept afloat till she neared Liverpool, where the dock-master refused to admit her into dock owing to her disabled condition and ordered her to lie outside. When the tide went out she grounded and fell outwards, thereby receiving additional damage. She was afterwards floated into dock, her cargo was delivered, and the freight was paid to the owners. She was then surveyed and pronounced to be a wreck and only worth £475. The owners thereupon abandoned the ship to the insurers and claimed for a total loss. Payment being refused, the owners brought an action, the jury found that the vessel was a total loss at the date of the second accident, and was rightly abandoned, and the court held that the underwriters on ship thereby became entitled to the freight. This was paid to them by the owners, who then sued the appellants, as insurers on freight, as for a total loss of freight.

I

Held: the freight insured was actually earned and received by the owners, who, but for their act in abandoning the ship after the receipt of the freight, might have retained it for their own use, and, therefore, the appellants were not liable and the respondents' action did not lie. A

Notes. It is now commonly provided in freight policies that the amount insured shall be paid in full in the event of the total loss, whether actual or constructive, of the ship: see *Institute Voyage Clauses, Freight*, cl. 6. B

Considered: *Rankin v. Potter* (1873), L.R. 6 H.L. 83. Referred to: *Miller v. Woodfall* (1857), 8 E. & B. 493; *Carras v. London and Scottish Assurance Corp'n., Ltd.*, [1935] All E.R.Rep. 246; *Robertson v. Petros M. Nomikos, Ltd.*, [1939] 2 All E.R. 723.

As to total loss of freight, see 22 HALSBURY'S LAWS (3rd Edn.) 147-149; and for cases see 29 DIGEST (Repl.) 242-245, 299-304. C

Cases referred to:

- (1) *Stewart v. Greenock Marine Insurance Co.* (1848), 2 H.L.Cas. 159; 9 E.R. 1052; sub nom. *The Laurel*, *Stewart v. Greenock Marine Insurance Co.*, 2 L.T. 809, H.L.; 29 Digest (Repl.) 336, 2556.
- (2) *Case v. Davidson* (1816), 5 M. & S. 79; affirmed sub nom. *Case v. Davidson* (1820), 2 Brod. & Bing. 379; 8 Price, 542; 5 Moore, C.P. 116; 129 E.R. 1013, Ex. Ch.; 29 Digest (Repl.) 336, 2555. D
- (3) *Benson v. Chapman* (1843), 6 Man. & G. 792; 7 Scott, N.R. 625; 7 Jur. 1170; reversed sub nom. *Chapman v. Benson* (1847), 5 C.B. 380, Ex. Ch.; affirmed sub nom. *Benson v. Chapman* (1849), 2 H.L.Cas. 696; 8 C.B. 960; 13 Jur. 969; 9 E.R. 1256, H.L.; 29 Digest (Repl.) 303, 2286. E
- (4) *Samuel v. Royal Exchange Assurance Co.* (1828), 2 B. & C. 119; 6 L.J.O.S.K.B. 315; 108 E.R. 987; 29 Digest (Repl.) 166, 1027.
- (5) *Thompson v. Rowcroft* (1803), 4 East, 34; 102 E.R. 742; 29 Digest (Repl.) 335, 2552.
- (6) *Everth v. Smith* (1814), 2 M. & S. 278; 105 E.R. 385; 29 Digest (Repl.) 327, 2471.
- (7) *M'Carthy v. Abel* (1804), 5 East, 388; 1 Smith, K.B. 524; 102 E.R. 1118; 29 Digest (Repl.) 242, 1826. F

Also referred to in argument:

- De Vaux v. Salvador* (1836), 4 Ad. & El. 420; 1 Har. & W. 751; 6 Nev. & M.K.B. 713; 5 L.J.K.B. 134; 111 E.R. 845; 29 Digest (Repl.) 246, 1844.
- Powell v. Gudgeon* (1816), 5 M. & S. 431; 105 E.R. 1108; 29 Digest (Repl.) 245, 1841. G
- Morrison v. Parsons* (1810), 2 Taunt. 407; 127 E.R. 1136; 41 Digest 633, 4641.
- Roux v. Salvador* (1836), 3 Bing.N.C. 266; 2 Hodg. 209; 4 Scott, 1; 7 L.J.Ex. 328; 132 E.R. 413, Ex. Ch.; 29 Digest (Repl.) 307, 2322.
- Cambridge v. Anderton* (1824), 2 B. & C. 691; 1 C. & P. 213; 4 Dow. & Ry.K.B. 203; Ry. & M. 60; 2 L.J.O.S.K.B. 141; 107 E.R. 540; 29 Digest (Repl.) 296, 2232. H
- Mellish v. Andrews* (1812), 15 East, 18; 104 E.R. 749; 29 Digest (Repl.) 328, 2490.
- Sharp v. Gladstone* (1805), 7 East, 24; 3 Smith, K.B. 39; 103 E.R. 10; 29 Digest (Repl.) 335, 2553.
- Leatham v. Terry* (1803), 3 Bos. & P. 479; 127 E.R. 260; 29 Digest (Repl.) 335, 2551. I
- Holdsworth v. Wise* (1828), 7 B. & C. 794; 1 Man. & Ry.K.B. 673; 6 L.J.O.S.K.B. 134; 108 E.R. 919; 29 Digest (Repl.) 309, 2337.
- Moss v. Smith* (1850), 9 C.B. 94; 19 L.J.C.P. 225; 14 L.T.O.S. 376; 14 Jur. 1003; 187 E.R. 827; 29 Digest (Repl.) 303, 2288.
- Idle v. Royal Exchange Assurance Co.* (1819), 8 Taunt. 755; 3 Moore, C.P. 115; 129 E.R. 577; on appeal, 3 Brod. & Bing. 151, n.; 29 Digest (Repl.) 326, 2467.

- A *Read v. Bonham* (1821), 3 Brod. & Bing. 147; 6 Moore, C.P. 397; 129 E.R. 1238; 29 Digest (Repl.) 305, 2305.
- Ashmole v. Wainwright* (1842), 2 Q.B. 837; 2 Gal. & Dav. 217; 11 L.J.Q.B. 79; 6 Jur. 729; 114 E.R. 325; 8 Digest (Repl.) 16, 76.
- Fleming v. Smith* (1848), 1 H.L.Cas. 513; 9 E.R. 859, II.L.; 29 Digest (Repl.) 332, 2528.
- B *Knight v. Faith* (1850), 15 Q.B. 649; 19 L.J.Q.B. 509; 15 L.T.O.S. 277; 14 Jur. 1114; 117 E.R. 605; 29 Digest (Repl.) 152, 898.

Appeal by the defendants from a decision of the Court of Session in an action on a policy of insurance of freight.

- C The respondents were owners of the ship *Laurel*, of Greenock, which was valued at £7,500. She was insured to the extent of £6,500, the owners being their own insurers for the remaining £1,000. The appellants were insurers of the ship to the extent of £1,500. The freight was also insured to the amount of £1,500, of which £1,000 were undertaken by the appellants. This policy effected with the appellants on the freight (on which the present action was brought) was dated July 15, 1842, and bore to be

- D "at and from Quebec to a port of discharge in the United Kingdom, beginning the said adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above,"

and continuing upon the said ship

- E "until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed."

The risks were described in the usual terms, perils of the seas, men-of-war, fire, etc.,

"and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, etc., or any part thereof."

- F The ship performed her outward voyage with safety, and at Quebec loaded for her return a cargo of timber, staves and flour. She left Quebec on July 14, 1842. On July 27 she came into contact with an iceberg, there being at the time strong breezes and a thick fog. Her bows and topgallant forecastle were stove in, and otherwise she was so damaged that she immediately filled and became waterlogged, and was thus reduced to a wrecked or sinking condition. By the exertions, however, of the crew, and owing to her cargo being timber, she was kept afloat, and ultimately arrived off Liverpool on Aug. 11. The dockmaster, on seeing her disabled condition, refused to receive her within the dock, and directed her to be moored outside, so that, when the tide left, she might be scuttled. The result was that she grounded, fell outwards, and sustained additional injury. When the tide receded holes were bored in the bottom, and the water allowed to run out. These openings were afterwards closed, and the wreck was ultimately floated into the dock, when the cargo was discharged, it having escaped uninjured. The owners received the freight from the consignees, amounting to £1,402 2s. 2d. On Sept. 1, after the cargo was cleared out, the owners had the wreck surveyed, and, finding her damage so great that the expense of the repairs would far exceed her value, they intimated an abandonment to the underwriters of the ship and their intention to claim for a total loss. No notice was sent to the underwriters of freight. Some of the underwriters of the ship having refused to pay except for a partial loss, an action was brought in Scotland by the owners against one of these underwriters to recover for a total loss. This action was entitled *Stewart v. Greenock Marine Insurance Co.* (1). It went to trial on the issue

"whether the *Laurel*, by and through injury sustained on or about July 27, 1842, and on or about Aug. 11, 1842, or one or other of these dates, and during the currency of the policy (on the ship), became a wreck and was totally lost."

The jury returned the following verdict :

"Find for the plaintiffs in respect that the *Laurel* was properly abandoned, and not worth repairing, and that her damage arose from her coming in contact with an iceberg, and also from grounding at the dock at Liverpool. Also find that the ship was perfectly seaworthy, reserving for the decision of the court the point raised by the defendants of their title to a proportion of the freight. Also find that the vessel was a total loss, irrespective of the decayed timber and deficient sails."

With respect to the question submitted by the verdict to the court, it was afterwards decided by the court that the underwriters of the ship were entitled to the freight earned subsequently to Aug. 11, the date of the accident in the Mersey. An appeal to the House of Lords was entered against that decision, and after argument LORD COTTENHAM confirmed it : see *Stewart v. Greenock Marine Insurance Co.* (1).

The owners, having under the above judgment paid over the freight which they had received to the underwriters of ship, brought the present action against the underwriters of freight to recover for a total loss of freight. The insurers demurred on the ground that there had been no loss of the freight within the policy; that the damage sustained by the ship did not disable the ship from earning freight; and that the owners themselves had de facto earned and received the freight. The court below, by a majority of three to one, gave judgment for the respondent, and the appellants appealed.

Sir Frederic Thesiger and *Willes* for the appellants.

Sir Fitzroy Kelly, *Serjeant Byles*, and *Burnie* for the respondents.

Their Lordships took time for consideration.

Mar. 3, 1853. The following opinions were read.

LORD CRANWORTH, L.C.—I have given very anxious attention to the able and well-reasoned judgments which fully disclose the grounds upon which the court below proceeded. Those grounds were these. First, they considered that there was a total and actual loss of the ship before she was brought into dock. Secondly, that being so, and the ship having been abandoned to the underwriters, or, at all events, notice of the loss having been duly given to them, the damaged vessel became their property as from the time of the fatal injury, say on Aug. 11. It is immaterial whether it was Aug. 11 or July 27 before she got into dock. Thirdly, the court considered the legal consequence of such a state of facts as established by *Case v. Davidson* (2), and a case in your Lordships' House, arising out of this very transaction (*Stewart v. Greenock Marine Insurance Co.* (1)), to be, that freight accruing due after Aug. 11 (which includes all the freight of the ship) belonged not to the owners, but to the insurers of the ship, and so was lost to the owners. Fourthly, the court held, that the cause of this loss of freight to the owners was the loss of the ship by perils of the sea, and so the freight was lost by one of the perils insured against.

These are the grounds on which the Court of Session proceeded. But with all respect to the distinguished persons by whom these judgments were pronounced, I think they rest on an unsound foundation. I do not think that, as between the parties in this cause, it can be said that the ship was totally lost during her voyage. That she was not, in fact, lost is certain, for she arrived at Liverpool—was there brought into dock—her cargo was safely delivered to the consignees, and the freight was paid to the owners. How then, it may be said, is this consistent with the verdict of the jury in the action against the underwriters of the ship, which finds expressly that the vessel was a total loss irrespective of the decayed timber and deficient sails? To this I answer, that the verdict was altogether *res inter alios acta*. As between the underwriters on the ship and the assured, it might be proper to treat the damage as a total loss. But it does not follow that it can be so treated as between the owners and other persons—as between the owners, for example, and the underwriters of the freight. When it is said that, as between the owners and

A the underwriters of the ship, there had been a total loss, all that is meant is that the circumstances of the case were such as gave to the owners the same rights against the insurers of the ship as if there had actually been a total loss. It does not by any means follow that the same circumstances will give to the owners similar rights against other persons. When the cargo was delivered to the consignees and the freight paid, the owners might, if they had thought it for their interest, have retained the damaged vessel, and come on the insurers for the cost of repairing her, or for a due proportion of that cost. In such a case there could have been no possible claim on the appellants, the underwriters of the freight. Their contract would have been performed. How can the right of the owners to enforce against third persons claims resting on what is in truth a fiction, namely, on the assumption that the ship did not perform her voyage, give them any right against those whose contract was actually performed?

The learned judges in the Court of Session seem to doubt whether the contract of the underwriters on the freight was performed; whether the sum paid to the owners by the consignees, on delivery of the cargo at Liverpool, could be treated as freight; whether it was not rather to be regarded as in the nature of salvage, paid indeed to the owners, but paid to them only as agents of the underwriters on the ship.

D I do not, however, think there is any ground for such a doubt. The sum paid to the owners by the consignees was due for freight, and for nothing else; and if payment had been withheld, there can be no doubt but that an action could have been maintained by the owners for freight, immediately on delivery of the cargo. None but the owners could have maintained such an action, and they could maintain it only by virtue of their original contract of affreightment. What the underwriters on freight undertook was that the voyage should be so performed as that the owners should be able to deliver the cargo, and so be in a condition to assert their title to freight; and this state of things actually occurred. It is true that the Court of Session first, and afterwards this House, in the action by the underwriters on the ship against the owners, decided that the sums paid for freight were paid to the owners, not for their own benefit, but for the use and behoof of the insurers; and it was strongly contended at your Lordships' Bar, that the contract into which the appellants, the underwriters on freight, entered with the owners was that the voyage should be so performed as to entitle the owners to recover the freight for their own use, and not merely as agents or trustees for others. The decision in the action by the owners against the insurers of the ship has been that under the circumstances the freight was due, not to the former, but to the latter, and so it was said the contract of the underwriters on the freight was not performed; but this reasoning rests on a fallacy. The underwriters on the freight engaged that the ship should not be prevented by perils of the sea from enabling the owners to earn her freight. Nor was she so prevented; for, in spite of those perils, she arrived in port under the conduct of the owners, and obtained payment of her freight. The right of the underwriters to claim that freight against the owners arose, not from perils of the sea, but from the election made by the owners after the freight had been earned and paid them, to treat the ship as wholly lost on or before Aug. 11. Where a ship has received such an injury as entitles the owner to treat it as totally lost, and the owner consequently abandons it to the underwriters, they, if they repair and navigate her, come in as assignees, and so are entitled to all freight afterwards earned. In such a case the owner has been compelled by perils of the sea to abandon the ship, and so he loses not only the ship, but all possibility of earning freight.

It was to this state of circumstances that TINDAL, C.-J., refers in *Benson v. Chapman* (3), where he says (6 Man. & G. at p. 810)

"The assured has sustained a total loss of the freight if he abandons the ship to the underwriters on ship, and is justified in so doing; for after such abandonment he has no longer the means of earning the freight, or the possibility of ever receiving it, if earned; such freight going to the underwriters on ship."

But there the very learned Chief Justice was referring to what was then treated as a total loss and abandonment to the underwriters before the freight was earned. The distinction between *Benson v. Chapman* (3), according to what were supposed in the Common Pleas to be the facts, and the present case is that there, before any freight had been earned, there had been a damage so serious as to justify the owner in treating it as a total loss and abandoning the ship to the underwriters, whereas here the owners remained in actual possession till after the freight had been earned, and earned by reason of the ship having actually performed the voyage in question. I do not apprehend that there is any doubt as to the soundness of the doctrine laid down by TINDAL, C.J., though the judgment of the Court of Common Pleas was reversed by the Exchequer Chamber, and that reversal was afterwards sustained by this House. That reversal proceeded on the ground, not that the views of the Chief Justice were erroneous if the facts had been such as they were supposed to be in the court below before the facts had been put on the record in the form of a special verdict, viz., that there had been a total loss and abandonment, but because it was considered that the facts found in the special verdict did not show that there had been a total loss and abandonment, so that the principles laid down by the Chief Justice were inapplicable.

It was argued at your Lordships' Bar that here the circumstances are precisely those to which the Chief Justice referred and on which he relied, namely, an abandonment to the underwriters on the ship in consequence of damage so serious as to have justified such an abandonment. This, it was said, was a total loss, and so the doctrine of the Chief Justice, that there was a total loss of freight as well as of ship, is strictly applicable. There is, however, a manifest and most important difference between the case on which TINDAL, C.J., was reasoning and the present. The Chief Justice was referring to a case of loss and abandonment during the course of the voyage, and before the freight had been earned. Here, though, according to the verdict, the ship was totally lost, yet there was no abandonment till after she had arrived in port, the owners were in a condition to insist on payment of the freight, and that freight had been paid to them.

In such a state of things, I concur in what was said by ALDERSON, B., when he delivered in this House the opinion of the judges in *Benson v. Chapman* (3), when he said (2 H.L.Cas. at p. 721):

"Nor, indeed, is there any instance to be found in which an action for a total loss of freight has been held to be maintainable, where the freight has been actually earned."

The court below seems to me to have fallen into an error by overlooking this distinction. Whatever might be the rights of the owners as between themselves and the insurers of the ship, it could not possibly be competent to them, after the freight had been earned, to make an election which should affect the interests of third persons. I am not aware, indeed, of any previous case in which, after a ship had actually performed her voyage, the owners have been permitted, even between themselves and the underwriters on the ship, to treat damage sustained on the voyage as a total loss, abandoning the ship to the underwriters after her arrival in port. I observe that the Lord Chancellor, in moving the judgment of this House in *Stewart v. Greenock Marine Insurance Co.* (1), where the question was who, as between the owners and the underwriters on the ship, were entitled to the freight earned, cautiously abstains from giving any opinion on the point whether there had been what could justly be treated as a total loss. His Lordship's opinion, indeed, proceeds on the assumption that such was the case, but then he says expressly:

"The facts, as found by the verdict, must be the ground on which the consideration of the question must proceed. . . . The verdict finds, first, that there was a total loss of the *Laurel*."

Then, proceeding on the ground that, as between the then parties, namely, the owners and the insurers on the ship, there had been what the verdict had con-

Aclusively established to be a total loss, he considers what, as between those parties, were the rights in respect of the freight. That was the sole question then before your Lordships; and the decision then come to does not govern a case where the parties are different and where it is open to the party sought to be charged to contend that, as against him, there cannot be said to have been that total loss the existence of which was the foundation of the former decision.

B On the ground, therefore, that here the freight insured was actually earned and received by the owners, and that but for their act, after such earning and receipt, they might have retained it for their own use, so that the contract into which the appellants entered was strictly performed, I have come to the conclusion that the judgment below was erroneous, and I, therefore, move your Lordships that it be reversed.

C **LORD TRURO.**—I concur in the conclusion to which my noble and learned friend has arrived, that the judgment which was pronounced in the court below is erroneous, and ought to be reversed. Except that the case is one of considerable importance, I should have been well content to have rested entirely upon the reasons which the noble Lord has given. I think they are perfectly sound. I am satisfied

D that they are consistent with every previous decision, except that which is now the subject of appeal.

Your Lordships are rightly told that in this case the assured upon a policy for freight claims to recover the total loss upon that policy, not by reason that the freight has been actually lost, but by reason that the assured, who has received the freight, is not entitled to retain it for his own use. The case of the respondent,

E as appears upon the record, is that the freight has been earned and has been received, but the assured, by reason of certain circumstances, has been compelled to allow the underwriters upon the ship the freight so earned and so received in an account by way of set-off against the subscription, the amount of which he claims to be entitled to receive. It appears, as your Lordships have heard, that this ship sailed from Quebec on July 14. She arrived in the River Mersey, and at the

F entrance of the Liverpool Docks on Aug. 11. She had been materially damaged on July 27, soon after she sailed from Quebec, by coming in contact with an iceberg, and again sustained considerable damage on Aug. 11 at the entrance into the Liverpool docks. It also appears by the respondents' case, that she was afterwards floated into the basin, and on Aug. 12 or 13 was floated into the dock, where she was moored and remained until the next day, when she was put into a graving

G dock, where she delivered her cargo, and the owner afterwards received freight. Some days after the delivery of the cargo it appeared that the ship was surveyed, and found to be damaged to such an extent, as to render her not worth repairing; whereupon the respondent, the assured, abandoned the ship to the underwriters, and sued them for a total loss, and recovered, but the court, in determining the amount which the respondent was entitled to recover, decided that the underwriters were entitled

H to have credit for the amount of the freight which the respondent had received against the amount of their subscriptions. The assured, being thus compelled to allow in an account with the underwriters in the settlement of the loss the amount of freight, instituted the present suit against the underwriters upon the freight, insisting that, because he was so compelled to allow the freight actually received to the underwriters of the ship, there had been within the meaning of the policy a

I total loss of freight.

The question now before your Lordships is whether, because the underwriters upon the ship were so entitled, which this House has decided they were, to the amount of freight, that in point of law constitutes a total loss of freight within the meaning of the policy. I own it appears to me that the assured's right of abandonment and recovery of a total loss against the underwriters upon the ship has been determined under circumstances somewhat peculiar. The ship actually performed the voyage, a circumstance which, as far as I am aware, has never occurred where the owner has been held entitled to abandon the ship and claim for a total loss,

however extensive the damage may have been which was incurred during the voyage. In the cases in which abandonment has hitherto been allowed, the voyage has either been actually lost, or the ship has been placed by the perils insured against in circumstances in which no prudent owner uninsured would do that which has become necessary to enable the ship to perform the voyage. In some of the cases ships have been under capture or detention by hostile powers, or stranded, attended with uncertainty whether the ship could ever be got off in a situation able to prosecute the voyage, or so damaged at an intermediate port as to be either irreparable altogether by reason of her own condition, or for want of the necessary means of repair, or requiring an outlay to enable her to pursue her voyage, such as no prudent owner uninsured would incur. In all these cases, at the time of the abandonment, either the voyage was lost, or in imminent peril of being so. But, as before stated, in this case, though the damage was incurred during the voyage, that is, before she had delivered her cargo in the Liverpool dock, yet that damage did not prevent her from completing her voyage by delivering her cargo and earning her freight. That the underwriters of the ship were liable to indemnify the owner for the pecuniary damages which he would sustain by the outlay necessary to repair the injuries which the ship had received is quite clear, but the decision, by which the right to abandon and recover a total loss was established, appears to me to be somewhat in advance of the previous decisions. A B C D

The case the nearest in point of circumstances is that of *Samuel v. Royal Exchange Assurance Co.* (4). In that case the ship was insured to the port of London, and was ultimately destined to deliver her cargo in the King's Dock at Deptford. She arrived at the dock gates, but before entering the dock was there totally lost and thereby prevented from completing her voyage. The plaintiff was held entitled to recover for a total loss, but only upon the ground that she was lost during her voyage, that is, before she was moored at the place of her ultimate destination, and her voyage thereby completed. But, as before stated, in the present case, though the damage was during the voyage, the ship was not thereby prevented from completing her voyage. It does not appear to me that, provided the loss occurs during a voyage, it is at all material whether that loss happens a short time after the inception of the risk, or a short time before the voyage is completed. From the commencement to the termination of the risk the effect of the loss is the same inasmuch as the loss during any portion of that interval is equally a loss at whatever time it may occur during the voyage. E F

In the action against the underwriters on the ship in the present case the jury found facts which must be coupled with facts admitted upon the record. This, I think, has been much overlooked, it being a clear principle of law that that which the parties admit upon the face of the record the jury cannot gainsay. It is not within the issue left to them. Their verdict, therefore, must always be construed with reference to the facts admitted upon the face of the record. The verdict in this case, taking it in its terms coupled with the facts admitted upon the record, shows that the ship, although so damaged as not to be worth repairing, had yet performed her voyage. The verdict is certainly not quite so distinct upon some of the material facts as we are accustomed to see verdicts in the English courts. But, the terms of that verdict being taken in connection with the facts admitted upon the record to which that verdict would be appended, and upon which the judgment was pronounced, the facts distinctly appear that the damage sustained by the ship, either by coming in contact with the iceberg or at the pier head, did not prevent her afterwards being floated into the basin, and subsequently into the dock, where she was moored and from which, on the following day, she was taken into the graving dock where she discharged her cargo. It further appeared that some days after this the ship was surveyed. It was at first reported that the cost of repairing her would be £3,000; it was afterwards estimated that it would exceed £4,000, the ship having been valued in the policy at £7,500. Further, it appears that the freight, as before stated, actually earned and paid to the owners, amounted to £1,402 2s. 2d., which is the amount sought to be recovered on the policies on freight. So that the G H I

A verdict, properly construed with reference to the other facts admitted upon the record, by which the parties are conclusively bound, shows that the damage sustained by the ship did not prevent her from completing her voyage and earning her freight. These are facts necessary to be attended to in proceeding with the inquiry as to the rights of the parties in the present case.

B In order to determine whether those facts constitute a loss of freight within the meaning of the policy on freight, it is necessary to consider what are the obligations which the underwriter takes upon himself by that policy. I conceive that the underwriter upon the freight binds himself to indemnify the assured against any loss of freight occasioned by the ship being prevented from performing the voyage insured by any of the perils mentioned in the policy and thereby the freight insured being earned. He does not engage that the assured should be able to procure a loading, or that he should be entitled to retain the freight as between him and any other persons after it shall have been earned. I understand his liability to indemnify against the loss of freight is limited to a loss occasioned by the ship's being prevented from performing the voyage insured by any of the perils within the policy. With a loss of freight sustained from any other cause, or by any other means than the incapacity of the ship to perform the voyage and earn the freight, D I do not understand the underwriter is at all concerned.

In *Benson v. Chapman* (3), ALDERSON, B., in delivering the opinion of the judges to your Lordships' House, expressly stated that there was no case in which it had been held there was a loss of freight where the voyage had been performed and the freight had been earned, and that the underwriters engaged only that freight should be earned, and it had been earned. I own, my Lords, it struck me with some surprise that that case should be stated, and that principle distinctly enunciated, but yet no answer that I can see is to be found in any part of the argument below, and none has been stated at your Lordships' Bar, which can in any respect impeach the soundness of that general principle which the learned baron pronounced in delivering the opinion of the judges. No case has been cited, and I believe none can be cited, inconsistent with that doctrine. It is correctly stated that the decision of the Common Pleas was upon the distinct ground that the voyage had been lost, that is to say, that the ship had been reduced to such a state of damage by the perils insured against as that she could not be put into a condition to perform the voyage without an outlay such as no uninsured prudent owner would incur. The owner, in order to save the underwriters, would not be bound to do that, greatly to his injury, which he would not do if uninsured, and, therefore, in that respect he was entitled to abandon the ship. When he abandoned the ship, he, of course, would be entitled to nothing which the future owner of the ship might earn by means of the ship, which, though once belonging to the original owner, had ceased to be so by the effect of the abandonment, justified by the consequences of those perils against which he had insured. That judgment, it is true, was reversed in the Exchequer Chamber, the reversal being sustained by this House, but nobody, that H I am aware of, uttered a word tending to impugn the correctness of the law which had been laid down in the Court of Common Pleas. It was argued in the Common Pleas upon a Special Case, that is, a statement of facts agreed to by the parties. That Special Case stated that certain circumstances had occurred to the ship, the parties leaving it to the court to say whether those circumstances amounted to a total loss or not. But when they bring a writ of error to review the judgment, it is I then necessary that that Special Case, with the statement of the circumstances, should be altered so as to state the conclusion of fact to which those circumstances lead. The court, in hearing the argument upon the Special Case in the first instance, draw the conclusion of fact as if they were a jury, but when it goes to a court of error there is no licence to the court of error to draw a conclusion of fact—they can only deal with the facts actually recorded. In the Court of Common Pleas the court inferred that there had been a total loss. When the facts with the conclusions came to be drawn out into the form of a special verdict, the fact was stated that no prudent owner would have incurred the expense which was necessary to

repair the ship; but the record did not state that, the ship being at Pernambuco and the owner in England, no prudent owner would have incurred the expense if he had been at Pernambuco. In other words, the captain upon the spot having been induced to repair, exercising his best judgment in regard to the facts, the Case, in stating that no prudent owner here would have incurred the expense, did not state that a prudent owner upon the spot, aware of the facts, which the captain was aware of, would not have repaired. The court of error said, therefore: "We cannot say that a prudent owner at Pernambuco would not have repaired, because you tell us a prudent owner in England would not have repaired. The captain stood in place of the owner, and, therefore, you must give us that conclusion of fact, placing the owner in the situation in which the captain was placed. And unless the verdict states that no prudent owner at Pernambuco would have incurred the expense, we cannot say that the owner was authorised to abandon the ship, because it is only on the footing that no prudent owner in the circumstances in which he is supposed to be placed would incur the expense that he is entitled to abandon her." The judgment, therefore, was reversed, because the court of error could not draw that conclusion of fact upon the special verdict which the Court of Common Pleas had drawn upon the Special Case, the law being perfectly unimpugned either in the Court of Exchequer Chamber or at the Bar of this House. The case, therefore, was ultimately determined upon the ground that there did not appear to have been such a constructive total loss of the ship as to warrant the owner in abandoning her. If the true construction of the policy, or, in other words, the obligation of the underwriters upon the freight, be what I have stated, the facts of this case appear to be conclusive against the claim of the respondent. As I before stated, it appears by the record that the voyage was performed notwithstanding the damage which the ship received, and the freight was not only earned but also received.

The decision against the underwriter below, however, was founded upon a different view of the effect of the policy, and it becomes necessary to examine the correctness of the construction so adopted, and the application of that construction to the facts of this case. The expression "the loss of freight" has two meanings, and the distinction between them and its effects it is material to bear in mind. Freight may be lost in the sense that by reason of the perils insured against the ship has been prevented from earning freight. Or you may use the expression "loss of freight" in the sense that it may be lost to the owner, after it has been earned, by some circumstances unconnected with the contract between the assured and the underwriters on the freight. For a loss of freight in the first sense, that is, the ship being prevented earning the freight by the non-performance of the voyage insured, the underwriter on the freight is liable. But for any loss of freight sustained by the owner after it has been earned, I conceive the underwriter is not liable. I can extract no obligation whatever from the policy which should subject him to such a loss. He has performed his warranty by the freight being earned, and he has no concern whatever with who may be entitled to the freight when so earned. In this case, at the time the owner received the freight, he received it on his own account for his own benefit, and, as the facts then stood, was entitled to retain it against all the world. The contract between the owner and the underwriters on freight had been entirely performed, and the relation between them determined, and the assured was at that time entitled not only to retain the freight, but to recover a full compensation for any pecuniary loss he might have incurred by reason of the damage which his ship had sustained. But having valued his ship at the sum of £7,500 and the cost of the necessary repairs of the damage being £4,000 only, he preferred to claim a total loss and to abandon his ship, and thereby obtain £7,500 rather than to claim a partial loss, by which he would be entitled to recover only his actual damage of £4,000, retaining at the same time his ship. The consequence of his electing to take that course was to make the freight which he had received for his own benefit an item in account between him and the underwriters of the ship, and upon that he founds a claim to a total loss of freight against the appellant. The act of aban-

A donment, if it did not operate as an assignment of the ship, at least enured as a binding agreement to assign it, and thereby invested the underwriter on the ship with all the rights which belonged to him as owner, among which rights it is said was that of having the benefit of the earnings of the ship during the voyage—the assignment by abandonment, as I call it, being supposed to entitle the underwriter to all the profits which had arisen throughout the voyage. If the ship had been

B uninsured, this question could never have arisen.

But it is said that although, if the owner had stood by his own insurer, there would have been no loss, yet, by reason of his having thought fit to make a contract of insurance with others, and afterwards to constitute those insurers owners of the ship in his place, the underwriters on the freight have been guilty of a breach of their contract by not indemnifying him for what he calls a loss of freight arising

C out of his having invested the underwriter of the ship with his title to the freight actually earned. I think such a claim is not founded in law or in justice. If uninsured, there could have been no pretence of loss; but if insured the amount of claim against the underwriter of the freight is, according to the argument of the respondent, to vary according to the proportion in which the assured happens to have insured the ship. Besides, what has been the effect of the judgment? In substance

D to make the underwriter of the freight an insurer of the ship. Hitherto his liability has been to answer for the loss of freight, provided the owner is prevented by the perils insured against from earning freight. But according to the decision freight may be earned, the underwriter upon the freight may have performed his duty, the ship may afterwards be lost in consequence of perils previously incurred, and by reason of such loss of the ship the underwriter upon the freight become liable.

E What does he receive his premium for? That the owner may be enabled to earn the freight, notwithstanding the perils of the sea and the perils of navigation. He knows that the ship may receive such damage as not to be liable to perform the voyage, but the goods may be carried forward and the freight earned. He knows that the insurance upon the ship may be made to last longer than the insurance upon the freight. Look at the form of the policy in question, which is that the

F insurance is to last until ten days after the report of the Custom House of the ship. So that, the ship having arrived and delivered her cargo, the freight earned and paid, if the ship sinks within the time of the insurance of the ship—that sinking resulting from the perils which had been incurred before—the underwriter is to be answerable for the loss of freight because the ship had been lost after the freight had been earned. My Lords, his premium is not measured by any such degree of

G risk. It is not within the terms of his contract—it is not within the spirit of his contract—and I think not within the terms of the policy.

Some question is raised in this case in regard to the necessity of an abandonment, and it is said that, if an abandonment was unnecessarily made, it ought not to affect the rights of the parties. I own I am clearly of opinion that abandonment was at all events essential in this case to entitle the assured to recover for a total

H loss. Whether, where a ship continues to exist in specie, the assured can ever recover for a total loss without abandonment, it is not necessary to consider, because I think that in this case no doubt can be reasonably entertained but that it was competent to the assured to retain his damaged ship, and to recover the £4,000 enabling him to repair, or any other sum of money which he might expend in order to repair the damage which the ship had sustained. The underwriter, if the

I assured had thought fit to claim his indemnity as for a partial loss, could have had no pretence to claim any interest in the damaged ship. The option rested entirely with the assured, either to abandon his ship and claim a total loss, or to repair his ship and claim the partial loss. It does not always become necessary, but, where it does become necessary, the course is for the assured upon the abandonment to assign the ship to the underwriters, as was done in the class of cases which your Lordships will recollect arising out of the Russian embargo. In that case the ships being under embargo, and it being uncertain whether they would be deemed to be captured or released, to put the underwriters in the perfect situation of owners, you

find by the reported cases that assignments were generally taken, when the abandonment was made or soon after. Therefore, the option rested with the assured either to abandon and to claim a total loss, or to repair his ship and claim a partial loss, and, unless he had declared his election within a reasonable time after he had become acquainted with the state of his ship, he would have waived his right of election, and his claim would have been confined to a partial loss. The title of the underwriter on the ship to the freight, was not founded upon the policy, or upon the extent of the damage which the ship had sustained, but upon the election of the assured to abandon, that is, to assign his ship to the underwriter; and a doctrine which leads to this, that an arrangement between the assured and the underwriter upon the ship will render an underwriter upon the freight liable to pay a total loss upon the freight, in relief of the underwriter upon the ship, and that in a case where the freight has been actually earned and received—I say such a doctrine as that should be watched with great jealousy. Wherever a ship is so circumstanced as that the assured has an election to treat it either as a total loss or a partial loss, I conceive abandonment is a condition to be performed either prior to or contemporaneously with his claim of total loss. I can see no just ground for doubting that this was at least a case of election, assuming, as I have before stated, that such an election exists after the voyage has been actually performed. The cases in the books, in which it is said that where it is in the option of the assured to claim as for a total or a partial loss, abandonment is necessary to be made within a reasonable time in order to support an election to treat the loss as a total loss, are too numerous and too well known to make it necessary for me to fatigue your Lordships by referring to them by name.

It appears to me, therefore, upon principle, that the judgment which has been pronounced in this case is erroneous, and decidedly at variance with the legal result of the whole record, which shows an ordinary insurance for freight, the voyage performed, and the earning of freight not only not prevented by the perils insured against, but actually accomplished, and the freight actually received by the owner at a time when he might have retained it for his own benefit except for his subsequent voluntary election to constitute the underwriters on the ship, as between him and them, the owners of the ship and thereby transfer his previously-vested right to the freight so earned to them—circumstances negating any breach of the contract on the part of the underwriters upon the freight that the vessel should not be prevented from performing the voyage insured, and thereby entitling the owner to the freight in consequence of any of the perils mentioned in the policy.

In *Thompson v. Rowcroft* (5), it is said that underwriters on the ship stand in the place of the owner after abandonment, and in *Case v. Davidson* (2), LORD TENTERDEN says: “abandonment is equivalent to a sale.” There are numerous authorities to the same effect. I think there is no authority in support of the respondents’ claim, but there is authority very strong in opposition to it. In illustration of the effect of a policy on the freight *Everth v. Smith* (6) may be referred to, by which it was decided that such a policy was not an insurance on specific freight, but on the freight generally, and that, if any freight was brought home, no loss would happen for which the underwriter was liable. *M’Carthy v. Abel* (7) seems to me directly in point, and was referred to and adopted in *Everth v. Smith* (6). There were insurances in that case on both ship and freight. The ship had been detained by the Russian government at Riga, and the cargo taken out, and while in that state under detention there was an abandonment of ship and freight to the respective underwriters, all of whom paid the owner for a total loss. The ship, however, was afterwards released, re-loaded her cargo, and performed the voyage, and the underwriters on the ship received the freight, whereupon the assured brought an action on the policy on the freight for a total loss. LORD ELLENBOROUGH, in giving judgment in that case, said (5 East, at p. 397):

“The case resolves itself into a single point, viz., whether the freight had been in this case lost or not. If the fact be merely looked at, freight in the events

A which have happened has not been lost, but has been fully and entirely earned and received by or on behalf of the plaintiff, the assured; and if so, no loss can be properly demandable against the underwriters on the freight, who merely insure against the loss of that particular subject by the assured. But if it have or can be considered as having been in any other manner or sense lost to the owners of the ship, it has become so lost to them, not by means of the perils
B insured against, but by means of an abandonment of the ship, which abandonment was the act of the assured themselves, with which, therefore, and the consequences thereof, the underwriters on freight have no concern. It appears to us, therefore, that quacunque via data—that is, whether there has been no loss at all of freight, or, being such, it has been a loss only occasioned by the act of the plaintiffs themselves—they are not entitled to recover, and therefore
C a nonsuit must be entered.”

That appears to me to be a distinct authority upon the present case, and, although the attention of the learned counsel at the Bar was called to the case, undoubtedly it has received no answer. Nothing has been said to impugn the doctrine there laid down, nor any distinction pointed out with reference to its just application to the present case. It is also to be observed that there is no case showing under-
D writers entitled to the freight by reason of their having a total loss, except where there has been an abandonment, which I should have expected it would have been thought necessary to produce evidence of in sustaining the present argument. I repeat that there is no case in which the underwriters of a ship have ever been held entitled to the freight, except when there has been an abandonment. I feel bound to state, with every respect to a contrary opinion, that it is clear to my
E mind, that there has been no loss of freight in this case within the meaning of the policy. I, therefore, concur in the opinion that your Lordships are bound, in point of law, to reverse the judgment of the court below.

Appeal allowed.

JORDEN AND WIFE v. MONEY

[HOUSE OF LORDS (Lord Cranworth, L.C., Lord Brougham and Lord St. Leonards),
June 22, 23, 26, 27, 30, July 3, 7, 1854]

[Reported 5 H.L.Cas. 185; 23 L.J.Ch. 865; 24 L.T.O.S. 160;
10 E.R. 868]

Estoppel—Estoppel by representation—Representation of existing fact, not statement of intention—Need to prove knowledge of falsity of representation.

If a person makes a false representation to another and that other acts on it the person who has made it will not afterwards be allowed to set up that what he said was false and to assert the truth in place of the falsehood which misled the other. It is not necessary that the person making the representation should know that it was false; no fraud need have been intended. If this party has unwittingly misled the other it must be shown that he did so in such circumstances that he had reasonable ground for supposing that the person whom he was misleading would act on what he was saying. It will not do if he merely said something, supposing it to be right, and some stranger, having heard and acted on it, should afterwards come to him to make it good. But **held** by LORD CRANWORTH, L.C., and LORD BROUGHAM, LORD ST. LEONARDS dissenting: the doctrine does not apply to a case where the representation is not a representation of fact, but a statement of intention.

Notes. Applied: *Hutton v. Rossiter* (1855), 7 De G.M. & G. 9; Distinguished: *Warden v. Jones* (1857), 23 Beav. 487; *Piggott v. Stratton* (1859), 1 De G.F. & J. 33; *Goldicutt v. Townsend* (1860), 28 Beav. 445. Considered: *Loffus v. Maw* (1862), 3 Giff. 592; *Stephens v. Venables* (1862), 31 Beav. 124. Explained: *Smith v. Hayes* (1867), 15 W.R. 871. Considered: *M'Askie v. M'Cay* (1868), 16 W.R. 1187; *Williams v. Williams* (1868), 37 L.J.Ch. 854. Approved: *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L.R. 6 H.L. 352. Explained: *Maddison v. Alderson*, [1881-5] All E.R.Rep. 742. Considered: *Mills v. Fox* (1887), 37 Ch.D. 153. Applied: *Balkis Consolidated Co. v. Tomkinson*, [1891-4] All E.R.Rep. 982. Approved: *Chadwick v. Manning*, [1896] A.C. 231. Distinguished: *Salisbury v. Gilmore and Marcel*, [1942] 1 All E.R. 457; *Bank of Baroda, Ltd. v. Punjab National Bank and, Ltd.*, [1944] 2 All E.R. 83; *Veitch v. Caldicott* (1945), 173 L.T. 30. Referred to: *Whitmore v. Mackeson* (1852), 16 Beav. 126; *Bushby v. Ellis* (1853), 17 Beav. 279; *Pulsford v. Richards* (1853), 17 Beav. 87; *Stone v. Godfrey* (1854), 5 De G.M. & G. 76; *Clelland v. Leech* (1856), 27 L.T.O.S. 59; *Monypenny v. Monypenny* (1858), 4 K. & J. 174; *Gillman and Spencer v. Carbutt* (1889), 37 W.R. 437; *Cave v. Crew* (1893), 68 L.T. 254; *Licenses Insurance Corp'n. and Guarantee Fund v. Lawson* (1896), 12 T.L.R. 501; *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331; *Whitechurch v. Cavanagh*, [1902] A.C. 117; *Cresswell v. Jeffreys* (1912), 28 T.L.R. 413; *Provident Accident and White Cross Insurance Co. v. Dahne and White*, [1937] 2 All E.R. 255; *Foot Clinics* (1943), *Ltd. v. Cooper's Gowns, Ltd.* (1946), 91 Sol. Jo. 309; *Central London Property Trust, Ltd. v. Hightrees House, Ltd.* (1946), [1956] 1 All E.R. 256; *Kelsen v. Imperial Tobacco Co. (of Great Britain and Ireland)*, [1957] 2 All E.R. 343.

As to estoppel by representation, see 15 HALSBURY'S LAWS (3rd Edn.) 223-232; and for cases see 21 DIGEST (Repl.) 369 et seq.

Cases referred to:

- (1) *Neville v. Wilkinson* (1782), 1 Bro.C.C. 543; 28 E.R. 1289; 21 Digest (Repl.) 392, 1214.
- (2) *Montefiori v. Montefiori* (1762), 1 Wm. Bl. 363; 96 E.R. 203; 12 Digest (Repl.) 280, 2156.

- A (3) *Gale v. Lindo* (1687), 1 Vern. 475; 23 E.R. 601; sub nom. *Gay v. Wendow*, Freem. Ch. 101; sub nom. *Anon.*, 2 Eq. Cas. Abr. 478, pl. 1, L.C.; 7 Digest (Repl.) 176, 84.
- (4) *Freeman v. Cooke* (1848), ante p. 185; 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 654; 21 Digest (Repl.) 366, 1090.
- B (5) *Pickard v. Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest (Repl.) 869, 1103.
- (6) *Graves v. Key* (1832), 3 B. & Ad. 313; 110 E.R. 117; 12 Digest (Repl.) 559, 4236.
- (7) *Heane v. Rogers* (1829), 9 B. & C. 577; 4 Man. & Ry.K.B. 486; 7 L.J.O.S.K.B. 285; 109 E.R. 215; 21 Digest (Repl.) 384, 1178.
- C (8) *Gregg v. Wells* (1839), 10 Ad. & El. 90; 2 Per. & Dav. 296; 8 L.J.Q.B. 193; 3 Jur. 555; 113 E.R. 35; 21 Digest (Repl.) 457, 1575.
- (9) *Vauxhall Bridge Co. v. Earl of Spencer* (1821), Jac. 64; 37 E.R. 774, L.C.; 12 Digest (Repl.) 280, 2160.
- (10) *Tawney v. Crowther* (1790), 3 Bro.C.C. 161; 29 E.R. 466, L.C.; subsequent proceedings (1791), 3 Bro.C.C. 318, L.C.; 12 Digest (Repl.) 153, 977.
- D (11) *Cookes v. Mascal* (1690), 2 Vern. 200; 1 Eq. Cas. Abr. 22; 23 E.R. 730; 40 Digest (Repl.) 509, 210.

Also referred to in argument:

- Wekett v. Raby* (1724), 2 Bro. Parl. Cas. 386; 1 E.R. 1014, H.L.; 20 Digest (Repl.) 306, 473.
- Cross v. Sprigg* (1849), 6 Hare, 552; 18 L.J.Ch. 204; 13 L.T.O.S. 505; 13 Jur. 785; 67 E.R. 1283; on appeal (1850), 2 Mac. & G. 113, L.C.; 20 Digest (Repl.) 257, 58.
- Aston v. Pye* (1788), cited in 5 Ves. at p. 354; 5 Ves. 350, n.; 31 E.R. 626; 44 Digest 245, 713.
- Richards v. Syms* (1740), Barn. Ch. 90; 2 Eq. Cas. Abr. 617; 27 E.R. 567, L.C.; 17 Digest (Repl.) 249, 518.
- F *Reeves v. Brymer* (1801), 6 Ves. 516; 31 E.R. 1172; 7 Digest (Repl.) 234, 724.
- Byrn v. Godfrey* (1798), 4 Ves. 6; 31 E.R. 3, L.C.; 12 Digest (Repl.) 566, 4306.
- Eden v. Smyth* (1800), 5 Ves. 341; 31 E.R. 620, L.C.; 44 Digest 618, 4468.
- Flower v. Marten* (1837), 2 My. & Cr. 459; 6 L.J.Ch. 167; 1 Jur. 233; 40 E.R. 714, L.C.; 20 Digest (Repl.) 306, 474.
- Buttemere v. Hayes* (1839), 5 M. & W. 456; 9 L.J.Ex. 44; 3 Jur. 704; 151 E.R. 193; 31 Digest (Repl.) 497, 5652.
- G *Cooth v. Jackson* (1801), 6 Ves. 12; 31 E.R. 913, L.C.; 42 Digest 462, 308.
- Skinner v. McDouall* (1848), 2 De G. & Sm. 265; 17 L.J.Ch. 347; 11 L.T.O.S. 411; 12 Jur. 741; 64 E.R. 120; 12 Digest (Repl.) 154, 980.
- Ridgway v. Wharton* (1854), 3 De G.M. & G. 677; 2 Eq. Rep. 839; 22 L.T.O.S. 265; 2 W.R. 137; 43 E.R. 266, L.C.; affirmed (1857), 6 H.L.Cas. 238; 27 L.J.Ch. 46; 29 L.T.O.S. 390; 4 Jur.N.S. 173; 5 W.R. 804; 10 E.R. 1287, H.L.; 42 Digest 458, 279.
- H *Clinan v. Cooke* (1802), 1 Sch. & Lef. 22, 33; 12 Digest (Repl.) 182, *706.
- Evans v. Bicknell* (1801), 6 Ves. 174; 1 Coop. temp. Cott. 480; 31 E.R. 998, L.C.; 21 Digest (Repl.) 391, 1208.
- Maunsell v. White* (1854), 4 H.L.Cas. 1039; 22 L.T.O.S. 293; 10 E.R. 769, H.L.; 40 Digest (Repl.) 514, 247.
- I *Wilnot v. Woodhouse* (1793), 4 Bro.C.C. 227; 29 E.R. 865; 23 Digest (Repl.) 445, 5136.
- Major v. Major* (1852), 1 Drew. 165; 61 E.R. 414; 7 Digest (Repl.) 237, 754.
- Scott v. Scott* (1787), 1 Cox, Eq. Cas. 366; 29 E.R. 1206; 12 Digest (Repl.) 279, 2153.
- Doe d. Roberts v. Roberts* (1819), 2 B. & Ald. 367; 106 E.R. 401; 20 Digest (Repl.) 287, 135.
- Walton v. Hobbs* (1789), 2 Atk. 19.

Keys v. Williams (1888), 3 Y. & C. Ex. 55; 7 L.J.Ex. Eq. 59; 2 Jur. 611; 160 A E.R. 612; 22 Digest (Repl.) 182, 1657.

Harrison v. Cage (1698), Carth. 467; Holt, K.B. 456; 1 Ld. Raym. 386; 5 Mod. Rep. 411; 12 Mod. Rep. 214; 1 Salk. 24; 90 E.R. 870; 12 Digest (Repl.) 249, 1934.

Prodger v. Langham (1663), 1 Keb. 486; 1 Sid. 133; 83 E.R. 1068; 25 Digest (Repl.) 260, 678. B

Kirk v. Clark (1708), Prec.Ch. 275; 2 Eq. Cas. Abr. 479; 24 E.R. 133; 25 Digest (Repl.) 254, 615.

Brown v. Carter (1801), 5 Ves. 862; 31 E.R. 898; 24 Digest (Repl.) 1124, 67.

Appeal against a decree made by SIR JOHN ROMILLY, M.R., which stood on appeal to the Court of Appeal in Chancery in a cause instituted by the respondent, James William Bayley Money, commonly called in the proceedings William Money, against the appellants, Mr. and Mrs. Jorden, and other parties, praying that a debt of £1,200, secured by a bond and warrant of attorney, might be declared to have been abandoned, and that the appellants might be decreed to release the respondent from the bond, that the warrant of attorney be given up to be cancelled, and that satisfaction be entered up on judgment which had been obtained against the respondent, or else that it might be declared that this was a partnership transaction arising upon this bond, and that the respondent was liable only for a portion of the bond debt. C D

Mrs. Jorden, then Miss Marnell, in the earlier period of her life lived in India with her two brothers, one of them Richard Marnell, a barrister, at Calcutta, and the other, Charles Browne Marnell, a solicitor there. Mr. Money, the father of the respondent, was also a barrister at Calcutta, and he had obtained the office of Master of the Supreme Court, which is a very lucrative office and a high station. He was on friendly terms with Miss Marnell and her brothers, and he settled on her certain property, then called the Midnapore property, described variously as of the value of £120 a year and as worth only about £70 a year, but probably something between both. Richard Marnell died in India, and upon his death Miss Marnell returned to England. Charles Marnell, the solicitor, also returned. Charles died in January, 1843, leaving Miss Marnell his sole executrix and residuary legatee. At the time of his death, Charles held the bond in question for £1,200, and a warrant of attorney as security for the same sum, both of them having been executed by the respondent, Money, as security for money advanced to him by Charles to finance a commercial speculation. As executrix, Miss Marnell became entitled to the bond in question, if it were a valid bond and capable of being enforced. E F G

The respondent, however, alleged that from the time of Charles Marnell's death, and even before the death actually occurred, Miss Marnell had repeatedly declared, and sometimes in the most solemn manner, to the respondent's father, to the respondent himself, and to numerous other persons, that she had abandoned and never intended to enforce against the respondent the claim which she was entitled to make, as her brother's representative, for the debt of £1,200, originally secured by the bond, assigning, as her reasons, that she had never considered the respondent liable, in honour or justice, for more than his proportionate share of that sum, and that she was determined to relinquish that share by way of return for the benefits which she had derived from the respondent's father. Messrs. Manning and Dalston acted as her solicitors in all the affairs relating to the probate of her brother's will and the administration of his estate. Probate duty was originally paid upon the sum of £2,000, under which the estate was sworn in the first instance; afterwards this was increased to £4,000, upon an affidavit sworn by Miss Marnell. The debt of £1,200 due upon the bond was not included in the sum of £2,000, under which the probate was first taken out, or in the increased amount of £4,000, or in the residuary account, and no application for payment of any part of this debt was ever made while Miss Marnell continued unmarried. H I

- A The respondent left the army in 1843, and in 1845 he became engaged to be married to Miss Eleanor Poore, daughter of Sir Edward Poore, of Cuffnells, near Lyndhurst. The respondent, having no property of his own and being dependant upon his profession and on what he might receive from his father after his decease, it was at first arranged that his marriage should be postponed for two years. He informed his intended wife, and Lady Poore, of the circumstances under which
- B he had become liable for the debt of £1,200, and of the kindness of Miss Marnell to him in promising not to enforce that liability. Immediately on his engagement being formed, he wrote her a letter informing her of his intended marriage, and also stating that he had told both Lady Poore and Miss Poore of "all her various kindnesses to him". During the negotiations and arrangements which took place after the date of this letter with a view to the solemnisation of the
- C marriage and to the execution of a settlement thereon, it was considered necessary, both by the respondent and his family, and by Lady Poore, on behalf of her daughter, that the respondent should be made secure against any future demand for payment of the debt of £1,200. Conversations took place with Miss Marnell which were spoken to by various witnesses examined on behalf of the respondent, and these witnesses said that she would not use the bond against the respondent.
- D The respondent said that his marriage, which took place in August, 1845, was contracted on the faith of these representations.

- Miss Marnell having married, she and her husband brought an action against the respondent to recover the £1,200 on the bond and warrant of attorney. Judgment was given in their favour, but it was not executed, and the respondent filed his bill in the present suit. To his claim the appellants put in an answer denying
- E in positive terms that there had been any abandonment of the debt, or any contract to abandon it. The cause was heard before the Master of the Rolls, who, on Feb. 9, 1852, granted an injunction to restrain the appellants from enforcing the judgment on the warrant of attorney. The case was taken by appeal before the lords justices, who, on May 29, 1852, delivered judgment. Their Lordships differed in opinion. KNIGHT-BRUCE, L.J., concurred with the Master of the Rolls, and LORD CRANWORTH, L.J., thought that the order of his Honour must be reversed: 2 De G.M. & G. 318. The order made at the Rolls continued, therefore, to stand, and this appeal was then brought.
- F

Rolt and Willcock (White was with them) for the appellants.

Roundell Palmer and Bates for the respondent.

- G **LORD CRANWORTH, L.C.** (who stated that, though for convenience sake he should speak only of the bond, his observations must be taken to apply equally to the warrant of attorney): The first question we have to consider is whether the bond was a valid security, because though it has not been actually argued that it was not, yet a good deal of discussion took place upon the question of this bond
- H with a view to show that the respondent had been induced by Charles Marnell improperly to execute it, and that, in truth he ought never to have been liable for the sum for which it was given. On that point not much reliance was placed, but I ought, perhaps, to say that I do not entertain a doubt that, at all events for the purpose of this suit, it must be treated as a valid bond.

- I The transaction which gave rise to the bond was unquestionably one of a very doubtful character, but, however hard the terms on which the money was obtained might be, they were perfectly lawful terms, which the parties being all *sui juris*, and upon an equal footing, could accept or refuse. I may stipulate what I choose, though I cannot thereby absolve myself from liability to third persons. I may stipulate with another, if I like to do so and he likes to agree, that I will advance £1,200 upon a speculation upon the terms, that at all events he is to pay me £1,200 with interest; that, if there is profit, I am to have a share of that profit, and, if there is a loss, he is to bear the loss; or upon any other terms between ourselves for which we may choose to stipulate. I do not inquire into the relations of these

persons as between themselves and third parties. However, whatever the terms were, the bond the warrant of attorney were given, and being given, the respondent thinks that there is something afterwards to affect his liability to Charles Marnell as to the payment of the £1,200. I had occasion, being one of the lords justices when the case was considered upon appeal, to look into the matter very attentively, and I have again done so on this occasion. Whatever defects there may be in my judicial character, the being too confident in my own opinion is not one of them, perhaps the reverse; but having again examined the matter, I cannot arrive at any conclusion different from that at which I arrived when the case was before me in the court below.

There are two grounds upon which it is said that the parties have lost their right to enforce the bond. The one is, that previously to William Money's marriage, Mrs. Jorden, then Miss Marnell, represented that the bond had been abandoned, that she had given up her right upon it, and upon the faith of that representation the marriage was contracted. Then it is said that upon a principle well known in the law, founded upon good faith and equity, a principle equally of law and of equity, if a person makes a false representation to another and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false and to assert the real truth in place of the falsehood which has so misled the other. That is a principle of universal application, and has been particularly applied to cases where representations have been made as to the state of the property of persons about to contract marriage, and where, upon the faith of such representations, marriage has been contracted. There the person who has made the false representations has in a great many cases been held bound to make his representations good.

A leading case, *Neville v. Wilkinson* (1), upon that subject, which has been referred to, came before LORD THURLOW. In that case, Mr. Neville, the son of Lord Abergavenny, was in treaty for a marriage with the daughter of a very rich person, a gentleman of the name of Robinson. The father of the young lady, it seems, was anxious as to the property, knowing that Mr. Neville, the intended husband, was a young man of expensive habits, and that he was involved in considerable debts, and Mr. Neville, in order to quiet Mr. Robinson's mind, induced Wilkinson, the defendant, who was his principal agent, to make out a schedule, and to state it to be a schedule of all the debts to which Mr. Neville was liable. Mr. Wilkinson did so, and he represented that a sum of £18,000 was the amount of all Mr. Neville's debts, concealing, at the instance of Mr. Neville, from Mr. Robinson, the fact that besides the £18,000, Mr. Neville was really indebted to Wilkinson himself, and another person, in a further sum of nearly £8,000, making £26,000, instead of £18,000. Upon that representation the marriage took place, and provision was made for the payment of the £18,000 debts; Mr. Robinson thought that his daughter was marrying a person who was free from debt. Afterwards Mr. Wilkinson sought to enforce his own claim of £8,000, and LORD THURLOW said that he could not do that; he had represented that there was not any sum of £8,000 due to him, and upon the faith of that representation the marriage had been contracted, and he could not be suffered to say that that which he had thus represented was a falsehood, and now to proceed upon the truth.

That was, in truth, a decision which was exactly in conformity with what had been previously decided by LORD MANSFIELD, in *Montefiori v. Montefiori* (2). In that case Joseph Montefiori, being about to contract marriage, induced his brother Moses to give him a note for a large sum of money, as the balance of accounts between them, which balance Moses acknowledged to have in his hands, though, in truth, no such balance, or anything like it, existed. The marriage took place upon the faith of that representation. Moses afterwards sought to get back the note, and the matter was referred to arbitration. The arbitrators awarded the note to be given up, but the matter was brought before the Court of King's Bench, and LORD MANSFIELD said (1 Wm. Bl. at p. 364):

A "It shall be as represented to be. . . . No man shall set up his own iniquity as a defence, any more than as a cause of action."

B There had been a much earlier case of *Gale v. Lindo* (3), where, just in the same way, a person, in order to make it appear that his sister had a fortune of £500, whereas, in truth, she only had £350, gave her a sum of £150, so as to make up the £500, and she gave him a bond for the amount. After the marriage had taken place upon the faith of that it was held that the bond could not be enforced, and it was ordered to be delivered up to be cancelled.

C These principles are plainly and perfectly intelligible, and quite consistent with good sense, and I should be in the last degree sorry that any opinion or decision to which I am a party, should lead to a notion that I, in the slightest degree, question their propriety. Nay, more, I think that the principle has been carried, and may be carried, much further, because I think it is not necessary that the party making the representation should know that it was false; no fraud need have been intended at the time. But if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying. It will not do if he merely said something, supposing it to be quite right, and that some stranger, having heard and acted upon it, should afterwards come to him to make it good.

E The whole doctrine was very much considered at law, for it is a doctrine not confined to cases in equity, but one that prevails at law also; and there are, in fact, more cases upon the subject at law than in equity. It was much considered in *Freeman v. Cooke* (4). There had been a previous case in the Court of Queen's Bench, of *Pickard v. Sears* (5), in which the doctrine had also prevailed. I shall shortly refer your Lordships to what fell from PARKE, B., who, after great consideration among all the judges of the Court of Exchequer (to which I can speak from personal knowledge), delivered judgment in *Freeman v. Cooke* (4). I need not refer to the particular facts in that case. It was a case where, upon the sheriff seizing goods, a party made certain representations as to the ownership of them, and the question was whether he was estopped from disputing the truth of what he had so said. PARKE, B., says (2 Exch. at pp. 662, 663):

G "The estoppel, therefore, if it be one, created by the conduct of the bankrupt in this case, is not opened by the omission to plead it, and the only question is, whether it be an estoppel? It is contended that it was upon the authority of the rule laid down in *Pickard v. Sears* (5). That rule is, 'that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.' That was founded on previous authorities in the cases *Graves v. Key* (6), *Heane v. Rogers* (7), and has been acted upon in some cases since. The principle is stated more broadly by LORD DENMAN, in the case of *Gregg v. Wells* (8), where his Lordship says that a party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

I I must beg leave, by the way, to say that I think that this is stated a little too broadly. PARKE, B., continues (*ibid.* at p. 663):

"Whether that rule has been correctly acted upon by the jury, in all the reported cases in which it has been applied, is not now the question; but the proposition contained in the rule itself, as above laid down in the case of *Pickard v. Sears* (5), must be considered as established. By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means

his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth."

I believe that the rule of law, which, as I have more than once said, is a rule founded upon perfectly good sense and is intelligible to every capacity, is illustrated by what then fell from PARKE, B., as well and as accurately as in any of the cases upon the subject. The question is whether the evidence here shows that anything took place which brings the case within those authorities. I am clearly of opinion, as clearly as I can be, knowing that I am counter in this respect, certainly, to an authority for which I feel very great deference, namely, the Master of the Rolls, probably to the lords justices, and I have some reason to suppose, also to some at least of your Lordships, that it does not. I think that that doctrine does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do. In the former case it is a contract, in the latter it is not. What is here contended for is that Mrs. Jorden, then Miss Marnell, over and over again represented that she abandoned the debt. Clothe that in any words you please, it means no more than that she would never enforce the debt; she does not mean, in saying that she had abandoned it, to say that she had executed a release of the debt so as to preclude her legal right to sue. All that she could mean was that she positively promised that she never would enforce it. My opinion is that if all the evidence had come up to the mark, which, for reasons I shall presently state, I do not think it did, if upon the very eve of the marriage she had said, "William Money, I never will enforce the bond against you," that would not bring it within these cases. It might be, if all statutable requisites, so far as there are statutable requisites, had been complied with, that it would have been a very good contract whereby she might have bound herself not to enforce the payment. That, however, is not the way in which it is put here; in short, it could not have been, because it must have been a contract reduced into writing and signed. This case is put entirely upon the ground of representation. I think that the not adhering to this statement, call it contract or call it representation, is no more a fraud than it would be not adhering to her engagement, if she had said: "Mr. William Money, you may marry; do not be in fear, you will not be in want; I promise to settle £10,000 consols upon you." If she did not perform that promise, she would be guilty of a breach of contract in respect of which she might be sued, if it were put into a valid form, but not otherwise; so if she had said, as she did to William Money: "I mean to give you everything I am worth in the world; I promise to do so," her not doing so is no fraud in the sense in which these cases speak of fraud; it is no misrepresentation of a fact which the party is afterwards held bound to make good as true. It seems to me that the distinction is founded upon perfectly good sense, and that in truth in the case of what is something future, there is no reason for the application of the rule, because the parties have only to say: "Enter into a contract," and then all difficulty is removed. It appears to me, therefore, that this, which is the ground upon which the Master of the Rolls proceeded, and upon which he thought that the respondent Money had the right to restrain the appellants from enforcing this bond, fails, for the reasons which I have stated.

There was another ground, however, upon which it was suggested by Mr. Money, and strongly argued, that he was entitled to relief, and upon this ground my then learned colleague, KNIGHT-BRUCE, L.J., decided in favour of the respondent. It was said that the Midnapore property, which was settled by Mr. Money, the father, upon Miss Marnell, then in India, was a mere gift, a mere voluntary settlement, a settlement, therefore, which it was competent to Mr. Money, the settlor, to

A defeat by parting with it for a valuable consideration to another; that Mr. Money, the father, when his son was about to marry, had an interview with Mrs. Jordan (this is the allegation); that, as the result of that interview, he agreed with her that he would never exercise the power of revoking the Midnapore settlement, in consideration of her engaging never to enforce the bond; and that, that agreement having been entered into, upon the faith of it the parties married. Mr. Money has certainly, if such an agreement was entered into, performed his part of it, for he has since died without ever attempting to exercise that power of revoking the gift of the Midnapore property.

[His LORDSHIP then examined the evidence, and concluded:] It appears to me, upon the grounds I have stated, first, that there is nothing within the meaning of the authorities or on principle to make this a representation by which Mr. and Mrs. Jordan are to be bound. I think further, that the second ground, and that on which the lords justices wholly or mainly proceeded, namely, the existence of a valid contract as to the Midnapore property, has not been made out by evidence upon which your Lordships can safely act, and, consequently, that there has been nothing established which impeaches the right of Mrs. Jordan, as the representative of her brother, to enforce this bond. I do believe that she often and often told this young man that she would leave him all her property and that she would never enforce this bond; I believe she said this over and over again, knowing that it would come to his ears, but that was all that was said either expressly or impliedly, and said with the qualification, "I will not give up my right to the bond; you must trust to my honour." That is the way in which I interpret what she has said from time to time, and, that being so, however discreditable or dishonourable it may be, having so spoken, to recede from it, it appears to me that that is a ground upon which your Lordships cannot safely act, and that, consequently, there was no valid foundation for this bill, which I think, therefore, ought to have been dismissed.

LORD BROUGHAM.—This case has given me, as I believe it has the rest of your Lordships, no small anxiety in the course of the argument, and subsequently in considering its details before coming to a decision, for there are a great many facts and a very considerable number of matters not easily reconcilable one with the other, and no little obscurity hanging over parts of the case even after all attempts shall be made to reconcile and to explain the darker passages. But there is also another circumstance which has given me very considerable anxiety, and that is the manner in which it was disposed of in the court below. For, first, we have the judgment of a most learned and able judge, the Master of the Rolls; then an appeal from that decree to the Court of Appeal in Chancery; and then the two learned lords justices, differing upon the subject; so that, in reality, there cannot so much be said to have been a decision of the Court of Appeal, from which this case comes to your Lordships, as that in consequence of the difference of opinion between the learned judges, before whom the decree of the Master of the Rolls was brought by appeal, there could be no decision, and that, therefore, of necessity, the decree of the Master of the Rolls stood.

If I found, upon examining the reasons of that learned and most able judge, for whom I entertain the greatest respect, that upon the question of fact that learned judge entertained one clear opinion, and that by the lords justices differing, it was sanctioned by the concurrence of one of those learned judges, I should certainly feel slow to disturb that judgment when brought before your Lordships by appeal. But upon examining the decree of the Master of the Rolls, and the reasons which he gave, I do not find that he proceeds upon the same ground as that upon which KNIGHT-BRUCE, L.J., proceeded when he differed from my noble and learned friend; and I do not find that there was that difference of opinion upon the matters of fact in the case between the learned Master of the Rolls and my noble and learned friend, one of the lords justices, in the Court of Appeal below. The Master of the Rolls proceeded upon the ground of there having been such a

misrepresentation by Louisa Marnell, afterwards Mrs. Jorden, as brought the case within the authorities which have been referred to, beginning with *Gale v. Lindo* (8), and followed by *Neville v. Wilkinson* (1), and *Montefiori v. Montefiori* (2). I entirely agree with my noble and learned friend that this is not a case of that kind. For example, in *Gale v. Lindo* (8) the ground is stated to have been a misrepresentation of a material fact, giving rise to what had taken place. A

The Lord Chancellor (who must have been LORD JEFFREYS at that time, October, 1687), said: "That which was once a fraud will always be a fraud," and so acted upon that principle on the ground of preventing or frustrating a fraud. B

In like manner take *Montefiori v. Montefiori* (2). There a man had stated that he owed his brother a sum of money upon the balance of partnership accounts, and gave a note for that amount to be shown to the friends of the lady whom the brother was about to marry, upon which a marriage took place shortly afterwards. C The rule for the attachment was discharged upon the ground of misrepresentation of a fact, and LORD MANSFIELD said (1 Wm. Bl. at p. 364):

"The law is, that where, upon proposals of marriage, third persons represent anything material in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it." D

So, in *Neville v. Wilkinson* (1), the plaintiff had stated his apprehension that the disclosure of the whole truth as to his debts, would prevent his marriage, and he induced the defendant, in making out a list of his debts, to omit from that list the amount which was due to himself. He was, after the marriage, on a bill filed for the purpose, restrained by injunction from proceeding to recover the amount upon the ground of his own representation. And LORD ELDON, in speaking of that case, in *Vauxhall Bridge Co. v. Earl of Spencer* (9), says he remembers arguing *Neville v. Wilkinson* (1) before LORD THURLOW, but LORD THURLOW thought that the defendant, E

"having made a representation, a court of equity must hold him to it, and that although the plaintiff was particeps criminis." F

In all those cases, therefore, there was a misrepresentation of the facts, and the learned Master of the Rolls appears to consider that in this case there was a similar misrepresentation. In my opinion, there was a representation by Louisa Marnell of an intention as to her will and a promise was made by her, but of misrepresentation of fact there was none. She simply stated what was her intention; she did not misrepresent her intention; and I have no manner of doubt that, at the time she made that statement, she had the intention which it is stated she professed, of never putting William Bailey Money in trouble, by proceeding upon the bond. G

[HIS LORDSHIP then referred to the evidence; said that, he had, after very considerable doubt upon some parts of the case, but after fully viewing the whole particulars, and examining those statements and those depositions, come to the conclusion that there was not an abandonment of the debt, by Mrs. Jorden—not only that there was no abandonment, but that there was rather a refusal of abandonment when one came to examine in what sense and with what intent the word "abandonment" has been used; and concluded:] Upon the whole, therefore, I am of opinion, after very great consideration of the facts, that the decree of the Master of the Rolls cannot be sustained. H

LORD ST. LEONARDS.—It is my misfortune on this occasion to differ from both my noble and learned friends on the facts as well as on the law applicable to those facts. I

[HIS LORDSHIP reviewed the evidence in detail, and continued:] I think I have shown your Lordships, from the evidence and from the facts, that the debt was abandoned, as far as it could be abandoned, both from affection and from the circumstances connected with the two families, for a valid consideration, namely, the intended marriage, and for a further valuable consideration (if that were necessary),

A namely, the abandonment of, or the non-execution of, the right of the respondent's father to defeat the gift of the Midnapore property. Then, what is the effect of that in point of law? As I understand the way in which it is put by my noble and learned friend on the Woolsack, it is this, and I am trying to see whether my view of it can be considered as in any way an answer to it. My noble and learned friend has made use of a form of expression that the whole question here

B turns on this, that in point of law, in order to avail yourself of any statement in a case like the present, it must be a misrepresentation of the facts, and not a declaration of what you intend to do or intend to omit to do. It is my misfortune not to agree in that view of the matter. I do not consider that that can be the case. I think it is utterly immaterial whether it is a misrepresentation of fact as it actually existed, or a misrepresentation of an intention to do, or to abstain

C from doing, an act which would lead to the damage of the party whom you thereby induced to deal in marriage or in purchase, or in anything of that sort, upon the faith of that representation. It is admitted that if she had said: "I have cancelled the bond, or have destroyed it, or burnt it," and she had not done so, then the respondent must necessarily have succeeded in a court of equity, but it is said that if she states: "I have got the bond, but you may safely rely upon it that I

D never intend to use it," that is not a misrepresentation of a fact, but only the declaration of an intention.

What is the principle upon which the cases have proceeded? The principle is simply that you shall not be allowed, either in a court of equity or in a court of law, to misrepresent the state of circumstances in which property exists, so as to deceive parties and induce them to rely upon your statement, and to deal with

E matters of the utmost importance, for example, as in this case, with a marriage settlement, or in the purchase of property, which is a very common case. If, therefore, I either say that I have abandoned a security, or that I never will enforce that security, and a third party is induced to enter into marriage upon the faith of that statement, although it may have been unwise (as in this case it was) that the party did not insist upon a release in order to make the thing quite regular

F and right, yet surely it is not meant to be argued—it is not, I think, arguable—that that party can afterwards enforce that right after an act has been done upon the faith of that declaration—an act which cannot be undone as to the party whom he has induced so to act. The whole current of authorities is the other way.

Take it on the Midnapore property, and let us see how it stands. George Money says: "You have got a bond against my son; it may at this moment not be binding,

G but he is about to be married; now, therefore, come to a determination, for the settlement will depend upon your determination. I have a right to affect your title, or to load your title to Midnapore with a heavy liability, and I can do that in favour of my son. I will not enforce my right if you choose not to enforce yours; that is agreed to, and that is a mutual promise." Can either party retire from that promise?

H Take the case which was decided a century and a half ago, and has been several times decided since, and is not disputed in law, namely, where a man makes his will and gives to a devisee all his property. He then tells the devisee that he is about to alter his will because he wants to give legacies to other persons, and the devisee says to him (there being nothing in writing): "If you will abstain from revoking your will, I promise you that the legacies shall be paid"; and the man

I abstains from revoking his will. It is perfectly settled law that in such a case the devisee, having made the promise, is bound by it. Yet that is not a misrepresentation of a fact; it is a declaration of an intention and a promise to do a thing in consequence of which a threat is not acted on, and a court of equity has over and over again enforced the right thereby created, and nobody disputes the authority to enforce it. How is that distinguishable from this case? Mr. Money says: "If you will not enforce that bond, I will not enforce my right; I will not, if you will not; if you will, I will." In the other case, the testator says: "If you will pay the legacies which I wish to give, there is no need of a codicil." In either case it

rests on a mere promise. The Statute of Frauds, about which something has been said, does not operate as any bar to the enforcement of the right by those who would have been legatees of a testator against the man who became devisee under the circumstances I have stated; and as a lawyer I am at a loss to distinguish that case from this in point of principle. A

As regards the authorities on this subject the question is whether I can find a case with the facts just the same as those of this case? My noble and learned friend said that the cases to which he referred were cases where there was a misrepresentation of a fact, and that, therefore, they do not form a precedent for this case. But the question is: What is the principle involved in these cases? Certainly I should recommend your Lordships to consider that principle as extending to this case. Let us hear how the principle is put in *Montefiori v. Montefiori* (2). LORD MANSFIELD there lays down the principle thus (1 Wm. Bl. at p. 384): B

"The law is, that where upon proposals of marriage third persons represent anything material in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it. It shall be as represented to be." C

The other judges concurred. It may be said again that that is representing something in a light different from the truth. Is it not different from the truth to represent that you have abandoned a thing; that you never will attempt to enforce it; and then subsequently to come forward and say you have not abandoned it, and never did, and that you are going to enforce the right, even to the extreme of throwing into jail the man who is so much the object of your affection? I can, no doubt, distinguish, in point of fact, the one case from the other, but not in point of principle. The principle is the same in both. She is asked: "Have you abandoned it?" (an abandonment is perfectly good as a consideration for marriage.) She now says that she had not abandoned it, and never did. She stated that as a fact, which was a misrepresentation, for that she said she had abandoned it is a fact which is proved beyond all doubt. Therefore, if a misrepresentation of fact were necessary, she has misrepresented a fact, for she stated over and over again, not only that she intended to abandon it, but that she had abandoned it, and now she says that she had not abandoned and never said she had abandoned it. D E F

Independently of that, your Lordships are asked to consider that a representation of an intention is not a binding act, and that you cannot misrepresent what you intend to do. But if you declare your intention with reference, for example, to a marriage, not to enforce a given right, and the marriage takes place on that declaration, I submit that, in point of law, that is a binding undertaking. In *Neville v. Wilkinson* (1), LORD THURLOW refers to the language, and adopts, after some hesitation, the very rule of LORD MANSFIELD, which goes to the real principle of the case. G

There is a case in VINER'S ABRIDGEMENT, tit. Contract and Agreement, 523, pl. 40, of this nature: H

"The bill here was to have a lease according to the defendant's promise, plaintiff having laid out money in the premises; and the defendant insists on the statute, there being no agreement in writing, nor any certain terms agreed upon, and says what plaintiff laid out was not on lasting improvements, but admits plaintiff built a stable, which cost him about £10. It was proved that defendant told the plaintiff his word was as good as his bond, and promised the plaintiff a lease when he should have renewed his own from his landlord. The Lord Chancellor said that the defendant is guilty of a fraud, and ought to be punished for it, and so decreed a lease to the plaintiff; though the terms were uncertain, it is in the plaintiff's election for what time he will hold it, and he doth elect to hold during the defendant's term, at the old rent, and plaintiff to pay costs." I

To be sure no case was ever carried further than that. The equity was of a trifling nature and the terms not clear, and a court of equity never undertakes to perform,

A or to decree, that which cannot be ascertained, but the defendant had promised and agreed to put the plaintiff in possession of a lease, and declared that "his word was as good as his bond," and the Lord Chancellor held that he was bound by this agreement in connection with the act done (and here the act is much stronger than that which took place there), and that the Statute of Frauds, though pleaded, could not operate in bar.

B There is a case before LORD THURLOW, L.C., of *Tawney v. Crowther* (10), in which there was an agreement drawn up and not signed, and one party who refused to execute the agreement swore that he refused to sign it because they could not come ultimately to terms. The father of the other party swore that they had come to terms, there were two writings produced of the man promising, and the phrase was, that "his word was as good as his bond," just the same as the words in the last case. LORD THURLOW there ultimately held that the man was bound, although he had not signed the agreement, and there were these circumstances. There was oath against oath, and the answer; but the Lord Chancellor makes this observation (3 Bro.C.C. at p. 320):

D "It has been argued that he declined to sign it. If he had said he would never sign it, he could not have been bound; but if he said he never would sign it, but would make it as good as if he did, it would be a promise to perform it; if he said he never would sign it, because he would not hamper himself by an agreement, it would be too perverse to be admitted; but here I am of opinion that the agreement must be performed."

E There is another case of *Cookes v. Mascall* (11). In that case it was an oath against the answer, which it was not in the former case. There was an agreement for marriage, or proposals, and it appeared that the proposals seemed to be approved, because the father of the intended husband went with an attorney to the father of the intended wife, and the attorney drew an agreement to be mutually signed, but before it was ready for execution, as Mascall, who was the father of the lady, swore positively, they disagreed, and he refused to proceed and never signed it. F The son's father swore that the articles were read over and agreed to, and that it was arranged that they should meet another time to execute them, so that there was an oath against the answer. The son was permitted to go to Mascall's house, and in December the daughter was married, with her father's approbation. In that case the agreement was enforced against her father. Here was an agreement, therefore. G The parties differed about whether the agreement was ever actually concluded, and there was no witness, but, as the father afterwards received the intended son-in-law and witnessed the marriage, he was held bound by these terms which he had never signed, amounting to a promise to make a settlement, and he was compelled to perform it. That proves, therefore, that the Statute of Frauds in such a case will have no operation, but that the promise to do an act, followed by marriage, which cannot be undone, is equivalent to a binding agreement to do that act.

H There are other cases to the same effect, but I will just refer you to *Pickard v. Sears* (5), where LORD DENMAN says (6 Ad. & El. at p. 474): :

I "But the rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; and the plaintiff in this case might have parted with his interest in the property by verbal gift or sale, without any of those formalities that throw technical obstacles in the way of legal evidence."

That is exactly this case, for, this lady having represented that she had abandoned the bond and would never enforce it against this gentleman who thereupon enters into a marriage treaty, a settlement following upon that, it would be impossible for her, consistently with the principle of that case, afterwards to say that she had not abandoned the bond, but that she would enforce it against him.

That is followed by *Gregg v. Wells* (8). The Chief Justice there says (10 Ad. & El. at pp. 97, 98), referring to *Pickard v. Sears* (5):

"The principle of that case may be stated even more broadly than it is there laid down. A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

So that, if this lady had stood by, had made no declaration, but knowing that they believed from the former declaration that that bond never would be enforced, and, acting upon it, they had made a settlement upon that young man for life, and she had afterwards attempted to enforce the payment of her bond as against that property, that declaration would be entirely good and perfect as an answer to such claim. That was followed by a similar case in the Exchequer, *Freeman v. Cooke* (4).

I submit, therefore, to your Lordships, that in point of law this case clearly comes within the scope of those authorities; and with great submission to my noble and learned friends, with whom it is my misfortune to differ, my apprehension is that the rule of law clearly extends to this case where the facts are made out that she did abandon the bond, that she abandoned it for a pecuniary consideration, that the marriage followed upon her declaration, that the settlement was made and the property vested in this gentleman in consequence of it, and that he never would have become possessed of the property which was settled upon him so as to make it available for paying the debt, if they had not trusted to that declaration of hers. Having promised that she would not enforce it, she is, in my opinion, bound by that promise. The Statute of Frauds does not extend to this case. Looking at the whole of the circumstances, from the beginning of the transaction down to the time of her own marriage, I should, but for the opinions expressed by my noble and learned friends, have thought it a clear case, both in point of law and in point of evidence. Having, for the reasons I have stated, come to the conclusion that this appeal ought to be dismissed with costs, I should, were it not for the different opinion of my noble and learned friends, have advised your Lordships, upon the weight of evidence as to the facts and upon the rule of law, as I understand it, to adopt the same view. As it is, the decision will be the other way

Appeal allowed.

R. v. EAGLETON

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Jervis, C.J., Pollock, C.B., Parke, Alderson, Platt and Martin, BB., Maule, Wightman, Cresswell, Erle, Williams and Crompton, JJ.), December 2, 1854, February 3, July 9, 1855]

[Reported Dears.C.C. 376, 515; 24 L.J.M.C. 158; 26 L.T.O.S. 7; 19 J.P. 546; 1 Jur.N.S. 940; 4 W.R. 17; 3 C.L.R. 1145; 6 Cox, C.C. 559]

Criminal Law—False pretences—Attempt—Fraudulent obtaining of credit for sum due to be paid later—No further step necessary to obtain payment—Subsequent payment liable to deductions.

Criminal Law—Attempt to commit crime—Act immediately connected with offence—Insufficiency of mere intention.

By a contract in writing dated Dec. 22, 1853, the prisoner undertook to supply to the out-door poor of a parish loaves weighing three and a half pounds each at a price of 7d. per loaf. The relieving officer gave to a poor person a ticket which the poor person handed to the prisoner in exchange for a loaf, and the prisoner returned that ticket to the relieving officer who credited him with the sum due for the loaf supplied. Payment was made on a subsequent date specified in the contract, which contained a provision authorising the guardians to make deductions from the money due to the prisoner in the event of any failure by him to perform the terms of the contract. The prisoner was charged with defrauding the guardians by supplying to poor persons loaves which were of less than the contract weight.

Held: when the prisoner obtained credit for the full price in respect of the deficient loaves it was not necessary for him to take any further step to enable him to receive the payment appropriate for loaves of full weight; accordingly, he was guilty of attempting to obtain that payment by false pretences, it being immaterial that the sums due to him under the contract were subject to deductions in certain circumstances.

Per PARKE, B.: The mere intention to commit a misdemeanour is not criminal. Some act is required, but all acts towards committing a misdemeanour are not indictable. Acts remotely leading to the commission of an offence are not to be considered as attempts to commit it, but acts immediately connected with it are, and if in the present case, after the defendant had obtained the credit with the relieving officer for the fraudulent overcharge, any further step on the part of the defendant had been necessary to obtain payment, e.g., the making of a further account, we should have thought that the obtaining credit in account with the relieving officer would not have been sufficiently proximate to the obtaining of the money.

Notes. Considered: *R. v. Roberts* (1855), Dears.C.C. 539; *R. v. Robinson*, [1915] 2 K.B. 342. Applied: *R. v. Woods* (1930), 143 L.T. 311; *R. v. Bloxham* (1943), 29 Cr. App. Rep. 37; *Hope v. Brown*, [1954] 1 All E.R. 330; *Re Miskell*, [1954] 1 All E.R. 137. Referred to: *R. v. Sherwood* (1857), 21 J.P. 342; *R. v. Goss* (1860), Bell, C.C. 208; *R. v. White* (1910), 4 Cr. App. Rep. 257; *R. v. Cope* (1921), 86 J.P. 78; *Gardner v. Akeroyd*, [1952] 2 All E.R. 306; *R. v. Oakes*, [1959] 2 All E.R. 92.

As to attempts to commit crimes generally and as to obtaining property by fraud and false pretences, see 10 HALSBURY'S LAWS (3rd Edn.) 306-310, 819-836; and for cases see 14 DIGEST (Repl.) 112-121, 15 DIGEST (Repl.) 1160 et seq.

Cases referred to:

(1) *R. v. Kenrick* (1843), 5 Q.B.D. 49; 1 Dav. & Mer. 208; 12 L.J.M.C. 135; 1 L.T.O.S. 336; 7 J.P. 463; 7 Jur. 848; 114 E.R. 1166, C.C.R.; 14 Digest (Repl.) 130, 934.

- (2) *R. v. Abbott, R. v. Dark, R. v. Garlick* (1847), 1 Den. 273, 276; 2 Car. & Kir. 630; 2 Cox, C.C. 430, C.C.R.; 15 Digest (Repl.) 1171, 11,825. A
- (3) *R. v. Witchell* (1798), 2 East, P.C. 830; 15 Digest (Repl.) 1186, 12,004.

Also referred to in argument :

R. v. Wheatly (1761), 2 Burr. 1125; 1 Wm. Bl. 273; 97 E.R. 746; 15 Digest (Repl.) 1160, 11,699. B

R. v. Dunnage (1761), 2 Burr. 1130; 97 E.R. 947; 15 Digest (Repl.) 1160, 11,717.

R. v. Haynes (1815), 4 M. & S. 214; 105 E.R. 814; 15 Digest (Repl.) 1161, 11,719.

R. v. Wilders (1719), 11 Mod. Rep. 309; cited in 2 Burr. 1128; 2 East, P.C. 819; 88 E.R. 1057; 15 Digest (Repl.) 1161, 11,729.

R. v. Lara (1796), 6 Term Rep. 565; 2 Leach, 647; 2 East, P.C. 819; 101 E.R. 706, C.C.R.; 15 Digest (Repl.) 1161, 11,735. C

R. v. Bower (1775), 1 Cowp. 323; 98 E.R. 1110; 15 Digest (Repl.) 1161, 11,718.

R. v. Combrune (1751), 1 Wils. 301; 95 E.R. 630; 15 Digest (Repl.) 1161, 11,715.

R. v. Osborn (1765), 3 Burr. 1697; 97 E.R. 1052; 15 Digest (Repl.) 1161, 11,734.

R. v. Dixon (1814), 4 Camp. 12; 3 M. & S. 11; 105 E.R. 516; 15 Digest (Repl.) 912, 8777.

R. v. Warren (1820), Russ. & Ry. 48, n.; 15 Digest (Repl.) 812, 7760. D

R. v. Booth (1803), Russ. & Ry. 47, n.; 15 Digest (Repl.) 812, 7758.

Young v. R. (1789), 3 Term Rep. 98; 100 E.R. 475; 15 Digest (Repl.) 1160, 11,703.

R. v. Codrington (1825), 1 C. & P. 661; 15 Digest (Repl.) 1184, 11,978.

Anon. (1773), Lofft. 271; 98 E.R. 646; 14 Digest (Repl.) 249, 2148.

R. v. Airey (1801), 2 East, 30; 2 East, P.C. 831; 102 E.R. 279; 15 Digest (Repl.) 1187, 12,015. E

R. v. Barnard (1837), 7 C. & P. 784; 15 Digest (Repl.) 1175, 11,868.

R. v. Crossley (1837), 2 Lew.C.C. 164; 2 Mood. & R. 17, N.P.; 15 Digest (Repl.) 1164, 11,760.

R. v. Bates and Pugh (1848), 3 Cox, C.C. 201; 15 Digest (Repl.) 1173, 11,842. F

R. v. Leonard (1848), 2 Car. & Kir. 514; 1 Den. 304; 11 L.T.O.S. 516; 3 Cox, C.C. 284; 15 Digest (Repl.) 1164, 11,755.

Watts v. Porter (1854), 3 E. & B. 743; 2 C.L.R. 1553; 23 L.J.Q.B. 345; 23 L.T.O.S. 228; 1 Jur.N.S. 133; 118 E.R. 1319; 30 Digest (Repl.) 190, 345.

R. v. Wavell (1829), 1 Mood.C.C. 224, C.C.R.; 15 Digest (Repl.) 1196, 12,147.

R. v. Crosby (1843), 2 L.T.O.S. 230; 1 Cox, C.C. 10; 15 Digest (Repl.) 1165, 11,764. G

R. v. Garrett (1853), Dears.C.C. 232; 23 L.J.M.C. 20; 17 J.P. 774; 17 Jur. 1060; 2 W.R. 97; 2 C.L.R. 106; 6 Cox, C.C. 260, C.C.R.; 14 Digest (Repl.) 147, 1105.

R. v. Chapman (1849), 1 Den. 432; T. & M. 90; 2 Car. & Kir. 846; 18 L.J.M.C. 152; 13 L.T.O.S. 308; 13 J.P. 363; 13 Jur. 885; 3 Cox, C.C. 467, C.C.R.; 14 Digest (Repl.) 114, 791. H

Case Stated by the recorder of Great Yarmouth for the consideration of the Court for Crown Cases Reserved.

By a contract in writing dated Dec. 22, 1853, it was provided :

“ . . the said John Eagleton [the prisoner] doth, in consequence of the payment to be made to him as hereinafter mentioned, hereby contract with the said guardians that he the said John Eagleton will henceforth until the 25th day of March next, serve, supply and deliver, or cause to be delivered to the out-door poor, at such times and in such manner as the said board of guardians, etc., shall from time to time direct, such quantities of bread and flour as shall be required, etc., at and after the rates or prices following, that is to say, bread made from the best household flour in loaves of three and a half pounds each, etc., at sevenpence per loaf.” I

A Then followed the agreement by the guardians to pay

"at and after the rates and prices aforesaid, during the said term, for every quantity of the said articles so to be ordered, served, supplied and delivered, and of which a bill of particulars shall be sent with the said articles at the time of the delivery thereof, within two calendar months from the said 25th day of March next."

B The agreement proceeded :

"Provided always, and it is hereby expressly agreed, and particularly by and on the part of the said John Eagleton, that in case such articles shall not be duly served, etc., when and as required by the said board, etc., and when delivered shall not in every respect be of the quality and sort contracted for, or shall be deficient in the weight stated and charged for in such bill of particulars, etc., or if delivered without such bill of particulars, they the said board, etc., shall be at liberty to return the same at the expense of the said John Eagleton. And that in every such case it shall be lawful for the said board, etc., to purchase a fresh supply or employ any other person to supply the said out-door poor with bread and flour, etc. And that in such case the said John Eagleton, his executors and administrators, shall bear and make good all costs, charges and expenses of such additional supply over and above the price at which the same are hereinbefore contracted to be supplied and delivered by the said John Eagleton. And also that it shall be lawful for the said board of guardians to retain and apply any sum of money which may be due to the said John Eagleton under and by virtue of this agreement at the time of such failure in the performance thereof to the payment of such loss, costs, damages and expenses as the said board may incur or be put to by reason thereof."

The poor person on presenting the ticket to the defendant was entitled to receive a loaf. Twenty of these tickets were given on Saturday, Jan. 21, 1855, to as many out-door poor by the relieving officer, and the poor persons on presenting them to the defendant received the number of loaves mentioned in the ticket. By the course of dealing the defendant would return the tickets on the following week with a statement in writing of the number of loaves he had supplied, and the relieving officer would credit the defendant in his books with the amount. The money would then be paid to him at the time stipulated in the contract. The tickets in question were returned by the defendant to the relieving officer with the note of the number of loaves and the defendant had credit accordingly. The defendant was charged G that he unlawfully and fraudulently and with intent to cheat the guardians supplied to fifty poor persons loaves which were deficient in weight, and then represented to the guardians that the loaves so supplied by him were of the contract weight, whereby he was credited by the relieving officer with the contract price of the loaves. It was objected on the part of the defendant that the evidence did not support any of the first seven counts in the indictment, which were for fraud, nor H the last three which charged an attempt to obtain money by false pretences. The jury found that the loaves of bread furnished by the defendant were deficient in weight and were so with the knowledge of the defendant; that he intended thereby to defraud the out-door poor for whose relief they had been ordered; and that in returning the tickets to the relieving officer he intended to represent that he had delivered the loaves mentioned on them of the weight stated in the contract, and I they returned a verdict of Guilty. The learned recorder requested the opinion of the court upon the objections taken on the part of the defendant.

Bulwer for the prosecution.

Bodkin, J. Clerk and *H. Mills* for the defendant.

Cur. adv. vult.

July 9, 1855. **PARKE, B.**, read the following judgment of the court.—It has been contended by counsel for the prisoner that the indictment for attempting to obtain money by false pretences could not be supported because the offence of obtaining

money under false pretences was committed only where the money was obtained wholly without consideration, and the offence was analogous to larceny, of which the prisoner might, by the Larceny Act, 1827 [repealed by the Criminal Statutes Repeal Act, 1861], s. 53, be convicted in case the offence should appear on the trial to be larceny. There are many cases, as is mentioned in that section, in which the distinction is very subtle between the misdemeanour of obtaining money under false pretences and the offence of larceny, and it was very proper to make that provision in the statute, but it does not follow that all the cases of obtaining money by false pretences are of that description. It was strongly contended that the statute against obtaining money by false pretences applies to no cases where there is some bargain or consideration for giving the money and so some cause for the giving of it other than the false pretence, as where goods were sold under a false representation of the quality or value, and the purchaser had the commodity, for otherwise the range of indictable offences would be greatly extended, and breaches of contract made the ground of criminal proceedings. If this had been the case of a sale of bread to the prosecutors with a false representation of the weight and an attempt thereby to receive a larger price than was really due, we should have had to decide whether an indictable offence had been thereby committed, and should have had to consider *R. v. Kenrick* (1), which was the case of a sale of horses by means of a false representation of their being the property of a private gentleman and quiet to ride and drive, and also *R. v. Abbott* (2), decided upon the authority of *R. v. Kenrick* (1). In all these cases the prosecutor did not part with his money merely on account of the false pretence, but principally because he had a consideration for it in the property vested in him by the contract. This is not the case of a sale of goods by a false pretence of their weight; it is an attempt to obtain money by the false and fraudulent representation of an antecedent fact, viz., that a greater number of pounds of bread had been delivered than had been actually delivered, that representation being made with a view of obtaining as many sums of twopence as the number of loaves falsely pretended to have been furnished amounted to. In this respect the present case exactly resembles that of *R. v. Wittchell* (3), where the prisoner obtained money by the false pretence that certain workmen whom it was his duty to pay had earned more than they really had; and since then, there are other cases of similar convictions where the prisoner falsely stated the quantity of work which he had done, according to which he was to be paid. We, therefore, think that those counts in the indictment which charged obtaining money by false pretences would be maintainable if the money had been obtained.

A second objection was, that the defendant was not to obtain the price of the number of pounds, falsely stated to have been delivered, in cash, but only to have credit in account. The statement of the learned recorder is that the defendant was to return the tickets given to the paupers by the relieving officers, and by the paupers delivered to the defendant on receiving the loaves, and that upon such return he would be credited in the relieving officer's book for the amounts, and the money would be paid at the time stipulated in the contract, that is, in two calendar months from Mar. 25 following. No further step would be necessary for the defendant to receive payment. The defendant did obtain credit in account from the relieving officer, in effect, for the amount of the number of pounds falsely represented to have been delivered. Further, the contract with the board of guardians stipulates that, if the defendant should fail in his performance of it, the board of guardians might deduct the damage and costs sustained thereby from the sums payable to him for loaves supplied. On the part of the defendant, his learned counsel contended (i) that the attempt to obtain credit in account for a sum of money by delivering up the tickets as vouchers was not in itself an attempt to obtain money within the meaning of the statute, for that credit in account was not equivalent to money. No doubt the credit in the relieving officer's book was not equivalent to money, and the defendant could not have been convicted of the offence of actually obtaining money by false pretences. Secondly, he contended

- A** that the credit in account would not necessarily lead to an ultimate payment, for there might be deductions for breaches of contract which would prevent any payments in cash by the guardians. We have had great doubt on this part of the case, but do not think that this objection should prevail. We think that the contingency of the whole sum due to him being subject to deductions in a future event does not the less make the obtaining credit an attempt to obtain money, if it would be so
- B** without that contingency.

Our doubt has been whether the obtaining that credit, though undoubtedly a necessary step towards obtaining the money, can be deemed an attempt to do so. The mere intention to commit a misdemeanour is not criminal—some act is required; and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are

- C** not to be considered as attempts to commit it, but acts immediately connected with it are, and if in this case, after the defendant had obtained the credit with the relieving officer for the fraudulent overcharge, any further step on the part of the defendant had been necessary to obtain payment, as the making out a further account, or producing the vouchers to the board, we should have thought that the obtaining credit in account with the relieving officer would not have been sufficiently
- D** proximate to the obtaining of the money. But on the statement in this Case no other act on the part of the defendant would have been required. It was the last act depending on himself towards the payment of the money, and, therefore, it ought to be considered as an attempt.

- The receipt of the money appears to have been prevented by a discovery of the fraud by the relieving officer, and it is very much the same case as if, supposing
- E** rendering an account to the guardians at their office with the vouchers annexed were a preliminary necessary step to receiving the money, the defendant had gone to the office, rendered the account and vouchers, and then been discovered, and the money consequently refused.

Conviction of an attempt affirmed.

LUMLEY v. WAGNER

[LORD CHANCELLOR'S COURT (Lord St. Leonards, L.C.), May 22, 26, 1852]

[Reported 1 De G.M. & G. 604; 21 L.J.Ch. 898; 19 L.T.O.S. 264;
16 Jur. 871; 42 E.R. 687]

Injunction—Contract for personal service—Undertaking not to serve any third person—Jurisdiction to grant injunction to restrain breach of undertaking—Effect to compel specific performance of contract.

The court will grant an injunction to restrain the breach of the negative part of a contract even though it cannot specifically enforce the performance of the positive part of the contract, e.g., where the positive part is an undertaking to render personal services, and the effect of the injunction is to compel the specific performance of the contract as a whole.

By a contract in writing W. bound herself to sing for three months at the plaintiff's theatre and "not to use her talents" at any other theatre.

Held: the court had jurisdiction to grant an injunction to restrain W. from appearing at a theatre other than that of the plaintiff.

Injunction—Damages—Plaintiff's right to recover damages—Jurisdiction to grant injunction.

Per LORD ST. LEONARDS, L.C.—It is no objection to the exercise of the jurisdiction by injunction that the plaintiff may have a legal remedy [i.e., a right to recover damages].

Notes. Considered: *Johnson v. Shrewsbury and Birmingham Rail. Co.* (1853), 3 De G.M. & G. 914; *De Mattos v. Gibson* (1859), 4 De G. & J. 276; *Peto v. Brighton, Uckfield and Tunbridge Wells Rail. Co.* (1863), 1 Hem. & M. 468. Distinguished: *Brett v. East India and London Shipping Co.* (1864), 2 Hem. & M. 404. Considered: *Adamson v. Gill* (1868), 17 L.T. 464. Applied: *Daggett v. Ryman* (1868), 16 W.R. 302. Considered: *Montague v. Flockton* (1873), L.R. 16 Eq. 189; *Warne v. Routledge* (1874), L.R. 18 Eq. 497. Applied: *Donnell v. Bennett* (1883), 22 Ch.D. 835. Explained: *Piperno v. Harmston* (1886), 3 T.L.R. 219. Distinguished: *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416. Considered: *Lanner v. Palace Theatre Eccarius and Armstrong* (1893), 9 T.L.R. 165; *Silver v. Gatti* (1893), 37 Sol. Jo. 776. Applied: *Star Newspaper v. O'Connor and Wetton* (1893), 9 T.L.R. 526. Distinguished: *Davis v. Foreman*, [1894] 3 Ch. 654; *Mutual Reserve Fund Life Association v. New York Life Insurance Co.*, [1895-9] All E.R.Rep. 799; *Ehrman v. Bartholomew*, [1898] 1 Ch. 671. Considered: *Chapman v. Westerby* (1913), 58 Sol. Jo. 50. Distinguished: *Mortimer v. Beckett*, [1920] All E.R.Rep. 179. Considered: *Lord Strathcona Steamship Co. v. Dominion Coal Co.* (1925), 42 T.L.R. 86; *Warner Brothers Pictures, Inc. v. Nelson*, [1936] 3 All E.R. 160. Applied: *A.-G. v. Colchester Corpn.*, [1955] 2 All E.R. 124. Referred to: *Dollfus v. Pickford* (1854), 2 W.R. 220; *South Wales Rail. Co. v. Wythes* (1854), 5 De G.M. & G. 880; *Paris Chocolate Co. v. Crystal Palace Co.* (1855), 3 Sm. & G. 119; *Stocker v. Wedderburn* (1857), 3 K. & J. 393; *Hope v. Hope* (1857), 8 De G.M. & G. 731; *Ogden v. Fossick* (1862), 4 De G.F. & J. 426; *Fechter v. Montgomery* (1863), 33 Beav. 22; *Messageries Imperiales Co. v. Baines* (1863), 7 L.T. 763; *Catt v. Tourle* (1869), 4 Ch. App. 654; *Cochrane v. Exchange Telegraph Co.* (1869), 65 L.J.Ch. 334; *Merchants Trading Co. v. Banner* (1871), L.R. 12 Eq. 18; *Cornwall v. Hawkins* (1872), 20 W.R. 653; *Wilkinson v. Clements* (1872), 8 Ch. App. 102, n.; *Crosse v. Duckers* (1873), 21 W.R. 287; *Fothergill v. Rowland* (1873), L.R. 17 Eq. 132; *Wolverhampton and Walsall Rail. Co. v. London and North Western Rail. Co.* (1873), L.R. 16 Eq. 433; *Ryan v. Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116; *Cochrane v. Exchange Telegraph Co.* (1896), 65 L.J.Ch. 334; *Robinson v. Heuer*, [1898] 2 Ch. 451; *Alexander v. Mansions Proprietary* (1900), 16 T.L.R. 431; *Manchester Ship Canal Co. v.*

- A *Manchester Racecourse Co.*, [1901] 2 Ch. 37; *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799; *Yorkshire Miners' Association v. Howden*, [1904-7] All E.R.Rep. 602; *Kirchner v. Gruban*, [1908-10] All E.R.Rep. 242; *Lord Strathcona Steamship Co. v. Dominion Coal Co.*, [1925] All E.R.Rep. 87; *Rely-A-Bell Burglar and Fire Alarm Co. v. Eisler*, [1926] Ch. 609; *Re Wait, The Trustee v. Humphries and Bobbett*, [1926] All E.R.Rep. 433; *Marco Productions, Ltd. v. Pagola*, [1945] 1 All E.R. 155.

As to injunctions relating to contracts containing both positive and negative covenants, see 21 HALSBURY'S LAWS (3rd Edn.) 385-387; and for cases see 28 DIGEST (Repl.) 828-831.

Cases referred to:

- C (1) *Martin v. Nutkin* (1724), 2 P.Wms. 266; 24 E.R. 724; 28 Digest (Repl.) 827, 704.
 (2) *Barret v. Blagrove* (1800), 5 Ves. 555; on appeal (1801), 6 Ves. 104.
 (3) *Robinson v. Lord Byron* (1785), 1 Bro.C.C. 588; 28 E.R. 1315, L.C.; 44 Digest 12, 41.
 (4) *Collins v. Plumb* (1810), 16 Ves. 454; 33 E.R. 1057, L.C.; 28 Digest (Repl.) 818, 641.
 D (5) *Morris v. Colman* (1812), 18 Ves. 437; 34 E.R. 382, L.C.; 42 Digest 914, 98.
 (6) *Dietrichsen v. Cabburn* (1846), 2 Ph. 52; 1 Coop. temp. Cott. 72; 7 L.T.O.S. 445; 10 Jur. 601; 41 E.R. 861, L.C.; 28 Digest (Repl.) 829, 723.
 (7) *Clarke v. Price* (1819), 2 Wils. Ch. 157; 37 E.R. 270, L.C.; 28 Digest (Repl.) 822, 671.
 E (8) *Kemble v. Kean* (1829), 6 Sim. 333; 58 E.R. 619; 28 Digest (Repl.) 829, 720.
 (9) *Kimberley v. Jennings* (1836), 6 Sim. 340; 5 L.J.Ch. 115; 58 E.R. 621; 28 Digest (Repl.) 829, 721.
 (10) *Hooper v. Broderick* (1840), 11 Sim. 47; 9 L.J.Ch. 321; 59 E.R. 791; 31 Digest (Repl.) 112, 2537.
 (11) *Smith v. Fromont* (1818), 2 Swan. 330; 1 Wils. Ch. 472; 36 E.R. 642, L.C.; 36 Digest (Repl.) 598, 1586.
 F (12) *Gervais v. Edwards* (1848), 2 Dr. & War. 80; 4 I.Eq.R. 555; 1 Con. & Law. 242; 42 Digest 432, 46ii.
 (13) *Hills v. Croll* (1845), 2 Ph. 60; 1 Coop. temp. Cott. 83; 14 L.J.Ch. 444; 5 L.T.O.S. 493; 9 Jur. 645; 41 E.R. 864, L.C.; 28 Digest (Repl.) 829, 722.
 (14) *Rolfe v. Rolfe* (1846), 15 Sim. 88; 1 Coop. temp. Cott. 87; 6 L.T.O.S. 518; 10 Jur. 61; 60 E.R. 550; 28 Digest (Repl.) 830, 728.
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Also referred to in argument:

- Heathcote v. North Staffordshire Rail. Co.* (1850), 2 Mac. & G. 100; 6 Ry. & Can. Cas. 358; 2 H. & Tw. 332; 20 L.J.Ch. 82; 14 Jur. 859; 47 E.R. 1710, L.C.; 28 Digest (Repl.) 866, 954.
Stocker v. Brockelbank (1851), 3 Mac. & G. 250; 20 L.J.Ch. 401; 18 L.T.O.S. 177; 15 Jur. 591; 42 E.R. 257, L.C.; 28 Digest (Repl.) 822, 674.
Baldwin v. Society for the Diffusion of Useful Knowledge (1838), 9 Sim. 393; 2 Jur. 961; 59 E.R. 409; 28 Digest (Repl.) 822, 672.
Blakemore v. Glamorganshire Canal Navigation (1832), 1 My. & K. 154; 2 L.J.Ch. 95; 39 E.R. 639, L.C.; 28 Digest (Repl.) 751, 83.
Swallow v. Wallingford (1848), 11 L.T.O.S. 217; 12 Jur. 403, L.C.; 28 Digest (Repl.) 764, 191.
French v. Macale (1842), 2 Dr. & War. 269; 28 Digest (Repl.) 824, *36a.
Whittaker v. Howe (1841), 3 Beav. 383; 49 E.R. 150; 43 Digest 68, 722.

Bill filed on April 22, 1852, by the plaintiff, Benjamin Lumley, lessee of Her Majesty's Theatre, London, praying that the defendants, Johanna Wagner, Albert Wagner, her father, and Frederick Gye, lessee of Covent Garden Theatre, might be restrained from committing any breach of an agreement dated Nov. 9, 1851.

The agreement provided:

"The undersigned Mr. Benjamin Lumley, possessor of Her Majesty's Theatre at London, and of the Italian Opera at Paris, of the one part, and Mademoiselle Johanna Wagner, cantatrice of the court of His Majesty the King of Prussia, with the consent of her father, Mr. A. Wagner, residing at Berlin, of the other part, have concerted and concluded the following contract.—First, Mademoiselle Johanna Wagner binds herself to sing for three months at the theatre of Mr. Lumley, Her Majesty's, London, to date from April 1, 1852 (the time necessary for the journey comprised therein) and to give the parts following, 1st, Romeo, Montecchi; 2nd, Fides, Prophète; 3rd, Valentine, Huguenots; 4th, Anna, Don Juan; 5th, Alice, Robert le Diable; 6th, an opera chosen by common accord. Second, the three first parts must necessarily be, 1st, Romeo, 2nd, Fides, 3rd, Valentine; these parts once sung, and then only she will appear, if Mr. Lumley desires it, in the three other operas mentioned aforesaid. Third, these six parts belong exclusively to Mademoiselle Wagner, and any other cantatrice shall not presume to sing them during the three months of her engagement. If Mr. Lumley happens to be prevented, by any cause soever, from giving these operas, he is nevertheless held to pay Mademoiselle Johanna Wagner the salary stipulated lower down for the number of her parts as if she had sung them. Fourth, in the case where Mademoiselle Wagner should be prevented by reason of illness from singing in the course of a month as often as it has been stipulated, Mr. Lumley is bound to pay the salary only for the parts sung. Fifth, Mademoiselle Johanna Wagner binds herself to sing twice a week during the run of the three months; however, if she herself was hindered from singing twice in any week whatever, she will have the right to give at a later period the omitted representation. Sixth, if Mademoiselle Wagner, fulfilling the wishes of the Direction, consent to sing more than twice a week in the course of three months, this last will give to Mademoiselle Wagner £50 sterling for each representation extra. Seventh, Mr. Lumley engages to pay Mademoiselle Wagner a salary of £400 sterling per month, and payment will take place in such manner that she will receive £100 sterling each week. Eighth, Mr. Lumley will pay by letters of exchange to Mademoiselle Wagner at Berlin, Mar. 15, 1852, the sum of £300 sterling, a sum which will be deducted from her engagement in his retaining £100 each month. Ninth, in all cases, except that where a verified illness would place upon her a hindrance, if Mademoiselle Wagner shall not arrive in London eight days after that from whence dates her engagement, Mr. Lumley will have the right to regard the non-appearance as a rupture of the contract, and will be able to demand an indemnification. Tenth, in the case where Mr. Lumley should cede his enterprise to another, he has the right to transfer this contract to his successor, and in that case Mademoiselle Wagner has the same obligations and the same rights towards the last as towards Mr. Lumley.

(Signed) JOHANNA WAGNER,
ALBERT WAGNER."

The bill stated, that in November, 1851, Joseph Bacher met the plaintiff in Paris, when the plaintiff objected to the agreement as not containing a usual and necessary clause preventing the defendant Johanna Wagner from exercising her professional abilities in England without the consent of the plaintiff, whereupon Joseph Bacher, as the agent of the defendants Johanna Wagner and Albert Wagner, and being fully authorised by them for the purpose, added an article in writing which was as follows:

"Mademoiselle Wagner engages herself not to use her talents at any other theatre, nor in any concert or re-union, public or private, without the written authorisation of Mr. Lumley.

DR. JOSEPH BACHER,
For Mademoiselle Johanna Wagner,
and authorised by her."

The bill then stated that the defendants J. and A. Wagner subsequently made another engagement with the defendant Gye, by which it was agreed that the

A defendant J. Wagner should, for a larger sum than that stipulated by the agreement with the plaintiff, sing at the Royal Italian Opera, Covent Garden, and abandon the agreement with the plaintiff. The bill stated that the defendant Gye had full knowledge of the previous agreement with the plaintiff, and that the plaintiff had received a protest from the defendants J. and A. Wagner repudiating the agreement on the allegation that the plaintiff had failed to fulfil the pecuniary portion of the agreement.

B The bill prayed that the defendants Johanna Wagner and Albert Wagner might be restrained from violating or committing any breach of the last article of the agreement; that the defendant Johanna Wagner might be restrained from singing and performing or singing at the Royal Italian Opera, Covent Garden, or at any other theatre or place without the sanction or permission in writing of the plaintiff

C during the existence of the agreement with the plaintiff; that the defendant Albert Wagner might be restrained from permitting or sanctioning the defendant Johanna Wagner singing and performing or singing as aforesaid; that the defendant Gye might be restrained from accepting the professional services of the defendant Johanna Wagner as a singer and performer or singer at the Royal Italian Opera, Covent Garden, or at any other theatre or place, and from permitting her to sing

D and perform or to sing at the Royal Italian Opera, Covent Garden, during the existence of the agreement with the plaintiff, without the permission or sanction of the plaintiff. The defendants A. and J. Wagner denied that Joseph Bacher was their authorised agent, at least for the purpose of adding the restrictive clause, and said that the plaintiff had failed to make the stipulated payment by the time mentioned in the agreement. The plaintiff having obtained an injunction from

E PARKER, V.-C., on May 9, 1852, the defendants now moved by way of appeal before the LORD CHANCELLOR to discharge his Honour's order.

Bethell, Malins, and Martindale for the defendants.

Bacon and H. Clarke for the plaintiff.

F **LORD ST. LEONARDS, L.C.**—The question which I have to decide in the present case arises out of a very simple contract, the effect of which is, that the defendant Johanna Wagner should sing at Her Majesty's Theatre for a certain number of nights, and that she should not sing elsewhere (for that is the true construction) during that period. As I understand the points taken by the defendants' counsel

G ought not to grant an injunction except in cases connected with specific performance, or where the injunction, being to compel a party to forbear from committing an act (and not to perform an act), that injunction will complete the whole of the agreement remaining unexecuted.

I have to consider how the question stands on principle and on authority, and in so doing I shall observe upon some of the cases which have been referred to and commented upon by the defendants in support of their contention. The first was *Martin v. Nuthin* (1), in which the court issued an injunction restraining an act from being done where it clearly could not have granted any specific performance, but it was said that that case fell within one of the exceptions which the defendants admit are proper cases for the interference of the court, because there the ringing of the bells, sought to be restrained, had been agreed to be suspended

I by the defendant in consideration of the erection by the plaintiffs of a cupola and clock, the agreement being in effect the price stipulated for the defendant's relinquishing bell-ringing at stated periods. The defendant having accepted the benefit, but rejected the corresponding obligation, LORD MACCLESFIELD first granted the injunction which the Lords Commissioners, at the hearing of the cause, continued for the lives of the plaintiffs. That case, therefore, however it may be explained as one of the exceptional cases, is nevertheless a clear authority showing that this court has granted an injunction prohibiting the commission of an act in respect of which the court could never have interfered by way of specific performance.

The next case referred to was *Barret v. Blagrove* (2), which came first before LORD LOUGHBOROUGH, and afterwards before LORD ELDON. There a lease had originally been granted by the plaintiffs, the proprietors of Vauxhall Gardens, of an adjoining house, under an express covenant that the lessee would not carry on the trade of a victualler or retailer of wines or generally any employment that would be to the damage of the proprietors of Vauxhall Gardens. An underlease having been made to the defendants, who were violating the covenant by the sale of liquors, the proprietors of Vauxhall Gardens filed a bill for an injunction, which was granted by LORD LOUGHBOROUGH. It has been observed in the argument here that in granting the injunction LORD LOUGHBOROUGH said: "It is in the nature of specific performance," and that, therefore, that case also falls under one of the exceptional cases. When that case came before LORD ELDON, he dissolved the injunction, but upon a different ground, namely, on that of acquiescence for many years, and in a sense he treated it as a case of specific performance. As far as the words go, the observations of those two eminent judges would seem to justify the argument which has been addressed to me; in effect, however, it was only specific performance, because a prohibition, preventing the commission of an act may as effectually perform an agreement as an order for the performance of the act agreed to be done. The agreement in that case being that the house should not be opened for the purposes of entertainment to the detriment of Vauxhall Gardens, the court granted the injunction. That was a performance of the agreement in substance, and the term "specific performance" is aptly applied in such a case, but not in the sense in which it has been used before me.

It was also contended that the plaintiff's remedy, if any, was at law, but it is no objection to the exercise of the jurisdiction by injunction that the plaintiff may have a legal remedy. [Now, by s. 36 of the Supreme Court of Judicature Act, 1925, law and equity are administered concurrently in the High Court.] *Robinson v. Lord Byron* (3), before LORD THURLOW, so very often commented upon by succeeding judges, is a clear illustration of that proposition, because in that case the defendant, Lord Byron, who had large pieces of water in his park which supplied the plaintiff's mills, was abusing his right by preventing a regular supply to the plaintiff's mill, and although the plaintiff had a remedy at law, yet this court felt no difficulty in restraining Lord Byron by injunction from preventing the regular flow of the water. Undoubtedly, there are cases such as that cited for the defendants of *Collins v. Plumb* (4), before LORD ELDON, in which this court has declined to exercise the power (which in that instance it was assumed to have had) of preventing the commission of an act, because such power could not be properly and beneficially exercised. In that case the negative covenant not to sell water to the prejudice of the plaintiffs was not enforced by LORD ELDON, not because he had any doubt about the jurisdiction of the court (for upon that point he had no doubt), but because it was impossible to ascertain every time the water was supplied by the defendants, whether it was or not to the damage of the plaintiffs, but, whether right or wrong, that learned judge, in refusing to exercise the jurisdiction on very sufficient grounds, meant in no respect to break in on the general rules deducible from the previous authorities.

At an early stage of the argument I adverted to the familiar cases of attorneys' clerks, and surgeons' and apothecaries' apprentices, and the like, in which this court has constantly interfered, simply to prevent the violation of negative covenants, but it was said that in such cases the court only acted on the principle that the clerk or apprentice had received all the benefit and that the prohibition operated upon a concluded contract, and, therefore, the injunction fell within one of the exceptional cases. I do not, however, apprehend that the jurisdiction of the court depends upon any such principle. It is obvious that in those cases the negative covenant does not come into operation until the servitude is ended, and therefore, that the injunction cannot be required or applied for before that period. The familiar case of a tenant covenanting not to do a particular act was also put during the argument, but it was said that in such a case the jurisdiction springs

- A** out of the relation of landlord and tenant and that, the tenant having received the benefit of an executed lease, the injunction operates only so as to give effect to the whole contract. That, however, cannot be the principle on which this court interferes, for, beyond all doubt, where a lease is executed containing affirmative and negative covenants, this court will not attempt to enforce the execution of the affirmative covenants, either on the part of the landlord or the tenant, but will
- B** leave it entirely to a court of law to measure the damages, though, with respect to the negative covenants, if the tenant, for example, has stipulated not to cut or lop timber, or any other given act of forbearance, the court does not ask how many of the affirmative covenants on either side remain to be performed under the lease, but acts at once by giving effect to the negative covenant, specifically executing it by prohibiting the commission of acts which have been stipulated not to be done.
- C** So far, then, each of the cases to which I have referred appears to me to be in direct contravention of the rules which have been so elaborately pressed upon me by the defendants' counsel.

The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendants, which state of facts may have and in some cases has introduced a very important difference, but of an act to be

- D** done by Johanna Wagner alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant—the one being ancillary to, and concurrent and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract. It is, in effect, one contract, and though beyond all doubt
- E** this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that Johanna Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of opinion
- F** that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered. Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements, and it will not suffer them to
- G** depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other, and, although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors
- H** have handed down as the rule for his guidance in the administration of such an equity.

It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant Johanna Wagner from performing at any other theatre while this court had no power to compel her to perform at Her Majesty's Theatre. It is true that I have not the means of compelling her to sing, but she

- I** has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the court, and, being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. The effect, too, of the injunction, in restraining Johanna Wagner from singing elsewhere may, in the event of an action being brought against her by the plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival

theatre. The injunction may also, as I have said, tend to the fulfilment of her engagement, though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly. A

Referring again to the authorities, I am well aware that they have not been uniform, and that there undoubtedly has been a difference of decision on the question now revived before me, but, after the best consideration which I have been enabled to give to the subject, the conclusion at which I have arrived is, I conceive, supported by the greatest weight of authority. The earliest case most directly bearing on the point is that of *Morris v. Colman* (5). There Mr. Colman was a part proprietor with Mr. Morris of the Haymarket Theatre; they were partners in that concern, and by the deed of partnership Mr. Colman agreed that he would not exercise his dramatic abilities for any other theatre than the Haymarket. He did not, however, covenant that he would write for the Haymarket, but it was merely a negative covenant that he would not write for any other theatre than the Haymarket. LORD ELDON granted an injunction against Mr. Colman writing for any other theatre than the Haymarket, and the ground on which LORD ELDON assumed that jurisdiction was the subject of some discussion at the Bar. It was truly said for the defendants that that was a case of partnership, and it was said, moreover, that LORD COTTENHAM was mistaken in *Dietrichsen v. Cabburn* (6), when he said that LORD ELDON had not decided *Morris v. Colman* (5) on the ground of there being a partnership. I agree that the observations which fell from LORD ELDON in the subsequent case of *Clarke v. Price* (7), show that he did mainly decide it on the ground of partnership; but he did not decide it exclusively on that ground. In the argument of *Morris v. Colman* (5), Sir Samuel Romilly suggested a case almost identical with the present. He contended that the clause restraining Mr. Colman from writing for any other theatre was no more against public policy than a stipulation that Mr. Garrick should not perform at any other theatre than that at which he was engaged would have been. LORD ELDON, adverting in his judgment to the case put at the Bar, said (18 Ves. at p. 438): B C D E

"If Mr. Garrick was now living, would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket Theatre, and Mr. Colman with him to write for the theatre alone? Why should they not thus engage for the talents of each other?" F

He gives the clearest enunciation of his opinion that that would be an agreement which this court would enforce by way of injunction.

SHADWELL, V.-C., of whom I always wish to be understood to speak with the greatest respect, decided in a different way in *Kemble v. Kean* (8) and *Kimberley v. Jennings* (9), on which I shall presently make a few observations. In the former case, he observed that LORD ELDON must be understood, in *Morris v. Colman* (5), to have spoken according to the subject-matter before him, and must there be considered to be addressing himself to a case in which Colman and Garrick would both have had a partnership interest in the theatre. I must, however, entirely dissent from that interpretation. LORD ELDON's words are perfectly plain, they want no comment upon them, they speak for themselves. He was alluding to a case in which Garrick, as a performer, would have had nothing to do with the theatre beyond the implied engagement that he would not perform anywhere else, and I have come to a very clear conclusion that LORD ELDON would have granted the injunction in that case, although there had been no partnership. G H

The authority of *Clarke v. Price* (7) was much pressed upon me by the learned counsel for the defendants, but that is a case which does not properly belong to their argument because there there was no negative stipulation, and I quite admit that this court cannot enforce the performance of such an affirmative stipulation as is to be found in that case. There the defendant having agreed to take notes of cases in the Court of Exchequer and compose reports for the plaintiff, and having failed to do so, the plaintiff, Mr. Clarke, filed a bill for an injunction, and LORD ELDON, when refusing the injunction, in effect said, I cannot compel Mr. Price to I

A sit in the Court of Exchequer and take notes and compose reports. The whole of his judgment shows that he proceeded (and so it has been considered in later cases) on the ground that there was no covenant on the part of the defendant that he would not compose reports for any other person. The expressions in the judgment are [*Morris v. Colman* (5)] :

B "I cannot, as in the other case, say that I will induce him to write for the plaintiff by preventing him from writing for any other person,"

and then come these important words, "for that is not the nature of the agreement."

C LORD ELDON, therefore, was of opinion, upon the construction of that agreement, that it would be against its meaning to affix to it a negative quality and import a covenant into it by implication, and he, therefore, very properly as I conceive, refused that injunction. That case, therefore, in no respect touches the question now before me, and I may at once declare that if I had only to deal with the affirmative covenant of the defendant Johanna Wagner that she would perform at Her Majesty's Theatre, I should not have granted any injunction.

D Thus far, I think, the authorities are very strong against the defendants' contention, but *Kemble v. Kean* (8) is the first case which has in point of fact introduced all the difficulties on this part of the law. There Mr. Kean entered into an agreement precisely similar to the present: he agreed that he would perform for Mr. Kemble at Drury Lane, and that he would not perform anywhere else during the time that he had stipulated to perform for Mr. Kemble. Mr. Kean broke his engagement, a bill was filed, and SHADWELL, V.-C., was of opinion that he could not grant an injunction to restrain Mr. Kean from performing elsewhere, which he was either about to do or actually doing, because the court could not enforce the performance of the affirmative covenant that he would perform at Drury Lane for Mr. Kemble. Being pressed by that passage which I have read from in the Lord Chancellor's judgment in *Morris v. Colman* (5), he put that paraphrase or commentary upon it which I have referred to, i.e., he says: "LORD ELDON is speaking of a case where the parties are in partnership together." I have come to a different conclusion, and I am bound to say that, in my apprehension, *Kemble v. Kean* (8) was wrongly decided and cannot be maintained. The same learned judge followed up his decision in that case in the subsequent one of *Kimberley v. Jennings* (9). That was a case of hiring and service, and the vice-chancellor there virtually admitted that a negative covenant might be enforced in this court, and quoted an instance to that effect within his own knowledge. He said (6 Sim. at p. 351):

G "I remember a case in which a nephew wished to go on the stage, and his uncle gave him a large sum of money in consideration of his covenanting not to perform within a particular district; the court would execute such a covenant, on the ground that a valuable consideration had been given for it."

H He admits, therefore, the jurisdiction of the court, if nothing but that covenant remained to be executed. The learned judge, however, adds (6 Sim. at pp. 351, 352):

I "but here the negative covenant does not stand by itself: it is coupled with the agreement for service for a certain number of years, and then, for taking the defendant into partnership: . . . this agreement cannot be performed in the whole, and therefore this court cannot perform any part of it."

Whatever may have been the mutual obligations in that case which prevented the court from giving effect to the negative covenant, I am not embarrassed with any such difficulties here, because, as I have already shown, both the covenants are on the part of the defendants.

Hooper v. Broderick (10) was cited as an instance in which the court had refused an injunction under circumstances like the present, but in that case the lessee of an inn had covenanted to use and keep it open as an inn during a certain time and not to do any act whereby the licence might become forfeited. In point of

fact the application was that he might be compelled to keep it open, and the vice-chancellor makes this observation (11 Sim. at p. 49): A

"The court ought not to have restrained the defendant from discontinuing to use and keep open the demised premises as an inn, which is the same in effect as ordering him to carry on the business of an innkeeper; but it might have restrained him from doing, or causing or permitting to be done, any act which would have put it out of his power, or the power of any other person, to carry on that business on the premises. It is not, however, shown that the defendant has threatened, or intends to do, or to cause or permit to be done, any act whereby the licences may become forfeited or be refused; and therefore the injunction must be dissolved." B

That, therefore, is an authority directly against the defendants because it shows that, if there had been an intention to break the negative covenant, this court would have granted the injunction. C

Smith v. Fromont (11) was also relied upon by the defendants as an instance where the injunction had been refused, but there was no negative covenant. It was an attempt to restrain by injunction a man from supplying horses to a coach for a part of a road when the party who was applying for the injunction was himself incapable of performing his obligation to horse his part of the road. LORD ELDON, in refusing the injunction and deprecating the interference of the court in such cases, there said (2 Swan. at p. 332): D

"The only instance I recollect of an application to this court to restrain the driving of coaches occurred in the case of a person who, having sold the business of a coach proprietor from Reading to London, and undertaking to drive no coach on that road, afterwards established one. With some doubt, whether I was not degrading the dignity of this court by interfering, I saw my way in that case; because one party had there covenanted absolutely against interfering with the business which he had sold to the other." E

That again is a direct authority, therefore, against the defendants, as LORD ELDON expressly says he had interfered in the case of a negative covenant, although he could not interfere on that occasion because there was no such covenant. F

Some observations have been made upon a decision of my own in Ireland in *Gervais v. Edwards* (12). That decision I believe to be right, but it is quoted to show that I was of opinion that this court cannot interfere to enforce specific performance, unless it can execute the whole of an agreement. I abide by the opinion I there expressed, and I mean to do nothing in this case which shall in any manner interfere with that opinion. That was properly a case for specific performance, but from the nature of the contract itself there was a portion of it which could not be executed. I said in effect: I cannot execute this contract which is intended to be binding on both parties. I cannot execute a portion of this contract for one, and leave the other portion of the contract unexecuted for the other, and, therefore, as I cannot execute the whole of the contract, I am bound to execute no part of it. That, however, has no bearing on the present case, for here I leave nothing unperformed which the court can ever be called upon to perform. G

In *Hills v. Croll* (13), LORD LYNTHURST refused to enforce an injunction to restrain the violation of a negative covenant. It was a case in which A. had given to B. a sum of money, and B. covenanted that he would buy all the acids he wanted from the manufactory of A., who covenanted that he would supply the acids, and B. also covenanted that he would buy his acids from no other person. LORD LYNTHURST refused to prohibit B. from obtaining acids from any other quarter, both because the covenants were correlative and because he could not compel A. to supply B. with acids. If, therefore, he had restrained B. from taking acids from any other quarter, he might have ruined him in the event of A. breaking his affirmative covenant to supply the acids. That case has never H I

A been rightly understood. It is supposed that LORD LYNTHURST's decision was based upon a wrong principle; that he followed the authority of *Gervais v. Edwards* (12) and such cases, and that he improperly applied the rule which was in that class of cases properly applied, but under the circumstances of the case before him I think the rule was not improperly applied.

B The next case which has been so much observed upon was that, before LORD COTTENHAM, of *Dietrichsen v. Cabburn* (6). That was a very simple case, and the question upon what principle it was decided, formed the subject of discussion before me. A man, in order to obtain a great circulation of his patent medicine, entered into a contract with a vendor of such articles, giving him a general agency for the sale of the medicine, with 40 per cent. discount, and stipulating that he would not supply anybody else at a larger discount than 25 per cent. He violated C his contract and was proceeding to employ other agents with a larger discount than 25 per cent.; an injunction was applied for and was granted; and it was said that it was properly granted because it was a case of partnership. This, however, was not the fact. It was not a case of partnership, but was strictly one of principal and agent, and it was only because there was the negative covenant that the court gave effect to it. It is impossible to read LORD COTTENHAM's judgment D without being satisfied that he did not consider it to be a partnership, though he said it was in the nature of a partnership, and in a popular sense it might be so called, because the parties were there both dealing with respect to the same subject, from which each was to have a benefit, but in no legal sense was it a partnership.

E Up to the period when *Dietrichsen v. Cabburn* (6) was decided, I apprehend that there could have been no doubt on the law as applicable to this case, except for the authority of SHADWELL, V.-C., but with great submission it appears to me that the whole of that learned judge's authority is removed by himself by his decision in the later case of *Rolfe v. Rolfe* (14). In that case A., B. and C. were partners as tailors. A. and B. went out of the trade on consideration of receiving £1,000 each, and C. was to continue the business on his own account. A. entered F into a covenant that he would not carry on the trade of a tailor which he had just sold, within certain limits, and C. entered into a covenant that he would employ A. as cutter at a certain allowance. The bill was filed simply for an injunction to prevent A. from setting up as a tailor within the prescribed limits, and the vice-chancellor granted that injunction. It was objected that this court could not grant the injunction when there was something remaining to be performed, for that A. had a right to be employed as a cutter, which right this court G would not even attempt to deal with or enforce as against C. That case, therefore, was open to a difficulty which does not occur here. In fact the same difficulty which might have arisen in *Hills v. Croll* (13) before LORD LYNTHURST. But the vice-chancellor held that to be no difficulty at all, observing that the bill simply asked for an injunction which he would grant, although he could not give effect to H the affirmative covenant to do the act in respect of which no specific performance was asked. His own decisions in *Kemble v. Kean* (8), and in *Kimberley v. Jennings* (9), were pressed upon him, but he observed (15 Sim. at p. 89):

I "that the bills in the cases cited asked for specific performance of the agreement, and that the injunctions were sought as only ancillary to that relief; but the bill in the present case asked merely for an injunction."

He no longer put it on the inability of the court to enforce a negative covenant, but he put it on the form of the pleadings. Whether that form was sufficient to justify his opinion is a question with which I need not deal, but I am very clearly of opinion that *Rolfe v. Rolfe* (14) does remove the whole weight of that learned judge's authority on this subject. It was said in argument that the injunction prayed in *Rolfe v. Rolfe* (14) was merely ancillary to the relief, but it will be seen that that was not so, and that the prayer extended only to the injunction and had nothing to do with relief in the shape of specific performance. And the

learned judge himself stated that, if it had gone to that extent, he, following his former decisions, would not have granted the injunction. A

From a careful examination of all these authorities I am of opinion that the principles and rules deducible from them are in direct contravention of those principles and rules which were so elaborately pressed upon me during the argument, and I wish it to be distinctly understood that I entertain no doubt whatever that the point of law has been properly decided in the court below. It was, nevertheless, and with some reason, said, that although the point of law should be decided in the plaintiff's favour, still he might be excluded from having the benefit of it on the merits of the case. B

[HIS LORDSHIP examined the statements in the answers and affidavits as to the unauthorised addition of the restrictive clause and as to the non-fulfilment by the plaintiff of his portion of the agreement. HIS LORDSHIP concluded by saying that, looking at the merits and circumstances of the case as well as at the point of law raised, he must refuse this motion with costs. C

Motion refused.

HENDERSON v. HENDERSON

[VICE-CHANCELLOR'S COURT (Wigram, V.-C.), July 4, 7, 11, 20, 1843]

[Reported 3 Hare, 100; 1 L.T.O.S. 410; 67 E.R. 313]

Estoppel—Res judicata—Adjudication by court of competent jurisdiction—Application of plea to every point properly belonging to subject of litigation and available to parties. F

Conflict of Laws—Foreign judgment—Defence to proceedings in England—Res judicata.

Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except in special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. G

A plea of *res judicata* in respect of the decision of the Supreme Court of Newfoundland, whence an appeal lay to the Privy Council, held to be good. H

Notes. Considered: *Simpson v. Fogo* (1863), 1 Hem. & M. 195. Explained: *Mutrie v. Binney* (1887), 35 Ch.D. 614. Considered: *Worman v. Worman* (1889), 43 Ch.D. 296; *Bake v. French*, [1907] 1 Ch. 428. Approved: *Hoystead v. Taxation Comr.*, [1925] All E.R.Rep. 56. Applied: *Green v. Weatherill*, [1929] All E.R.Rep. 428; *West v. Automatic Salesman, Ltd.*, [1937] 2 All E.R. 706. Considered: *New Brunswick Rail. Co. v. British and French Trust Corpn.*, [1938] 4 All E.R. 747; *Greenhalgh v. Mallard*, [1947] 2 All E.R. 255; *Breakwell v. Breakwell*, [1947] W.N. 249; *Dixon v. Dixon*, [1953] 1 All E.R. 910. Referred to: *Srimut Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v.* I

- A *Katama Natchiar, Shivagunga* (1866), 1 Moo. Ind. App. 50; *Re Henderson, Nou-vion v. Freeman* (1887), 57 L.J.Ch. 367; *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Pickford v. Quirke, Pickford v. I.R.Comrs.* (1927), 44 T.L.R. 15; *Mould v. Mould*, [1933] All E.R.Rep. 122; *Marginson v. Blackburn Borough Council*, [1938] 2 All E.R. 539; *E. E. and Brian Smith (1928) Ltd. v. Wheatsheaf Mills, Ltd.*, [1939] 2 All E.R. 251; *Winnan v. Winnan*, [1948] 2 All E.R. 862; *Re Koenigsberg Public Trustee v. Koenigsberg*, [1949] 1 All E.R. 804; *Bright v. Bright*, [1953] 2 All E.R. 939; *Thompson v. Thompson*, [1957] 1 All E.R. 161; *Re A Debtor* (No. 472 of 1950), [1958] 1 All E.R. 581; *Fisher v. Fisher*, [1959] 3 All E.R. 131.

As to *res judicata*, see 15 HALSBURY'S LAWS (3rd Edn.) 184-187; and for cases see 21 DIGEST (Repl.) 225 et seq. As to pleading a foreign judgment as a defence, see 7 HALSBURY'S LAWS (3rd Edn.) 150, 151; and for cases see 11 DIGEST (Repl.)

C 528-531.

Cases referred to :

- (1) *Breadalbane v. Chandos* (1837), 2 My. & Cr. 711; 7 L.J.Ch. 28; 40 E.R. 811, L.C.; 11 Digest (Repl.) 495, 1166.
 (2) *Farquharson v. Seton* (1828), 5 Russ. 45; 38 E.R. 944; 21 Digest (Repl.) 233, 268.
 (3) *Partridge v. Osborne* (1828), 5 Russ. 195; 7 L.J.O.S.Ch. 49; 38 E.R. 1000, L.C.; 40 Digest (Repl.) 107, 818.
 (4) *Chamley v. Lord Dunsany* (1807), 2 Sch. & Lef. 690; 25 Digest (Repl.) 243, *557.

Also referred to in argument :

- E *Phillips v. Hunter* (1795), 2 Hy. Bl. 402; 126 E.R. 618; 5 Digest (Repl.) 871, 7310.
Cottingham's Case (1678), cited in 2 Swan. 326; 36 E.R. 640; 11 Digest (Repl.) 519, 1331.
White v. Hall (1806), 12 Ves. 321; 33 E.R. 122, L.C.; 11 Digest (Repl.) 378, 416.
 F *Henley v. Soper* (1828), 8 B. & C. 16; Dan. & Ll. 38; 2 Man. & Ry.K.B. 153; 6 L.J.O.S.K.B. 210; 108 E.R. 949; 1 Digest (Repl.) 348, 272.
Fuller v. Willis (1831), 1 My. & K. 292, n.; 39 E.R. 693, L.C.; 11 Digest (Repl.) 520, 1343.
Alivon v. Furnival (1834), 1 Cr.M. & R. 277; 3 L.J.Ex. 241; 149 E.R. 1084; 2 Digest (Repl.) 520, 639.
 G *Cowan v. Braidwood* (1840), 1 Man. & G. 882; 9 Dowl. 26; Drinkwater, 40; 2 Scott, N.R. 138; 10 L.J.C.P. 42; 133 E.R. 589; 11 Digest (Repl.) 510, 1255.
Becquet v. MacCarthy (1831), 2 B. & Ad. 951; 109 E.R. 1396; 11 Digest (Repl.) 511, 1265.
Houlditch v. Marquess of Donegall (1834), 2 Cl. & Fin. 470; 8 Bli.N.S. 301; 6 E.R. 1232, H.L.; 11 Digest (Repl.) 520, 1344.
 H *Russell v. Smyth* (1842), 9 M. & W. 810; 11 L.J.Ex. 308; 152 E.R. 343; 11 Digest (Repl.) 512, 1277.
Ferguson v. Mahon (1839), 11 Ad. & El. 179; 3 Per. & Dav. 143; 9 L.J.Q.B. 146; 113 E.R. 382; 11 Digest (Repl.) 510, 1254.
Thompson v. Derham, Thompson v. Goodman (1842), 1 Hare, 358; 66 E.R. 1071; 4 Digest (Repl.) 377, 3432.

I

Demurrer to a bill filed in May, 1843, by Bethel Henderson against Elizabeth Henderson, the widow of Jordan Henderson (the plaintiff's deceased brother), Charles Simms and Joanna, his wife (the daughter of Jordan), and J. Gadsden (administrator of the estate of Jordan, in England), praying that an account might be taken of what was due to the plaintiff from the estate of Jordan, and of the other debts of Jordan, and of his personal estate, and that the same might be applied in a due course of administration; that an account of the partnership transactions between the plaintiff and Jordan might be also taken; that all

necessary inquiries might be directed to ascertain the personal estate of William, the father of the plaintiff and Jordan; that so much, if any, of two sums of £8,883 6s. 8d. as might be found payable by the plaintiff (he not admitting that any part thereof was so payable) might be applied and administered as part of the assets of Jordan: that the defendants, Elizabeth, the widow, and Simms and his wife, might be restrained by injunction from proceeding with any action to recover the said two sums of £8,883 6s. 8d.; and that a commission might be issued to examine witnesses in Newfoundland. To this bill, the defendants, Elizabeth, the widow, and Simms and his wife, demurred for want of equity, want of parties, and multifariousness.

Tinney, Burge and Rolt for the demurrer.

Purvis and Bagshawe for the bill.

WIGRAM, V.-C.—The plaintiff by his bill alleges that he and Jordan, his late brother, were partners in business, one branch of which was carried on at Bristol and the other in Newfoundland, and that, in respect of that partnership, he is a creditor to a large amount on the estate of Jordan, that part of the partnership property was derived from their father, and that all the property which they derived from their father formed part of the assets of the partnership. The plaintiff also alleges that he is a creditor on the estate of Jordan in respect of a private debt, and the bill prays such an account as would comprise all these matters which are in question between the plaintiff and the estate of Jordan. Upon these facts, a decree for an account against Gadsden, the personal representative of Jordan in England, would be of course, and, perhaps, also, if that had been the object of the suit, the decree for an account might have been extended to Elizabeth, the widow, as the personal representative of Jordan in Newfoundland. The widow of Jordan, and Simms and his wife, are, however, before the court in the character of next-of-kin, and there is no pretence for making them parties in that character in a suit for the mere administration of the estate of Jordan. The relief sought against those parties is founded upon the proceedings which have taken place in the court in Newfoundland, and the use which they are about to make of those proceedings in this country. The defendants, who have demurred, insist, in support of their demurrer, first, that all and every part of the matter in question on this bill was concluded by a final decree of the Supreme Court of Newfoundland, dated in June, 1841, made in a suit wherein the defendants and William, the son of Jordan, were plaintiffs, and the present plaintiff was defendant, except in so far as that decree is subject to be reviewed in the Privy Council; and, secondly, that by that decree the amount recovered was decreed to be paid to the plaintiffs in that suit as beneficial owners, and that the same thereby ceased to be part of the estate of Jordan, subject to his debts. They insist, moreover, that the proceedings appear upon the bill with sufficient certainty to sustain the decree upon the grounds advanced, and that the only party against whom the plaintiff can proceed to recover his claim, or any part of it, is the defendant Gadsden.

I have read the bill carefully, and, without going minutely through the facts of the case, it is sufficient to say, for the purpose of explaining the order I am about to make, that the original bill in the Supreme Court of Newfoundland claimed an account of the same partnership dealings as those of which accounts are prayed by the present bill, and also sought accounts in respect of the estate of William Henderson, the father, possessed by Bethel on account of Jordan; that the defendant in that suit, who is the plaintiff here, made claims by his answer to the original bill corresponding in substance with those which he makes by his bill in the present suit; that an amended bill, or a bill which the court thought it right to term an amended bill, was afterwards filed by the same plaintiffs against Bethel; and that the amended bill stated and charged that Bethel was largely indebted to the estate of Jordan, on the partnership accounts, but that such accounts could not be taken in consequence of Bethel absenting him-

A self from the island and not producing the documents. It further appears that, Bethel having absented himself from the jurisdiction, an order of the Supreme Court was made in February, 1840, for taking the amended bill pro confesso, and that the amended bill was by the same order referred to the Master to compute principal and interest due to the plaintiffs, and that the Master made his report in June 1840. It appears, further, that the Supreme Court pronounced its final decree in June, 1841, and thereby, after referring to all the antecedent proceedings in the cause, decreed that Bethel Henderson should pay to the widow and two children of Jordan, who were plaintiffs, the sum of £8,888 6s. 8d. each, and the costs of the suit. This decree has in effect severed William, the father's, estate from the bulk of the property in question, and the partnership accounts and the private debt are not specifically the subject of adjudication. Upon this decree, Elizabeth, the widow, and Joanna, the daughter of Jordan, and the husband of Joanna have brought their actions in this country.

B The bill charges that the proceedings leading to this decree were irregular, that the decree itself was irregular, that a large balance was due to the plaintiff, and that the decree ought not to be enforced, but ought to be reversed by Her Majesty in Council, on appeal, which the plaintiff intends to bring. The bill specially alleges, as one ground of irregularity, that the report of the Master, of June 6, 1840, wholly omitted any notice of the account connected with the partnership, and is confined to the monies alleged to be due from the plaintiff, in respect of the estate of William Henderson, the father, and that a large sum of money is due to the plaintiff on the partnership accounts, as would appear if they were properly taken. On behalf of the defendants, it has been argued that the proceedings on the face of the bill showed that the decree concluded the whole matter, that I could not re-hear that decree, and that it was final and conclusive unless reversed by the Privy Council, the proper appellate tribunal.

E Without giving any opinion upon the question whether charges showing that the proceedings in a foreign court were altogether null and void, as being against natural justice, would or not, upon general demurrer, have been treated as null, and have sustained the bill as to the whole of the relief prayed, I have no doubt that mere irregularity in the proceedings is insufficient for that purpose, in a case in which an appeal lies from the colonial court to the mother country, and there is a tribunal competent to reform the errors of the court below, and even to suspend the execution of the decree pending the appeal, if justice requires that it should be suspended. But as the plaintiff in this case argued only that the whole question between the parties was not concluded by the decree, and did not contend that, upon the charges in the bill, I ought to disregard the decree, I assume for the present purpose that I must, upon this demurrer, consider the amount due from Bethel, in respect of William the father's estate, as concluded by the decree of the supreme court, subject only to the appeal to the Privy Council, and that the only question I have now to decide is whether I am to consider the partnership account and the claim of Bethel in respect of the private account as having been likewise the subject of adjudication by the Supreme Court in the island, or whether those items in the general account, which certainly might have been taken in that suit, are to be considered as excepted out of the operation of the decree, under the special circumstances appearing on the Master's report, and the other proceedings stated in the bill.

H I In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which

the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. A

Those who have had occasion to investigate the subject of bills of review in this court will not discover anything new in the proposition I have stated, so far as it may apply to proceedings in this country: and in an application to a court of equity in this country, for its aid against the effect of a proceeding by a court of equity in one of the colonies, I conceive it to be the duty of this court to apply the same reasoning, at least in the absence of charges in the bill, showing that a different principle ought to be applied. The observations of LORD COTTENHAM, L.C., in *Breadalbane v. Chandos* (1) have an important bearing upon this point, I may mention also *Farquharson v. Seton* (2), *Partridge v. Usborne* (3), and the judgment of LORD ELDON, L.C., in *Chamley v. Lord Dunsany* (4), as showing the general principle to which I have adverted. It is plain that litigation would be interminable if such a rule did not prevail. B C

Undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule. What are those circumstances? One circumstance relied upon was that, by the decree of the colonial court of Feb. 11, 1840, the amended bill was only taken pro confesso. The amended bill, it appears, is not, as in this court, the original bill amended and written upon, so that the amended bill wholly supersedes and comes in the place of the original bill, but the amendments are upon a distinct record. The bill in this cause charges that the last bill was in fact and substance an original bill and addressed to different judges, and that it was not an amended bill. This charge I might have been bound to take as a fact, if the plaintiff had not, by setting out the amended bill and the final decree, given me an opportunity of judging in what sense only the charge is true. I find that the amended bill proceeds upon and refers to the original bill and to the answer of the defendant thereto, and the final decree of the court recites the whole of the proceedings anterior to the final decree, beginning with the original bill. It is impossible, therefore, to contend with effect that the amended bill, though in a sense distinct from the original bill, as being written upon other paper, leaving the first bill still on the record, was not a continuance of the pleadings in one and the same cause, and this, critically considered, is not inconsistent with the charge in the bill which I have just read. D E F G

Another objection was the absence or the irregularity of service upon the plaintiff. Although it is not necessary that I should go into the question respecting the notice, I ought not to disregard the fact that the plaintiff represents that he had, on different occasions, actual notice of the suit, and of the relief which was sought against him by it, however irregularly that notice might have been communicated; and if the plaintiff thought that he might safely disregard the proceedings and abstain from interposing any defence on the ground of their irregularity, I think I ought to consider him as having relied on the strength of his case for establishing that irregularity by a complaint in the same jurisdiction, or in the Court of Appeal, and not to have relied on being able to set the decree of the Supreme Court at defiance, even while it remained unreversed. I may here recur to the observation, that the omission of the Master to take the partnership accounts is stated in the bill to be an error in the decree, forming one ground for appeal to the Privy Council. The point upon which I have had most difficulty in satisfying myself is this. If the decree of the Supreme Court is conclusive upon one party, it must, I conceive, be conclusive upon both; and, if not conclusive upon both, it ought to be conclusive upon neither. The amended bill alleged that the plaintiffs there were creditors upon the partnership account, but that the accounts H I

A of the partnership could not be taken, owing to the manner in which the defendant in that suit had acted. These allegations were established as facts by the effect of the order for taking the bill pro confesso, and it appeared to me during the argument that the present defendants (the plaintiffs in Newfoundland) might have a right to say that the accounts not taken by the Master were open for their benefit, by reason that it was the conduct of the defendant alone which had prevented those accounts from being taken. But that, I think, is not a correct view of the case. The decree was to compute what was due to the plaintiffs for principal and interest—that is, upon all the accounts in question in the pleadings, including the partnership and private account. The plaintiffs were not compelled to take such a decree, but, having taken it, they are bound by the consequences, and must be taken to have waived any disadvantage to themselves which would result from it.

C The conclusion to which I must come, in a case where relief is sought in this court in consequence of errors and irregularities in the decree of a colonial court—and an appeal lies from that decree to the appellate jurisdiction in this kingdom—is to allow the demurrer. I do not say that my conclusions would have been the same if the proceedings which were impeached had taken place in a foreign court
D from which there was no appeal to any superior jurisdiction which a court of equity in this country could regard as certain to administer justice in the case. I express no opinion on that point.

Demurrer allowed.

E

F

ROBINSON v. HARMAN

[COURT OF EXCHEQUER (Parke, Alderson and Platt, BB.), January 18, 1848]

[Reported 1 Exch. 850; 18 L.J.Ex. 202; 13 L.T.O.S. 141;
154 E.R. 368]

Landlord and Tenant—Lease—Grant—Proposed lessor having to his knowledge no title—Tenant's right to damages—Measure of damages.

G

Where a party agrees to grant a good and valid lease, having full knowledge that he has no title, the plaintiff, in an action for breach of the agreement, may recover, beyond his expenses, damages resulting from the loss of his bargain.

H

Notes. Where, on a contract for the sale of land the vendor, in the absence of any fraud and any express stipulation, is unable to make a good title the purchaser is not entitled to recover damages for the loss of the bargain. He can only recover the expenses he has incurred in investigating the title and repayment of the deposit where he has paid one: see *Bain v. Fothergill*, [1874–80] All E.R.Rep. 83, where the exception engrafted on *Flureau v. Thornhill* (1) (1776), 2 Wm. Bl. 1078, by *Hopkins v. Grazebrook* (2) (1826), 6 B. & C. 31, was overruled.

I

Considered: *Sikes v. Wild* (1861), 1 B. & S. 587. Applied: *Lock v. Furze* (1866), L.R. 1 C.P. 441; *Engell v. Fitch* (1869), L.R. 4 Q.B. 659; *Godwin v. Francis* (1870), 39 L.J.C.P. 121; *Bain v. Fothergill*, [1874–80] All E.R.Rep. 83; *Abrahams v. Reiach*, [1922] 1 K.B. 477. Considered: *Collins v. Howard*, [1949] 1 All E.R. 507. Referred to: *Pounsett v. Fuller* (1856), 17 C.B. 660; *Wigsell v. School of Indigent Blind* (1882), 8 Q.B.D. 357; *Quirk v. Thomas*, [1916] 1 K.B. 516; *Watts, Watts & Co., Ltd. v. Milsui & Co., Ltd.*, [1916–17] All E.R.Rep. 501; *Montevideo Gas & Drydock Co. v. Clan Line Steamers* (1921), 37 T.L.R. 544; *York Glass Co., Ltd. v. Jubb*, [1925] All E.R.Rep. 285; *Harold Wood Brick Co., Ltd. v. Ferris*, [1935] All E.R.Rep. 603; *J. D'Almeida Aranjó Limitada v. Sir*

Frederick Becker & Co., [1953] 2 All E.R. 288; *Robshaw Bros., Ltd. v. Mayer*, A [1958] 3 All E.R. 833; *Charterhouse Credit Co., Ltd. v. Tolly*, [1963] 2 All E.R. 432.

As to damages for breach of contract to grant a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 462-463; and for cases see 30 DIGEST (Repl.) 442 et seq.

Cases referred to:

- (1) *Flureau v. Thornhill* (1776), 2 Wm. Bl. 1078; 96 E.R. 635; 17 Digest (Repl.) 104, 187. B
- (2) *Hopkins v. Grazebrook* (1826), 6 B. & C. 31; 9 Dow. & Ry. K.B. 22; 5 L.J.O.S.K.B. 65; 108 E.R. 364; 40 Digest (Repl.) 286, 2375.

Also referred to in argument:

- Speck v. Phillips* (1839), 5 M. & W. 279; 7 Dowl. 470; 8 L.J.Ex. 249, 277; 3 J.P. 421; 151 E.R. 119; 17 Digest (Repl.) 107, 213. C
- Walker v. Moore* (1829), 10 B. & C. 416; 8 L.J.O.S.K.B. 159; 109 E.R. 504; 40 Digest (Repl.) 284, 2360.
- Johnson v. Johnson* (1802), 3 Bos. & P. 162; 127 E.R. 89; 40 Digest (Repl.) 382, 3068.

Rule Nisi obtained by the defendant to set aside the verdict, and for a new trial in an action of assumpsit by which the plaintiff claimed damages for breach of an agreement in writing, dated April 15, 1846, whereby the defendant agreed to grant and deliver to the plaintiff a good and valid lease of a certain dwelling-house, etc., and other hereditaments and premises in the agreement mentioned, for a term of twenty-one years from the 29th day of September then next ensuing, at the yearly rent of £110. D

The declaration set out the agreement in terms, and, after alleging mutual promises, averred that, although the plaintiff had always been ready and willing to accept a lease, yet the defendant did not nor would grant a good and valid lease of the said dwelling-house, etc., and discharged the plaintiff from preparing and tendering such lease, and wholly neglected and refused to grant or deliver the said or any lease whatever of the said hereditaments and premises; "whereby the plaintiff lost and was deprived of great gains and profits, which would otherwise have accrued to him, and paid, expended, and incurred liability to pay divers sums of money, in and about the preparation of the said agreement and lease, etc., amounting, to wit, to £20." Plea, payment of £25 into court, and no damages ultra. The plaintiff replied damages ultra, upon which issue was joined. E

At the trial, before LORD DENMAN, C.J., at the Surrey Spring Assizes, 1847, it was proved that the plaintiff and defendant had entered into the agreement set out in the declaration, by which the defendant agreed to grant to the plaintiff a good and valid lease of a dwelling-house and premises, situate in High Street, Croydon, for a term of twenty-one years from Sept. 29, 1846, at a yearly rent of £110. The premises in question had belonged to the defendant's father, who was recently dead, and in consequence, the plaintiff's solicitor, while preparing the agreement, asked the defendant whether he was sure that he had power to grant the lease without the concurrence of other parties, and suggested that the will might have vested the legal estate, or the power of leasing, in trustees. The defendant replied, that there was nothing of the sort, that it was his property out and out, and that he alone had the power of leasing. It appeared, however, that the defendant's father had devised the premises in question (subject to an annuity of £300 to his daughter) to trustees, to pay the defendant a moiety of the rent during his life only. The premises were worth considerably more than £110 a year, and the bill of the plaintiff's solicitor, for preparing the agreement and lease, and investigating the title, amounted to £15 12s. 8d. F G H

On the part of the defendant, evidence was tendered to show that the plaintiff, when he entered into the agreement, had full knowledge of the defendant's incapacity to grant the lease; but the learned judge ruled that such evidence was inadmissible. It was urged, on the part of the defendant, that the plaintiff could I

A not recover damages for the loss of his bargain; and that, as the sum paid into court exceeded the expenses which he had been put to, the defendant was entitled to the verdict. The learned judge was of a different opinion, and a verdict was found for the plaintiff for £200, beyond the sum paid into court.

A rule nisi having been obtained to set aside the verdict, and for a new trial,

B *Serjeant Shee* and *Willes* for the plaintiff showed cause against the rule. *Montagu Chambers* supported the rule.

PARKE, B.—The rule must be discharged. The defendant contracted to grant a good and valid lease, and the learned judge was right in rejecting evidence which would go to alter the contract admitted by the plea.

C The next question is: What damages is the plaintiff entitled to recover? The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. *Flureau v. Thornhill* (1) qualified that rule of the common law. It was there held, that contracts for the sale of real estate are merely on condition that the vendor has a good title, so that, when a person contracts to sell real property, there is an implied understanding that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law, and I am unable to distinguish it from *Hopkins v. Grazebrook* (2).

E **ALDERSON, B.**—I am of the same opinion. The damages have been assessed according to the general rule of law, that where a person makes a contract and breaks it, he must pay the whole damage sustained. Upon that general rule an exception was engrafted by *Flureau v. Thornhill* (1), and upon that exception *Hopkins v. Grazebrook* (2) engrafted another exception. This case comes within the latter, by which the old common law rule has been restored. Therefore, the defendant, having undertaken to grant a valid lease, not having any colour of title, must pay the loss which the plaintiff has sustained by not having that for
F which he contracted.

PLATT, B.—Upon general principle, I cannot distinguish this case from *Hopkins v. Grazebrook* (2).

Rule discharged.

PELLEY v. WATHEN AND OTHERS

[COURT OF APPEAL IN CHANCERY (Lord Cranworth and Knight-Bruce, L.JJ.),
November 5, 6, 25, 1851]

[Reported 1 De G.M. & G. 16; 21 L.J.Ch. 105; 18 L.T.O.S. 129;
16 Jur. 47; 42 E.R. 457]

*Solicitor—Lien—Extent of lien—Lien no greater than client's right to retain—
Purchase by client of land—Mortgage created by client before completion—
Title deeds handed to purchaser's solicitors on completion—Enforcement of
solicitors' lien against mortgagee.*

A purchaser of property subject to a mortgage created, before the completion of his purchase, a second mortgage of the property. He afterwards created a third mortgage, with respect to which the second mortgagee's conduct was such as to give it priority over his. The purchase was completed, the purchaser paying off the first mortgage, and taking a conveyance to a trustee for himself. On this occasion the title deeds were handed to his solicitors, who afterwards took a transfer of the third mortgage. One of them was the trustee for the purchaser in the conveyance. The second mortgagee did not give them, nor had they, any notice of his security. On the question whether the solicitors had a lien over the title deeds either for their general bill of costs or for their costs relating to the conveyance which was enforceable against the second mortgagee,

Held: (i) it was the general doctrine that the rights of a solicitor in respect of his lien for his bill of costs were no greater than those of his client; (ii) there were no special circumstances exempting the present case from the general rule, the second mortgagee not being under any obligation to give notice of his mortgage to the mortgagor's solicitors; and (iii) the solicitors were, therefore, not entitled to any lien against the second mortgagee for their general bill of costs, and (*per curiam*, KNIGHT-BRUCE, L.J., dubitante) they could not claim a lien against the second mortgagee limited to the costs relating to the conveyance, notwithstanding that it enured partly for the benefit of the second mortgagee, because they had been employed solely by the mortgagor.

Notes. On the question whether the lien of a solicitor is affected by his taking a partner, WIGRAM, V.-C., stated that "he could not think that a solicitor's right of lien, where it existed, could be altered by taking a partner."

Applied: *Re Long, Ex parte Fuller* (1881), 44 L.T. 63; *Re Llewellyn, A Solicitor*, [1891-4] All E.R.Rep. 1106. Considered: *Brunton v. Electrical Engineering Corpn.*, [1892] 1 Ch. 434. Referred to: *Barratt v. Gough-Thomas*, [1945] 2 All E.R. 414; *Barratt v. Gough-Thomas*, [1951] Ch. 242.

As to a solicitor's retaining lien, see 36 HALSBURY'S LAWS (3rd Edn.) 173 et seq.; and for cases see 43 DIGEST (Repl.) 293 et seq.

Cases referred to:

- (1) *Smith v. Chichester* (1842), 2 Dr. & War. 393; 43 Digest (Repl.) 296, *986.
- (2) *Blunden v. Desart* (1842), 2 Dr. & War. 405; 43 Digest (Repl.) 297, *999.
- (3) *Molesworth v. Robbens* (1845), 8 I.Eq.R. 223; 2 Jo. & Lat. 358; 43 Digest (Repl.) 293, *979.
- (4) *Re Forshaw* (1847), 16 Sim. 121; 17 L.J.Ch. 61; 10 L.T.O.S. 262; 60 E.R. 818; 43 Digest (Repl.) 292, 3082.

Also referred to in argument:

Davies v. Vernon (1844), 6 Q.B. 443; 14 L.J.Q.B. 30; 3 L.T.O.S. 300; 8 Jur. 871; 115 E.R. 169; 35 Digest (Repl.) 367, 690.

- A *Wiseman and Benley v. Westland, Fisher, Benson, Davies and Stanbridge* (1826), 1 Y. & J. 117; 148 E.R. 610; 35 Digest (Repl.) 472, 1593.
Bernard v. Drought, 1 Mol. 38.
Allen v. Knight (1847), 16 L.J.Ch. 370; 11 Jur. 527, L.C.; 35 Digest (Repl.) 542, 2219.
Mangles v. Dixon (1849), 1 H. & Tw. 542; 1 Mac. & G. 437; 19 L.J.Ch. 240; 47 E.R. 1525, L.C.; on appeal (1852), 3 H.L.Cas. 702; 19 L.T.O.S. 260; 10 E.R. 278, H.L.; 35 Digest (Repl.) 536, 2167.
Hooper v. Ramsbottom (1815), 6 Taunt. 12; 1 Marsh 414; 128 E.R. 936; 17 Digest (Repl.) 225, 253.
Philips v. Robinson (1827), 4 Bing. 106; 12 Moore, C.P. 308; 5 L.J.O.S.C.P. 111; 130 E.R. 708; 38 Digest (Repl.) 842, 547.

C **Appeal** by the defendants, Messrs. Wathen, Bassett & Gurney, who had acted as solicitors for William Lewis in connection with the purchase of certain land, from an order of WIGRAM, V.-C., reported 7 Hare, 351, made on the hearing of the cause, on exceptions to the Master's report, and on further directions, holding that they were not entitled as against the plaintiff, Pelly, a mortgagee of such land, to a lien on the title deeds either for their general bill of costs or for their costs relating to the conveyance. Previously to the month of September, 1839, William Lewis had contracted to purchase the equity of redemption of certain property in Gloucestershire, which was designated as the Lyppiatt estate, and which was subject to two large mortgages for £18,000 and £6,000. In order to enable him to raise money for completing the purchase, he agreed to sell part of the property to two gentlemen, who agreed to become purchasers. By an indenture of Sept. 14, 1839, he conveyed to the plaintiff all his real estates, including so much of the Lyppiatt estate as had not been so agreed to be sold, to hold the same to the plaintiff by way of mortgage for securing a running account not exceeding £10,000. By another indenture, dated Dec. 14, 1840, Lewis mortgaged a part of the Lyppiatt property, comprised in the plaintiff's mortgage, to Horatio James to secure £3,000; and, afterwards, by another mortgage, dated Sept. 8, 1841, he mortgaged the same property to Charles Barton, to secure £1,000.

The purchase of the property by Lewis had not, up to this time, been completed; but, in January, 1842, the transactions were brought to a close in the following manner. The parts of the property which had been agreed to be sold were conveyed to the purchasers, and, by means of their purchase-money or otherwise, the two old mortgages of £18,000 and £6,000 were paid off, and the legal fee in the parts not sold to the two sub-purchasers was conveyed to Thomas Bassett in trust for Lewis; and an outstanding term of 1,000 years was, at the same time, assigned to John Gurney in trust to attend the inheritance. At this time, Thomas Bassett and John Gurney carried on business as attorneys and solicitors in partnership with the defendant George Wathen, under the firm of Wathen, Bassett & Gurney; and that firm acted as solicitors for Lewis in the matter of the purchase, Wathen having in fact so acted for many years previously.

After the execution of these deeds, the only outstanding interests, exclusive of the plaintiff's mortgage, were the two mortgages vested in James and Barton. George Wathen agreed with Lewis to pay off those charges, and to take assignments thereof to himself. This was accordingly done by two indentures, both dated and executed on Feb. 14, 1842, so that George Wathen became a mortgagee for the two sums of £3,000 and £1,000. In the following month of August he advanced a further sum of £673 on security of the same premises, and thus became an encumbrancer for a principal sum of £4,673.

It was taken as a fact not in dispute that the plaintiff so conducted himself towards the parties to these securities, thus amounting to £4,673, that his mortgage, though prior in point of date, would be postponed to theirs. He had actively assisted Lewis in obtaining the loans from James and Barton, and neither to them, nor afterwards to George Wathen, did he communicate the fact of the existence of

his mortgage of September, 1839, of which George Wathen had no notice till a few days before the institution of this suit, on Mar. 19, 1843. A

Upon the completion of the purchase by Lewis in January, 1842, the title deeds were all handed over to Messrs. Wathen, Bassett & Gurney, as solicitors of Lewis, and they claimed a lien on those deeds against the plaintiff for the amount of their bills of costs against Lewis; and the question for the court was whether this claim was valid. WIGRAM, V.-C., decreed against the lien; and against his decision the solicitors appealed. B

Rolt, Follett and Bazalgette for the defendant solicitors.

Sir William Page-Wood, Q.C., and Bevir for the plaintiff.

Cur. adv. vult.

Nov. 26, 1851. **LORD CRANWORTH, L.J.**, delivered the following judgment of the court, in which after stating the facts as set out above, he proceeded.—The argument for the defendants divided itself into three heads. First, it was contended that, independently of any special circumstances, the lien of the solicitor must prevail; secondly, if this were not so, still that here there were circumstances which would give such a lien independently of any general right; and thirdly, it was argued that, even if there is no lien for the general costs due to the solicitor, still there is such a lien for the costs of and incidental to the procuring the conveyance. C

On the first point we think it clear that no such lien as that contended for exists. The general lien of a solicitor is merely a right to keep back from his client the deeds and papers, which he holds as solicitor, until his bill of costs is satisfied. It is a right derived entirely through the client, and, therefore, on the most obvious principles of justice, cannot go beyond the right of the client himself. If the client's right to the deeds which came to the hands of the solicitor is absolute, so will be the right of the solicitor. If the deeds in the hands of the client are subject to any rights outstanding in third parties, such rights will follow them into the hands of the solicitor. These consequences flow so immediately from the nature of the relation subsisting between the client and his solicitor, that, even independently of authority, we should have felt bound by the principles on which they depend. But we have the most ample authority in support of the view we take on this part of the case, in the three cases before SIR EDWARD SUGDEN, so much dwelt on in the argument. We allude to *Smith v. Chichester* (1), *Blunden v. Desart* (2), and *Molesworth v. Robbins* (3). In *Molesworth v. Robbins* (3) it was expressly decided, that the claim of a party, having an equitable right against the client, must prevail against the solicitor, into whose hands the deeds had come after such equitable right had arisen. Indeed, the principle is obviously the same, whether the right affecting the client's interest is legal or equitable. No man, as was stated by SIR EDWARD SUGDEN in his judgment, can give a lien to his solicitor of a higher nature than the interest he himself has in the deeds. D

Applying these principles to the facts of the present case, it appears to us clear, that (laying aside all consideration of particular conduct) the solicitor did not, on the completion of the contract, acquire any lien on the deeds against the plaintiff. If, on the completion of the contract and execution of the conveyance in January, 1842, the title deeds had been all handed over to Lewis himself and not to his solicitors, he would then have had them, subject to an equitable claim, on the part of the plaintiff, as mortgagee by virtue of his mortgage of September, 1839; and if Lewis had then put them into the hands of his solicitors, they could only have held them subject to the same rights as had attached on them in the hands of Lewis. It can make no difference, that instead of coming, first, into the hands of Lewis, and from him to the solicitors, they were at once handed over by the vendors to the solicitors. For the solicitors, in so obtaining them, obtained them, not by any title paramount to that of their client, but as his agents, and of course with all the liabilities which would have attached on them if they had passed first into the hands of the client, and from him to the solicitors. E

A This disposes of the first head of the argument. But then it was said, secondly, that whatever may be the general doctrine, here the conduct of the plaintiff was such as to preclude him from insisting on his title, against the lien of the solicitors of Lewis. But we can discover nothing whatever in the plaintiff's conduct to warrant such a proposition. When the plaintiff advanced his money and obtained his mortgage deed, in September, 1839, he of course employed his own solicitor to act for him. All which can be alleged against him by the solicitors of Lewis the mortgagor is, that he did not inform them of his security. But he was under no obligation to give them any such information, nor was it in the ordinary course of business that he should do so. There is no suggestion that he meant or wished to mislead them. There was nothing to suggest to his mind that it could be of importance to the solicitors that he should give them notice of his security. Cases may undoubtedly occur, in which parties, by standing by and remaining silent, may give to others rights against them, in the same way as if they had been active in making representations; but that can only be when it has been the duty of the party not to be silent, or when the party remaining silent might reasonably infer that such silence would be taken by others as sanctioning a particular course of conduct. No such circumstance exists here. The conduct of the plaintiff, for ought, at least, that appears, was just what might be expected from a man intending to deal with perfect fairness. He became mortgagor, employing his own solicitor, and took it for granted that the mortgagor and his solicitor would settle their own rights among themselves. There does not, therefore, appear to us to be anything in the conduct of the plaintiff depriving him of his ordinary rights.

The only remaining question is on the point whether the solicitors may not have a lien against the plaintiff, though not for their whole demand on Lewis, yet for so much as relates to the obtaining the conveyance of the Lyppiatt estate from the vendors. As to this the argument was, that these costs were incurred for the common benefit of the plaintiff and Lewis, and so that the lien of the solicitors ought to prevail against both the one and the other. On this minor point, **KNIGHT-BRUCE, L.J.**, entertains some doubt, and I can, therefore, express my own opinion only. In my opinion these costs do not differ from the rest. I think the solicitors have no lien against the plaintiff for the costs of obtaining the conveyance, any more than for any other part of their bill.

The lien of the solicitor is a right to retain deeds as a mode of enforcing payment of a debt due by the party whose deeds are retained. It is essentially a right arising between the party employed and his employer. The right when once constituted, may, under circumstances, prevail in favour of the solicitor, not only against his employer, but also against parties deriving title under his employer. But it always originates from the relation of client and attorney, i.e., employer and employed. Taking this to be a correct view of the law, the question here is, Who employed Messrs. Wathen, Bassett & Gurney to obtain and perfect the conveyance? No doubt when they had completed the conveyance, their services enured to the benefit, not only of Lewis the purchaser, but also of the plaintiff, who claimed under him. But I do not think this is material. If the case could be brought to the point that the solicitors were acting not only for Lewis, but also for the plaintiff, then neither Lewis nor the plaintiff could take the deeds of conveyance out of their hands without paying them the full amount of their costs incurred in preparing and perfecting them. But this certainly was not so. The solicitors were the solicitors of Lewis, and of him only. He alone employed them. He alone was liable to pay them for their services, and against him alone, therefore, was their lien available when the deeds came into their hands. Their right is, as I think, precisely what it would have been, if, on the final settlement of the purchase and execution of the deeds, the vendors had delivered the deeds to Lewis and he had handed them over to the solicitors. In such a case the right of the solicitors would be only, as I think, to hold the deeds subject to all the rights, legal and equitable, affecting them in the hands of Lewis; and, therefore, their right was, as I conceive, subject to a prior right in the plaintiff in respect of his mortgage of September,

1839. I do not think there is any distinction between these deeds and the other A
deeds in the hands of the solicitors.

The result, therefore, is, that the decision of WIGRAM, V.-C., will be affirmed in every respect, and this appeal must, therefore, be dismissed. **KNIGHT-BRUCE, L.J.**, concurs with me in thinking that the costs of the appeal must in that case follow the event, and so be paid by the defendants, because the appeal reproducing litigation on points, manifestly, in the opinion of both members of this court, B
properly decided by the vice-chancellor, has taken a range widely beyond the narrow and restricted part of the case, on which alone my learned brother entertains any doubt.

It is unnecessary to say that the question raised at the Bar, whether, if the lien had been established, it would have extended to the debts due to all the successive firms, or only to that due to the last firm; whether, in short, according to the C
doctrine laid down in *Re Forshaw* (4), the lien of a solicitor is affected by his taking a partner, does not arise in this case. On that point we express no opinion.

Appeal dismissed with costs.

CUCKSON v. STONES

[COURT OF QUEEN'S BENCH (Lord Campbell, C.J., and Erle, J.), November 22, 25, 1858]

[Reported 1 E. & E. 248; 28 L.J.Q.B. 25; 32 L.T.O.S. 242;
5 Jur.N.S. 337; 7 W.R. 134; 120 E.R. 902]

Master and Servant—Wages—Incapacity for work—Sickness—Employer's liability to pay wages during servant's convalescence.

By an agreement in writing dated Dec. 30, 1848, the plaintiff agreed that he would serve the defendant as a brewer for a period of ten years and the defendant agreed to pay him £2 10s. a week during that time. The plaintiff served the defendant until Christmas, 1857, when, through illness, he became unable to perform his services, but he continued to receive his weekly wage until March, 1858. He then went away for a change of air for thirteen weeks, during which he received no wages, and on his return he resumed his work. In an action by him to recover wages in respect of the thirteen weeks, G

Held: the contract being still in force there should have been no suspension of the weekly payments by reason of the plaintiff's inability to work through illness, and, therefore, the plaintiff was entitled to succeed. H

Notes. Applied: *K— v. Raschen*, [1874-80] All E.R.Rep. 1013; *Warren v. Whittingham* (1902), 18 T.L.R. 508. Distinguished: *Niblett v. Midland Rail. Co.* (1906), 23 T.L.R. 240. Considered: *Storey v. Fulham Steel Works Co.* (1907), 23 T.L.R. 306. Applied: *Warburton v. Co-operative Wholesale Society*, [1917] 1 K.B. 663; *Browning v. Crumlin Valley Collieries*, [1926] All E.R.Rep. 132. Considered: *Maloney v. St. Helens Industrial Co-operative Society, Ltd.*, [1932] All E.R.Rep. 437. Applied: *Marrison v. Bell*, [1939] 1 All E.R. 745. Referred to: *Loates v. Maple* (1903), 88 L.T. 288; *Nordman v. Rayner and Sturges* (1916), 33 T.L.R. 87; *Price v. Guest, Keen and Nettlefolds*, [1917] 1 K.B. 780; *Lind v. Johnson*, [1937] 4 All E.R. 201; *Petrie v. Macfisheries, Ltd.*, [1939] 4 All E.R. 281; *Romford Ice and Cold Storage Co. v. Lister*, [1955] 3 All E.R. 460; *Orman v. Saville Sportswear, Ltd.*, [1960] 3 All E.R. 105. I

A As to summary determination of contract of service, see 25 HALSBURY'S LAWS (3rd Edn.) 485 et seq.; and for cases see 34 DIGEST (Repl.) 71 et seq.

Case referred to:

- (1) *Harmer v. Cornelius* (1858), 5 C.B.N.S. 236; 28 L.J.C.P. 85; 32 L.T.O.S. 62; 22 J.P. 724; 4 Jur.N.S. 1110; 6 W.R. 749; 141 E.R. 94; 34 Digest (Repl.) 82, 534.

B

Also referred to in argument:

R. v. Madington, 3 Burr.S.C. 675.

R. v. Winterset (1783), Cald. Mag. Cas. 298; 34 Digest (Repl.) 141, 966.

Wallis v. Warren (1849), 4 Exch. 361; 7 Dow. & L. 58; 18 L.J.Ex. 449; 14 L.T.O.S. 108; 154 E.R. 1252; 34 Digest (Repl.) 128, 865.

C

Beale v. Thompson (1804), 4 East, 546; 1 Smith, K.B. 144; 102 E.R. 940; affirmed sub nom. *Thomson v. Beale* (1813), 1 Dow, 299, H.L.; 34 Digest (Repl.) 97, 684.

Melville v. De Wolf (1855), 4 E. & B. 844; 24 L.J.Q.B. 200; 25 L.T.O.S. 127; 19 J.P. 628; 1 Jur.N.S. 758; 3 W.R. 401; 3 C.L.R. 960; 119 E.R. 313; 12 Digest (Repl.) 421, 3253.

D

Stavers v. Curling (1836), 3 Bing.N.C. 355; 2 Hodg. 237; 3 Scott, 740; 6 L.J.C.P. 41; 132 E.R. 447; 12 Digest (Repl.) 481, 3584.

Chandler v. Grieves (1792), 2 Hy. Bl. 606, n.; 126 E.R. 730; 41 Digest 236, 763.

De Medina v. Norman (1842), 9 M. & W. 820; 11 L.J.Ex. 320; 152 E.R. 347; 30 Digest (Repl.) 418, 618.

E

Aspdin v. Austin (1844), 5 Q.B. 671; 1 Dav. & Mer. 515; 13 L.J.Q.B. 155; 8 Jur. 355; 114 E.R. 1402; 12 Digest (Repl.) 681, 5251.

Rule Nisi obtained by the defendant to enter the verdict for him or for a nonsuit, and, **demurrer** by the plaintiff in an action by the plaintiff to recover wages tried at Derbyshire Assizes, before SIR ALEXANDER COCKBURN, C.J., where a verdict was returned for the plaintiff, with £32 10s. damages.

F

The declaration stated that, by a memorandum of agreement, dated Dec. 30, 1848, between the plaintiff of the one part, and one Watts, since deceased, and the defendant of the other part it was agreed that the plaintiff, in consideration of £20 paid by them to the plaintiff on the execution of the agreement, and also in consideration of weekly and other payments, the plaintiff agreed with them that he should well and truly serve the defendant and Watts for ten years as a brewer. Watts and the defendant, in consideration of the premises, agreed with the plaintiff that they should pay him £20 on the execution of the agreement, and should find and provide the plaintiff with a dwelling-house for his own occupation, and also coals during the whole of the term of ten years, and should pay him the weekly sum of £2 10s. during the term of ten years. Although all things had happened and been performed in order to entitle the plaintiff to the performance of the promise of the defendant, yet the defendant, after Watts' death, refused to permit the plaintiff to continue in his service under the agreement, and to earn his weekly wages, and refused to pay the plaintiff the sum of £2 10s. a week for thirteen weeks.

G

H

The fourth plea, which was pleaded to so much of the declaration as related to the claim for wages, stated that the plaintiff was not, during any part of the time in respect of which such wages were claimed, ready, willing, or able to render, and did not, in fact, during any part of such time, render the agreed or any service in manner and form as alleged. Issue was joined on this plea, and it was demurred to.

I

It was proved at the trial that the plaintiff had, under this agreement, served the defendant until Christmas, 1857, when he had an attack of rheumatic gout, which made him unable to perform his services. He received, however, his weekly wages until the following March, when he went to Brixton for a change of air, and was absent thirteen weeks, during which he received no wages, and for which period the present action was brought. Afterwards he returned and resumed his services.

Serjeant Hayes, having obtained a rule on the part of the defendant to set aside the verdict, it was arranged that the rule and the demurrer should be argued together. A

Mellor, Q.C., and *Mundell* for the plaintiff.

Serjeant Hayes for the defendant.

Cur. adv. vult. B

Nov. 25, 1858. **LORD CAMPBELL, C.J.**, delivered the following judgment of the court.—We are of opinion that this plea is good, being pleaded only to the claim for wages, and it appeared that the plaintiff was not, during any part of the time in respect of which such wages are claimed, ready and willing or able to render, and did not in fact render, the agreed or any services. We think the gist of this plea is, that the plaintiff during the time in question was not ready and willing to render, and did not render, any services, and voluntarily and wilfully refused. If so, we think he could not claim for wages in consideration of his services. C

It was suggested that the breach of contract could only be the subject of a cross-action; but the alleged breach of contract on his part seems to go to the whole consideration for the wages. We must treat the demurrer as if the action were brought for the wages only, and to avoid circuity of action it may well be considered that this action should be barred, so as to prevent an unjust advantage in this action, and to put an end to further litigation, rather than that the plaintiff should be allowed to recover wages when he had refused to serve, and that another action should be brought against him to recover them back. Therefore, on the demurrer to the fourth plea, we give judgment for the defendant. D

Then as to the rule for entering the verdict on the fourth plea: the verdict was given for the plaintiff on the fourth plea, and this was a rule to set the verdict aside, and to enter it on that plea for the defendant. Whether, when issue is joined on such a plea, a want of ability to do an act proves, in point of law, a want of readiness and willingness, depends on whether this want of ability is necessarily a breach of the contract to perform a condition precedent, or the consideration for the promise sued on. In an action for not adopting goods purchased, issue being joined on a plea that the plaintiff was not ready and willing to deliver them, the defendant would be entitled to the verdict, on proof that the plaintiff never was in possession of the goods he undertook to deliver. But looking at the nature of the contract sued on in the action, we think that want of ability to serve for a week would not of necessity be an answer to a claim for a week's wages. In truth, the plaintiff was ready and willing to serve, or had been able to do so, and was only prevented serving during the week by the visitation of God, the contract to serve never having been determined. E

That leads to the consideration of the following question which was reserved at the trial, i.e., whether, in the circumstances, the plaintiff was entitled to recover. The agreement is of a very peculiar nature: that the plaintiff should serve the defendant and Watts in the capacity of a brewer, and teach them to brew; that they were to pay the plaintiff £20 on the execution of the agreement; to find him a house; to supply him with coals for ten years, and to pay him the weekly sum of £2 10s. during the said term. We concur in the observations of WILLES, J., in *Harmer v. Cornelius* (1), that if the plaintiff, from unskilfulness, had been wholly incompetent to brew, or by the visitation of God had become, from paralysis or any other bodily illness, permanently incompetent to act in the capacity of a brewer to the defendant, we think the defendant might have determined the contract. He could not be considered incompetent by illness of a temporary nature; but if he had been struck with disease, so that he could not have been expected to return to his work, we think the defendant might have dismissed him and employed another brewer in his stead. Instead of being dismissed he returned to service; and the defendant and Watts, when he had been restored to them, employed him and paid him as before. F

- A At the trial the defendant's counsel admitted that the contract was not rescinded. The contract being in force, we think that there was no suspension of the weekly payment by reason of the plaintiff's illness, or inability to work. It is allowed that, under this contract, there could be no deduction from the weekly sum in respect of his being disabled by illness from brewing one day, or week; and while the contract remained in force, we see no difference between his being disabled for a
- B day, or a week, or a month. On the whole, therefore, we think that the verdict obtained by the plaintiff ought not to be disturbed, and that the rule granted for that purpose ought to be discharged.

Judgment for defendant on the demurrer.

C

Re MARSDEN'S TRUST

D

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), June 3, 4, 1859]

[Reported 4 Drew. 594; 28 L.J.Ch. 906; 33 L.T.O.S. 217;

5 Jur.N.S. 590; 7 W.R. 520; 62 E.R. 228]

Power of Appointment—Exercise—Fraudulent exercise—Exercise to benefit person not intended to be benefited—Appointee ignorant of purpose of appointor.

E

Property was settled upon trust for C.M. for her life and after her death upon trust to pay one quarter of the income to her husband for his life, and, subject thereto, upon trust for such of C.M.'s children as she should appoint, and in default of appointment, for her children equally. Shortly before her death C.M. appointed the whole property, after her death and subject to her husband's interest, in favour of her eldest daughter. It was C.M.'s intention that her daughter would hand over one-half of the property to C.M.'s husband, and give him a life interest in the remaining one-half. The whole purpose of the appointment was for his benefit. The daughter stated that she was wholly ignorant of the appointment until after C.M.'s death, and that she had not made any bargain or agreement with reference to the funds appointed to her.

F

G

Held: although the court would not set aside an appointment on a mere suspicion that it had been exercised from a wrongful motive, it would do so if there were acts from which it could draw a legitimate inference that it had been exercised from an improper or corrupt motive; if there was such proof, it was not necessary, to constitute a fraud, that the appointee should be aware of the appointment or of the intention of the appointor; in the present case there was clear evidence that C.M. intended so to exercise the power as to defeat its real purpose, which was to appoint among children; and, accordingly, the appointment would be set aside.

H

Notes. Followed: *Topham v. Portland* (1862), 31 Beav. 525. Considered: *Ranking v. Barnes* (1864), 3 New Rep. 660; *Topham v. Portland* (1869), 5 Ch. App. 40. Distinguished: *Roach v. Trood* (1876), 3 Ch.D. 429. Explained: *Re Crawshay*, *Crawshay v. Crawshay*, [1886-90] All E.R.Rep. 724. Considered: *Re Crawshay*, *Hore-Ruthven v. Public Trustee*, [1948] 1 All E.R. 107. Referred to: *Henty v. Wrey* (1882), 19 Ch.D. 492; *Re Nicholson's Settlement*, *Moloney v. Nicholson*, [1938] 3 All E.R. 532; *Re Simpson*, *Chadderton v. Simpson*, [1952] 1 All E.R. 963.

I

As to fraud on a power, see 30 HALSBURY'S LAWS (3rd Edn.) 275 et seq.; and for cases see 37 DIGEST (Repl.) 388-389.

Case referred to:

- (1) *Lady Wellesley v. Earl of Mornington* (1855), 2 K. & J. 143; Jur.N.S. 1202; 69 E.R. 728; 37 Digest (Repl.) 378, 1135.

Also referred to in argument :

Wright v. Goff (1856), 22 Beav. 207; 25 L.J.Ch. 803; 27 L.T.O.S. 179; 2 Jur.N.S. 481; 4 W.R. 522; 52 E.R. 1087; 37 Digest (Repl.) 387, 1199.

Rowley v. Rowley (1854), Kay, 242; 2 Eq. Rep. 241; 23 L.J.Ch. 275; 23 L.T.O.S. 55; 18 Jur. 306; 69 E.R. 103; 37 Digest (Repl.) 392, 1236.

Huguenin v. Baseley (1807), 14 Ves. 273; 33 E.R. 526; 40 Digest (Repl.) 600, 1025.

Birley v. Birley (1858), 25 Beav. 299; 27 L.J.Ch. 569; 31 L.T.O.S. 160; 4 Jur.N.S. 315; 6 W.R. 400; 53 E.R. 651; 37 Digest (Repl.) 386, 1185.

Askham v. Barker (1850), 12 Beav. 499; 50 E.R. 1152; 37 Digest (Repl.) 378, 1132.

M'Queen v. Farquhar (1805), 11 Ves. 467; 32 E.R. 1168, L.C.; 37 Digest (Repl.) 390, 1215.

Daubeny v. Cockburn (1816), 1 Mer. 626; 35 E.R. 801; 37 Digest (Repl.) 385, 1181.

Campbell v. Home (1842), 1 Y. & C. Ch. Cas. 664; 7 Jur. 365; 62 E.R. 1062; 37 Digest (Repl.) 389, 1212.

Fearon v. Desbrisay (1851), 14 Beav. 635; 21 L.J.Ch. 505; 51 E.R. 428; 37 Digest (Repl.) 380, 1146.

Watt v. Creyke (1856), 3 Sm. & G. 362; 26 L.J.Ch. 211; 28 L.T.O.S. 245; 3 Jur.N.S. 56; 65 E.R. 695; 37 Digest (Repl.) 361, 993.

Beere v. Hoffmister (1856), 23 Beav. 101; 26 L.J.Ch. 177; 28 L.T.O.S. 155; 3 Jur.N.S. 78; 53 E.R. 40; 37 Digest (Repl.) 380, 1148.

Carver v. Bowles (1831), 2 Russ. & M. 301; 9 L.J.O.S.Ch. 91; 39 E.R. 409; 37 Digest (Repl.) 369, 1046.

Wheate v. Hall (1809), 17 Ves. 80; 34 E.R. 31; 40 Digest (Repl.) 768, 2530.

Vane v. Lord Dungannon (1804), 2 Sch. & Lef. 118; 40 Digest (Repl.) 680, *320.

Lysaght v. Royse, 2 Sch. & Lef. 151.

Butcher v. Jackson (1845), 14 Sim. 444; 60 E.R. 430; 37 Digest (Repl.) 379, 1144.

King v. King (1857), 1 De G. & J. 663; 27 L.J.Ch. 29; 30 L.T.O.S. 177; 4 Jur.N.S. 721; 6 W.R. 85; 44 E.R. 881, L.J.J.; 43 Digest 776, 2167.

Petition by Isabel Charlotte Martin, the eldest child of Charlotte Martin (formerly Marsden) praying that certain canal shares which had been appointed to her might be transferred out of court to her, the respondents being the younger children of Charlotte Martin, who claimed that the appointment was invalid.

By an indenture dated Oct. 14, 1836, certain canal shares were vested in trustees upon trust to pay the annual income of the shares to Charlotte Marsden for her own use and benefit during her life, or until she should attempt or agree to sell, assign, mortgage, charge or otherwise dispose of the same by way of anticipation; and it was provided that, if she did so, her interest in them should cease as if she was dead. Subject to this proviso the shares were limited, after the death of Charlotte Marsden, as to one-fourth part of the income, to any husband she might leave surviving, for his life. The indenture then directed that the trustees of the shares should hold them upon trust, from and after the decease of the said Charlotte Marsden, that the said canal shares should, subject and without prejudice to the trust thereinbefore declared in favour of any husband who should survive her, remain and be in trust for all and every or such one or more exclusively of the others or other of the children or child or other issue of the said Charlotte Marsden, with such provisions for the respective maintenance, education and advancement at such age, day or time, or respective ages, days or times, and if more than one, in such parts, shares and proportions, and charged with such annual sums of money and limitations over for the benefit of the said children and issue, or some or one of them, and upon such conditions and with such restrictions and in such manner as the said Charlotte Marsden, whether covert or sole, and if under coverture, notwithstanding such coverture, should, by any deed or deeds, instrument or instruments, to be by her sealed and delivered in the presence of and attested by two or

A more credible witnesses, or by her last will and testament in writing, or any codicil or codicils in writing, or any writing in the nature of or purporting to be a will or codicil, to be by her signed and published in the presence of and attested by the like number of credible witnesses, from time to time direct or appoint, and in default of such direction or appointment, and so far as any such direction or appointment, if incomplete or partial, should not extend, in trust for all and every the children
B or child of the said Charlotte Marsden, who, being a son, should attain the age of twenty-one years, or being a daughter or daughters, should attain that age, or marry under that age, with the consent of her or their parent or parents, guardian or guardians, for the time being, and to be divided between or amongst the said children, if more than one, in equal shares as tenants in common.

C On Nov. 22, 1836, Charlotte Marsden married William John Martin, and there were six children born of that marriage, one of whom died an infant. By a deed-poll, dated July 24, 1857, Charlotte Marsden exercised the above-mentioned power of appointment, and appointed the canal shares after her decease, and subject to her husband's life-interest in the one-fourth of the income, to her daughter Isabel Charlotte Martin, in case she lived to attain twenty-one years of age, absolutely. Charlotte Martin died on Aug. 7, 1858, intestate; and Isabel Charlotte Martin
D attained her majority on Nov. 20 in the same year. She then applied to the trustees of the deed of 1836 to hand over to her the funds to which she was entitled, under the deed of appointment; but they refused to do so without the sanction of the court, and in February last the surviving trustee transferred the trust-funds into court.

E It appeared from the affidavit which was made by the trustee when he paid the money into court, that Mr. and Mrs. Martin were residing at Brussels when she executed the deed of appointment; that her husband wrote to his solicitor the following letter:

"July 10th, 1857.

F "Mrs. Martin wishes to make a will, of which she has the power under her marriage-settlement, leaving to her eldest daughter Isabel Charlotte the whole of the property, provided she, the said Isabel Charlotte, will, on coming of age, make over to her father one-half of the said property, giving him at the same time a life-interest in the other half. If the above cannot with perfect safety be done, then let the will be in favour of the eldest daughter absolutely."

Mr. Christie, the conveyancer, was accordingly instructed to advise in the matter;
G and he ultimately drew the deed of appointment, which Mrs. Martin executed in favour of her daughter. Mr. Christie advised that notice of the appointment should be given to the trustee of the indenture of 1836, and that Mrs. Martin should have the assistance of a separate solicitor in the execution of the appointment. That was done, and the effect of it explained to her; but she was at that time in very bad health. After the execution of the appointment, and after Mrs. Martin's death,
H considerable correspondence took place between the parties interested in the trust-funds. Isabel Charlotte Martin ultimately presented a petition, praying the transfer out of court to her of the canal shares, to which she was entitled under the appointment. The petition stated that Isabel Charlotte Martin was wholly ignorant, until after her mother's death, of the execution of the appointment by her, and that she never made any bargain or agreement with any one with reference to the funds
I appointed to her. The younger children of the marriage contended that the appointment was made on the understanding above mentioned, and was, therefore, a fraud upon the power, and void.

Shapter, Q.C. (Renshawe with him), for the petitioner.

Baily, Q.C. (Cracknall with him), for the younger children.

KINDERSLEY, V.-C.—The question in this case is whether the execution of a power of appointment is to be defeated on the ground that it is what is commonly called a fraud upon the power. The petitioner is the person in whose favour the

power has been exercised, and she insists that the appointment is good. The other side say it is a fraud upon the power, having regard to the circumstances of the case which are by no means common. A

Upon the face of the instrument the power is well executed; and the question is whether, under the circumstances, it was a fraud upon the power. This power is in point of form a trust, to be exercised by a certain person in favour of certain objects of the trusts. These powers occur in a great many forms: one is, at the discretion of the donee with a view to accomplish some purpose for the benefit of certain other persons; and in such cases the persons to take under the power are in a great majority of instances the persons who would take in default of appointment; but on the failure of these there are often ulterior objects. I mention this because it may be one thing to do an act which turns out to be to the prejudice of the persons who take, if there are no immediate objects of the power, and another thing to do an act which is to defeat the immediate objects of it. B C

The purpose of such a power as this is to provide for the children of the marriage, but at the same time to preserve to the parent such powers as will keep the children under the control of the parent. The power is intended to enable the parent, when the children come into existence, to distribute and deal with the property as will be best for the objects of the power. I need hardly say that the same rules which are applicable to discretionary trusts generically, must be applicable to every species of them. As you cannot enter into a man's mind and so conjecture what were his motives, unless there are some acts from which we can draw a legitimate inference as to his motives, whenever there is a discretionary trust, and that discretion is exercised either improperly or corruptly—unless you can show that to the court, the court will not control the exercise of the discretion. You may have a suspicion that the power has been exercised from a particular motive; but if it is a mere suspicion, and not a matter of clear, judicial inference, you must leave it as you find it. When, however, we find that trustees have a discretionary trust, and it is proved to the satisfaction of the judicial mind that the exercise has been either corrupt or for purposes which have the effect of defeating, instead of carrying out, the trusts, then the court will not uphold that exercise of the power. D E F

This is, not a general, but a special power, and as to a special power, whether exclusive or with power to appoint among the children generally, if the donee of such a power attempt to exercise it in plain terms in favour of a person who is not an object of the power, that is no proper exercise of the power—it is no exercise of it at all. If a person having a power to appoint to A. appoints to B., that is, of course, void. But when the donee exercises the power so that upon the face of the instrument it is not entirely within the scope of the power—that is to say, not in favour of the objects of the power alone—then arises the question whether it is a fraud upon the power—whether it was exercised under such circumstances that the court will say the appointment ought not to be sustained. If a power be honestly exercised, the court will not control its exercise, though it may be exercised capriciously or under a prejudice for a particular child. G H

In this case it is clear and proved that, for two years before this instrument was executed, Mr. and Mrs. Martin had had the settlement under discussion. And why? Because it excluded the husband from that interest which he usually has under a marriage-settlement of this kind. Mrs. Martin regretted that it was so; and I will assume that nothing could be more right than the feeling she entertained on the subject. They seem to have said: "We have now five children, the eldest will be twenty-one in a little more than twelve months; suppose an appointment is made to her entirely under a condition that she shall hand over one-half to the husband, and give him a life-interest in the other half; and as to the other four children, they will have nothing." I do not blame them for having this idea in their minds; they were not aware of the moral rule which exists in courts of equity, as to the exercise of powers. They never communicated with the daughter on the subject till after the death of Mrs. Martin. She was in a bad state of health, and it was arranged that Mr. Martin should go over from Brussels to England and I

- A consult their legal adviser. He, of course, advised that what they wished could not be done. Then the husband suggested that, still, the appointment might be made to the daughter absolutely. He then intended to communicate to her what had been the object of the appointment, and that if she thought fit she might give him the benefit contemplated; which I will assume was a very legitimate design. This was not an appointment made because the daughter was going to be married, or
- B anything of that kind; the whole purpose was for the benefit of Mr. Martin. There was no concealment about it, but there was clear evidence of what was the design of Mr. Martin and also of Mrs. Martin: viz., that it was her intention to exercise the power so as to defeat the real purpose of the power. The exercise of the power by Mrs. Martin in the mode suggested was an exercise that defeated the interests of the real objects of the power.
- C I am satisfied that this case comes within what is called a fraud upon the power, not imputing any bad motives to the parties; but it is clearly contrary to the scope of the power. In some of the cases it has been a bargain under which the donee of the power was to derive a benefit—that is something more than a moral fraud—but there is nothing of the kind here. It is not necessary that the appointee should be aware of the appointment; *Lady Wellesley v. Earl of Mornington* (1) shows that.
- D Nor is it necessary to constitute fraud that the object of the donee should be to benefit himself alone, because, if he wishes to benefit another person not the object of the power, it is just the same; as, for instance, if a man stipulated to have an interest given to his wife. It appears to me that it is not necessary that an appointee should be aware of the intention; but it is necessary that the motives should be matter of proof. I must decide that the execution of this appointment
- E is void, as being in fraud of the power; and, therefore, I cannot grant the prayer of this petition.

Petition dismissed.

F

R. v. BLANE

G

[COURT OF QUEEN'S BENCH (Lord Denman, C.J., Coleridge and Erle, JJ.), June 6, 13, 1849]

[Reported 13 Q.B. 769; 3 New Mag. Cas. 168; 3 New Sess. Cas. 597;
18 L.J.M.C. 216; 13 L.T.O.S. 257; 13 J.P. 825; 13 Jur. 854;
116 E.R. 1458]

H

Bastardy—Affiliation order—Jurisdiction of justices—Child born abroad—Mother domiciled abroad, though ordinarily resident in England—Return of mother to England.

I

A single woman, a native of France, and domiciled in that country, who had lived in England for some thirteen years, became pregnant. She went to France where the child was born, but returned to England shortly after its birth. On an application by her for an affiliation order against the putative father,

Held: the order could not be made in respect of a child born abroad.

Notes. The Poor Law Amendment Act, 1844, s. 2, has been repealed. See now the Affiliation Proceedings Act, 1957, s. 1 and s. 3.

Approved and Distinguished: *Marshall v. Murgatroyd*, [1861-73] All E.R.Rep. 821. Distinguished: *R. v. Humphrys, Ex parte Ward*, [1914-15] All E.R.Rep. 189. Approved: *Tetau v. O'Dea*, [1950] 2 All E.R. 695. Followed: *R. v. Wilson*.

Ex parte Pereira, [1952] 2 All E.R. 706. Doubtful and Distinguished: *Buckeridge v. Hall*, [1963] 1 All E.R. 509.

As to jurisdiction in affiliation proceedings, see 3 HALSBURY'S LAWS (3rd Edn.) 110; and for cases see 3 DIGEST (Repl.) 441 et seq. For the Affiliation Proceedings Act, 1957, ss. 1 and 3, see 37 HALSBURY'S STATUTES (2nd Edn.) 37, 39.

Case referred to:

- (1) *R. v. Eastbourne (Inhabitants)* (1803), 4 East, 103; 102 E.R. 769; 2 Digest (Repl.) 170, 8.

Also referred to in argument:

- Mostyn v. Fabrigas* (1774), 1 Cowp. 161; 98 E.R. 1021, Ex. Ch.; 11 Digest (Repl.) 450, 886.

Rule Nisi to quash an order made by one of the Metropolitan Police Magistrates on Nov. 9, 1848, adjudging the defendant to be the putative father of a bastard child born of Barbe Sophie Mertz, and ordering the defendant to pay her, or other person as in the order mentioned, certain sums of money therein specified; and also an order made by Middlesex Sessions in January, 1849, confirming the magistrate's order. Both orders had been removed by certiorari into Court of Queen's Bench.

It appeared that B. S. Mertz was a single woman, a native of France, who had come to England in 1835, and had resided continually in London until March, 1848. During that time, with the exception of a few months, she had served as an apprentice and afterwards as assistant to a milliner. In March, 1848, being then pregnant and near her confinement, she went to France for the purpose of her confinement and with the intention of returning to London as soon as possible. She was delivered, in France, of a child of which she alleged the defendant to be the father, and returned to London in April, 1848.

J. H. Parry and *J. Brown* showed cause against the rule.

Pashley and *Maynard* were not called on to support the rule.

LORD DENMAN, C.J.—Assuming that the magistrate who made this order has examined the law of France, and ascertained that, according to that law, the child is a bastard, we are clearly of opinion that children born out of this country are not the subject of our bastardy laws. I will only add that the principles of humanity are not concerned in this decision; for every destitute person in this country has a right to maintenance as casual poor. This great principle was broadly laid down by LORD ELLENBOROUGH, C.J., in *R. v. Eastbourne (Inhabitants)* (1) (4 East. at p. 107).

COLERIDGE, J.—The provisions in the Poor Law Amendment Act, 1844, respecting bastardy have, certainly, modified the old law on the subject in many important particulars; but the foundation of the former system remains. The burden cast on parishes by the birth of bastard children was the foundation of that system; and the object was to relieve parishes from that burden. The bastardy provisions in the earlier statutes are referable to the birth in some parish; and, when it is said, in s. 71 of the Poor Law Amendment Act, 1834,

“that every child which shall be born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child, until such child shall attain the age of sixteen,”

there is a clear reference to the former system. The legislature in all these statutes is obviously dealing with bastards born in some parish; that is, in this country. The word “bastard,” therefore, has always been used by the legislature in a sense known to our law, and as denoting all the incidents which belong to the status of bastardy according to our law. If the word “bastard” is, on the other hand, to comprehend any bastard born in any part of the world, an immense field of inquiry must be traversed respecting the status of children according to the different laws of different countries. On this ground, I am of opinion that this order is bad.

A There may be two sides to the question of policy and humanity which have been touched on in the argument; but I have yet to learn that it is the duty of courts of law to enter on such an inquiry.

ERLE, J.—It is our duty to quash these orders. It is quite clear that our statutes relating to bastardy never contemplated the case of a child born a bastard
B in a foreign country.

Rule absolute.

GRAVES v. LEGG AND ANOTHER

D [COURT OF EXCHEQUER (Pollock, C.B., Parke, Platt and Martin, BB.), May 3, 9, 1854]

[Reported 9 Exch. 709; 2 C.L.R. 1266; 23 L.J.Ex. 228;
23 L.T.O.S. 254]

E *Sale of Goods—Rejection—Breach of condition—Condition precedent—Notification of name of ship in which goods shipped—Neglect to notify within reasonable time.*

F By an agreement in writing the plaintiff contracted to sell and the defendants to buy 300 to 350 bales of wool of specified quality, to arrive at Liverpool, Hull, or London, deliverable at Odessa during August then next, to be shipped with all dispatch, etc., "the name of the ship to be declared as soon as the wool is shipped." The wool was shipped during August and arrived at Liverpool in November, and the plaintiff claimed damages for breach of the contract by the defendants' refusal to accept or pay for any part of the wool. The defendants pleaded that they agreed to buy the wool for re-sale, and, as the value fluctuated with the market, they could only re-sell the wool when they had notice of its shipment and the name of the ship in which the wool was shipped in accordance with the terms of the contract, but that the plaintiff had not notified the defendants of the name of the ship as soon as the wool was shipped, but had delayed to do so for a long and unreasonable time and before the defendants had such notice the price had fallen in the market.

H **Held:** the provision in the contract that the name of the ship in which the wool was shipped should be notified as soon as the wool was shipped was a condition precedent to the defendants' obligation to accept and pay for the wool, and, therefore, the defendants' plea was good.

Notes. The Sale of Goods Act, 1893, provides, by s. 11, when a condition is to be treated as a warranty and, by s. 50, the buyer's remedy in such case: see 22 HALSBURY'S STATUTES (2nd Edn.) 99, 1014, respectively.

I Considered: *Rolt v. Cozens* (1856), 18 C.B. 673. Applied: *Pust v. Dowie* (1864), 5 B. & S. 20. Referred to: *Croockewit v. Fletcher* (1857), 1 H. & N. 893; *Gilkes v. Leonino* (1858), 4 Jur.N.S. 537; *Newson v. Smythies* (1858), 28 L.J.Ex. 97; *Robert v. Brett* (1859), 6 C.B.N.S. 611; *Seeger v. Duthie* (1860), 7 Jur.N.S. 239; *Behn v. Burness* (1863), 3 B. & S. 751; *Carter v. Scargill* (1875), L.R. 10 Q.B. 564; *Oppenheim v. Fraser* (1876), 34 L.T. 524; *Kidston v. Monceau Ironworks Co.* (1902), 86 L.T. 556; *Leiston Gas Co. v. Leiston-cum-Sizewell U.D.C.*, [1916-17] All E.R.Rep. 329; *Metropolitan Water Board v. Dick, Kerr & Co.*, [1917] 2 K.B. 1; *Huntoon Co. v. Kolynos (Inc.)*, [1930] 1 Ch. 528; *Guy-Pell v. Foster*, [1930] All E.R.Rep. 790; *De Ridder (Luis), Ltd. v. André et Cie. S.A. Lausanne*, [1941] 1 All E.R. 380.

As to conditions and warranties and as to remedy available when buyer refuses to accept goods, see 34 HALSBURY'S LAWS (3rd Edn.) 40 et seq., and 145, respectively; and for cases see 39 DIGEST (Repl.) 575 et seq. A

Cases referred to :

(1) *Campbell v. Jones* (1796), 6 Term Rep. 570; 101 E.R. 708; 12 Digest (Repl.) 482, 3589.

(2) *Boone v. Eyre* (1779), 1 Hy. Bl. 273, n.; 1 Wms. Saund. 320, c.; 2 Wm. Bl. 1312; 126 E.R. 160; 12 Digest (Repl.) 472, 3526. B

(3) *Pordage v. Cole* (1669), 1 Wms. Saund. 319; 1 Lev. 274; 2 Keb. 542; T. Raym. 183; 1 Sid. 423; 85 E.R. 449; 12 Digest (Repl.) 472, 3520.

(4) *Ellen v. Topp* (1851), 6 Exch. 424; 20 L.J.Ex. 241; 17 L.J.O.S. 52; 15 Jur. 451; 155 E.R. 609; 12 Digest (Repl.) 473, 3530. C

Also referred to in argument :

Cutter v. Powell (1795), 6 Term Rep. 320; 101 E.R. 573; 12 Digest (Repl.) 463, 3454.

Ollive v. Booker (1847), 1 Exch. 416; 17 L.J.Ex. 21; 154 E.R. 177; sub nom. *Olive v. Booker*, 10 L.T.O.S. 137; 41 Digest 326, 1839.

Fishmongers' Co. v. Robertson (1843), 5 Man. & G. 131; 6 Scott, N.R. 56; 134 E.R. 510; sub nom. *London City Fishmongers' Mystery v. Robertson*, 12 L.J.C.P. 185; 13 Digest (Repl.) 304, 1181. D

Demurrer in an action for breach of contract by the defendants' refusal to accept or pay for any part of certain bales of wool in accordance with the terms of the contract.

The declaration stated that the plaintiff agreed to sell to the defendants, and the defendants agreed to buy of the plaintiff, about 300 or 350 bales whitewashed Douskoy fleece wool, to arrive, at 10½d. per pound, laid down either at Liverpool, Hull, or London, deliverable at Odessa during August then next, old style, to be shipped with all dispatch, warranted fair average quality, but should they prove otherwise, to be taken with a fair allowance, which it was mutually agreed between buyer and seller should be assessed by Messrs. Hughes and Ronald, subject to the safe arrival of the wool in good condition at any of the ports stated, and the names of the ships to be declared as soon as the wool was shipped, customary allowances, payment cash in fourteen days, less £1 10s. per cent. discount, from the date of finishing loading, which agreement being made afterwards, the wool, being 333 bales of wool of the quality and description in the agreement mentioned, was during the month of August, old style, delivered, by the growers thereof at Odessa, to the agents of the plaintiff in that behalf, and was with all dispatch then shipped there on board a ship, called the *Science*, which then sailed from Odessa with the wool on board and afterwards, on Nov. 22, 1853, arrived at Liverpool with the wool on board, safe and in good condition, and according to the terms of the contract; averment of notice to the defendants, and of the lapse of reasonable time after arrival, and of performance by the plaintiff of all conditions. Breach, that the defendants would not accept or pay for the wools or any part thereof. E

The defendants pleaded that they agreed with the plaintiff to buy the wool for the purpose of re-selling it in the way of the defendants' trade and business of wool dealers, and thereby acquiring gains and profits, that wool is an article that fluctuates greatly in price in the market, and that the defendants could only re-sell the wool when, and not before, the defendants had notice of its being shipped, and when, and not before, the name of the ship in which it was so shipped had been declared according to the contract which the plaintiff at the time of making of the agreement had notice; and the defendants further said that, although the plaintiff had such notice, yet the plaintiff did not declare to the defendants, or either of them, the name of the ship in which the wool was shipped at or within the time at or within which the plaintiff was by the agreement bound to declare, that is to say, as soon as such wool was so shipped, but omitted so to do, and delayed and omitted so to declare the name of the ship in which the wool was so shipped, or F

G

H

I

A to give the defendants any notice of its being so shipped for a long and unreasonable time after it had been so shipped; and the defendants had not notice of the shipment of the wool, or of the name of the ship in which it had been so shipped, until after the expiration of a long and unreasonable time after it had been so shipped, and that after the plaintiff was bound to and ought to have given and declared it, and ought and could have done so; and the defendants further said that between
 B the time that the name of the ship ought to have been declared, according to the agreement, and the time when it was first declared to the defendants or when they first had any notice of the ship having sailed with the wool on board thereof, the price of wool in the market had greatly fallen, and the wool thence continually remained so fallen in price, and that the wool, when the name of the ship was first declared and when the defendants first had notice or knowledge of its having
 C been so shipped, would sell or could be sold only for a much less sum of money than it would have done at the time when the plaintiff ought to and could have declared the name of the ship, or given the defendants such notice; wherefore the defendants did not nor would accept or pay for the wool.

Demurrer by the plaintiff and joinder.

Blackburn for the plaintiff.

D *C. E. Pollock* for the defendants.

Cur. adv. vult.

May 9, 1854. **PARKE, B.**, delivered the following judgment of the court.—In this case, the question raised by these pleadings is whether the provision that the names of the vessels should be declared as soon as the wools were shipped was a condition precedent to the defendants' obligation to accept and pay for the wools according to the contract stated in the declaration, and under the circumstances stated in the plea. This contract, we think, is to be construed with reference to some of those circumstances. It is stated in the plea that the wool was bought, with the knowledge of both parties, for the purpose of re-selling in the course of the defendants' business; that it is an article of fluctuating value, and not saleable until the names of the vessels in which it was shipped should have been declared according to the contract. The declaration having averred, according to s. 57 of the Common Law Procedure Act, 1854 [repealed], the performance of conditions precedent generally, the defendants proceed in this plea to specify this condition of declaring the names of the vessels as one on the breach of which they insist. The loss which they aver to have sustained by that breach is immaterial. The only
 F question is whether the performance of the agreement was a condition precedent or not to the defendants' contract to accept and pay for the goods.

In the numerous cases on the subject in which it has been laid down that the general rule is to construe covenants and agreements to be dependent or independent according to the intent and meaning of the parties to be collected from the instrument, and of course to the circumstances legally admissible in evidence, with reference to which it is to be construed, one particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract, and an action might be brought for the breach of it, without averring performance in the declaration under the old system of pleading, and under the new the denial of such performance would be bad; and *Campbell v. Jones* (1) and *Boone v. Eyre* (2) are instances of the application of the rule. But then it appears, as MR. SERJ. WILLIAMS observes, in *Pordage v. Cole* (3) (1 Wms. Saund. at pp. 320 d, 320 e) and *POLLOCK, C.B.*, in delivering the judgment of this court in *Ellen v. Topp* (4), adopts the observation:

"The reason of the decision in these and other similar cases, besides the inequality of the damages, seems to be, that where a person has received part of the consideration for which he entered into the agreement, it would be unjust that because he had not the whole, he should, therefore, be permitted to enjoy

that part without either payment or doing anything for it. Therefore, the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damage he may have sustained in not having received the whole consideration."

He goes on to observe that it must appear upon the record that the consideration was executed in part. This may appear by the instrument declared on itself, whereby a valuable right, part of the consideration, is conveyed, as in *Campbell v. Jones* (1), or *Boone v. Eyre* (2), or by averment in pleading. When that appears, it is no longer competent for the defendants to insist upon the non-performance of that which was originally a condition precedent; and this is more correctly expressed, than to say it was not a condition precedent at all.

In this case, if the stipulation that the names of the vessels should be stated as soon as the wools were shipped was originally a condition precedent, it is so still. No other benefit was taken under the contract itself as the consideration for the promise to pay the money, than the shipment and delivery of the goods by the named vessels, nor was any subsequently received by the acceptance of the goods, or any part thereof. After such acceptance, the defendants would have been bound to pay the price, or the residue of it, and could not have insisted on the neglect to name in due time; but if there had been any such neglect, they would nevertheless have had their remedy for the damage by cross-action on the contract to declare the names. In the state of things on this record, the simple question is whether this contract was originally a condition precedent or not. Looking at the nature of the contract, and the great importance of it, to the object with which the contract was entered into with the knowledge of both parties, we think it was a condition precedent, quite as much indeed as the shipping of the goods at Odessa with all dispatch after the end of August; and with respect to the shipment itself, counsel for the plaintiff did not venture to contend that the performance of the plaintiff's contract in that respect was not a condition precedent. The defendants, therefore, have a right to object to fulfil the contract on their part, as the plaintiff did not fulfil his, though they could no longer object to the plaintiff's non-performance, had they afterwards taken any benefit under the contract.

Judgment for defendants.

A

GUNDRY v. PINNIGER

[COURT OF APPEAL IN CHANCERY (Lord Cranworth and Knight-Bruce, L.JJ.),
March 4, 5, 1852]

B

[Reported 1 De G.M. & G. 502; 21 L.J.Ch. 405; 18 L.T.O.S. 325;
16 Jur. 488; 42 E.R. 647]

Will—*Next-of-kin*—*Time for ascertainment of class*—*Death of person whose next-of-kin referred to in will.*

C

"Next-of-kin" mean next-of-kin at the death of the party whose next-of-kin are spoken of in the will, so long as there is nothing in the will to make such a construction an absurdity.

Bequest of a fund on trust for T. for life with remainder to her children at twenty-one, but if T. died without issue "to pay or assign and transfer" the fund to P. if then living, but, if then dead, to the next-of-kin of P. in a legal course of distribution ex parte materna. T. died without issue after the death of P.

D

Held: the class of next-of-kin were to be ascertained at the death of P. and not at the death of T., and as at that date T. was next-of-kin ex parte materna, she was not excluded by being also next-of-kin ex parte paterna.

Notes. The rules of descent on intestacy, in case of deaths after 1925, are dealt with by the Administration of Estates Act, 1925, s. 46 (9 HALSBURY'S STATUTES (2nd Edn.) 751-753), and as amended, in the case of deaths after 1952, by the Intestates Estates Act, 1952, s. 1 (32 HALSBURY'S STATUTES (2nd Edn.) 116-119).

E

Applied: *Cable v. Cable* (1853), 16 Beav. 507. Followed: *Bullock v. Downes* (1860), 3 L.T. 194. Distinguished: *Pinder v. Pinder* (1860), 29 L.J.Ch. 527. Followed: *Re Hutchinson, Carter v. Hutchinson*, [1919] 2 Ch. 17. Considered: *Re Gansloser's Will Trusts, Chartered Bank of India, Australia and China v. Chillingworth*, [1951] 2 All E.R. 936. Referred to: *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 28 L.J.Ch. 110; *Re Ford, Patten v. Sparks* (1895), 72 L.T. 5.

F

As to gifts to next-of-kin and time for ascertainment of class, see 39 HALSBURY'S LAWS (3rd Edn.) 1042; and for cases see 44 DIGEST 879 et seq.

Case referred to:

G

(1) *Warburton v. Loveland d. Ivie* (1828), 1 Hud. & B. 623; 17 Digest (Repl.) 277, *371.

Also referred to in argument:

H

Say v. Creed (1847), 5 Hare, 580; 16 L.J.Ch. 361; 11 Jur. 603; 67 E.R. 1041; 44 Digest 882, 7392.

Beck v. Burn (1844), 7 Beav. 492; 13 L.J.Ch. 319; 2 L.T.O.S. 515; 8 Jur. 348; 49 E.R. 1156; 44 Digest 1077, 9293.

Clapton v. Bulmer (1840), 10 Sim. 426; affirmed, 5 My. & Cr. 108; 9 L.J.Ch. 261; 5 Jur. 477; 41 E.R. 312, L.C.; 44 Digest 885, 7416.

Viner v. Francis (1789), 2 Bro.C.C. 658; 2 Cox, Eq. Cas. 190; 29 E.R. 365; 44 Digest 763, 6218.

I

Knight v. Gould (1833), 2 My. & K. 295; Coop. temp. Brough. 240; 39 E.R. 956, L.C.; 44 Digest 516, 3356.

Gould v. Kemp (1834), 2 My. & K. 304; 39 E.R. 959, L.C.; 38 Digest (Repl.) 825, 380.

Urquhart v. Urquhart (1844), 13 Sim. 613; 2 L.T.O.S. 438; 8 Jur. 161; 60 E.R. 239; 44 Digest 882, 7387.

Ware v. Rowland (1847), 15 Sim. 587; 16 L.J.Ch. 427; 11 Jur. 622; affirmed (1848), 2 Ph. 635; 17 L.J.Ch. 147; 11 L.T.O.S. 305; 12 Jur. 165; 41 E.R. 1089, L.C.; 44 Digest 880, 7372.

Booth v. Vicars (1844), 1 Coll. 6; 13 L.J.Ch. 147; 2 L.T.O.S. 307; 8 Jur. 76; A
63 E.R. 297; 44 Digest 897, 7564.

Bird v. Luckie (1850), 8 Hare, 301; 14 Jur. 1015; 68 E.R. 375; 44 Digest 883,
7394.

Leeming v. Sherratt (1842), 2 Hare, 14; 11 L.J.Ch. 423; 6 Jur. 663; 67 E.R. 6;
44 Digest 1137, 9839.

Toldervy v. Colt (1836), 1 M. & W. 250; Tyr. & Gr. 324; 1 Y. & C.Ex. 621; 5 B
L.J.Ex. Eq. 25; 150 E.R. 427; 44 Digest 485, 3046a.

Appeal by the defendants from a decision of SIR JOHN ROMILLY, M.R., reported 14 Beav. 94, on a construction summons to determine, whether the persons to take under the will, as next-of-kin of N. T. S. Ponting (the person mentioned in the will) were to be ascertained at his death or at the death of Mary Lucy Tuckey (the tenant for life) being the period of distribution of the fund; and if so ascertained at the death of N. T. S. Ponting, whether Mary Lucy Tuckey was entitled to take under the description of next-of-kin ex parte materna, notwithstanding that she was also next-of-kin ex parte paterna or whether the defendants, the Ashes, were entitled as coming within the description of next-of-kin ex parte materna alone. SIR JOHN ROMILLY, M.R., held that the next-of-kin were to be ascertained at the death of N. T. S. Ponting and that Mary Lucy Tuckey became entitled to the fund as next-of-kin materna notwithstanding that she was also his next-of-kin paterna.

The testatrix, by her will in 1808, gave the residue of her stock in the Consolidated Bank Annuities to trustees, for the benefit of her grandniece, Mary Lucy Ponting, with a bequest over to Nicholas T. S. Ponting in case she died before twenty-six, or married. In 1810 the testatrix made a codicil to her will, whereby after reciting that Mary Lucy Ponting had since married John Tuckey, upon which event no separate provision had been made for her or her issue, she revoked the bequest of the stock, consisting of a fund of £4,316 three per cent. consols, and gave the same to trustees in trust for her grandniece, Mary Lucy Tuckey, for life, with remainder to her children at twenty-one; but in case she died without issue (which event happened), or they should all die before their shares became payable, then, upon trust, after the decease of Mary Lucy Tuckey, to pay, or assign, and transfer the stock unto her grand-nephew, Nicholas T. S. Ponting, if he should be then living; but if he should be then dead, then unto the next-of-kin of her grand-nephew, in a legal course of distribution ex parte materna.

The testatrix died in 1836. Nicholas T. S. Ponting died in 1836, leaving his sister Mary Lucy Tuckey, and some first cousins once removed, ex parte materna of the name of Ashe. Mary Lucy Tuckey died without issue in 1849, at which period the defendants, the Ashes, were the next-of-kin of N. T. S. Ponting.

The defendants, the Ashes, appealed.

Hobhouse for the plaintiffs, the executors taking no interest in the question.

Sir William Page-Wood and *J. V. Prior* for the defendants.

Bethell and *Lloyd* for the personal representative of Mrs. Tuckey.

LORD CRANWORTH, L.J.—Neither of us entertains any doubt that SIR JOHN ROMILLY, M.R., has come to a right conclusion on the construction of this will. It is very difficult, if not impossible, to reconcile all the cases on the subject; but the view that I take is, that with all this difference there is a great cardinal rule to be observed, as laid down by BURTON, J., in *Warburton v. Loveland d. Ivie* (1), with regard to the construction of statutes, namely, to adhere as closely as possible to the literal meaning of the words used. If we depart from this, we launch into a sea of difficulties which it is not easy to fathom. In the course of the argument I have been putting to myself various combinations of circumstances, as to which, if we could ask the testatrix in her grave what she intended, she would probably say that she had not contemplated them, but would nevertheless wish the words she had used to be adhered to. It is, however, useless to speculate on these mat-

A ters. The conclusion at which I arrive is, that the words "next-of-kin" mean next-of-kin at the death of the party whose next-of-kin are spoken of, and there is nothing in the will to make this construction absurd.

KNIGHT-BRUCE, L.J.—I cannot go so far as to say that I entertain no doubt, but I think that the decision of **SIR JOHN ROMILLY, M.R.**, is correct.

B

Appeal dismissed.

C

HARDCASTLE v. SOUTH YORKSHIRE RAILWAY AND RIVER DUN CO.

D [COURT OF EXCHEQUER (Pollock, C.B., Martin, Bramwell and Watson, BB.), January 11, 21, 1859]

[Reported 4 H. & N. 67; 28 L.J.Ex. 139; 32 L.T.O.S. 297;
23 J.P. 183; 5 Jur.N.S. 150; 7 W.R. 326; 157 E.R. 761]

Negligence—Occupier of land—Liability to trespasser—Reservoir seven yards from public footpath—Duty of owner to fence.

E

Where an excavation is made at some distance from the public way and a person falling into it would be a trespasser upon the owner's land before he reached it the owner will not be liable. The true test of legal liability is whether the excavation is substantially adjoining the public way.

F

The defendants owned a reservoir built on their land which was unfenced and more than seven yards from a public footpath. On May 22, 1858, T.H. walked along this footpath, but, instead of continuing along it, strayed off it by mistake on to the defendants' land, fell into the reservoir, and was drowned. In an action under the Fatal Accidents Act, 1846, the plaintiff, the widow and administratrix of T.H., alleged that the defendants were negligent in not having fenced off the reservoir.

G

Held: by straying off the public footpath, T.H. was a trespasser on the defendants' land before reaching the reservoir; as the reservoir did not substantially adjoin the footpath, the defendants were under no obligation to fence it; and, therefore, the action failed.

Notes. Considered: *Binks v. South Yorkshire Rail. and River Dun Co.* (1862), 3 B. & S. 244. Referred to: *Hounsell v. Smyth* (1860), 7 C.B.N.S. 731; *Bolch v. Smith* (1862), 10 W.R. 387; *R. v. Dant* (1865), Le. & Ca. 567; *Pearson v. Cox* (1877), 2 C.P.D. 369; *Latham v. Richard Johnson & Nephew, Ltd.*, [1911–13] All E.R.Rep. 117; *Coleshill v. Manchester Corpn.*, [1928] 1 K.B. 776; *Caseley v. Bristol Corpn.*, [1944] 1 All E.R. 14; *Jacobs v. L.C.C.*, [1950] 1 All E.R. 737.

As to the duty of an occupier of premises to trespassers, see 28 HALSBURY'S LAWS (3rd Edn.), 53, 54; and for cases see 36 DIGEST (Repl.) 70–72.

I

Cases referred to:

- (1) *Barnes v. Ward* (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 7 Digest (Repl.) 289, 148.
- (2) *Blyth v. Topham* (1607), Cro. Jac. 158; 79 E.R. 189; 7 Digest (Repl.) 294, 171.

Also referred to in argument:

Deane v. Clayton (1817), 7 Taunt. 489; 1 Moore, C.P. 203; 2 Marsh. 577; 129 E.R. 196; 2 Digest (Repl.) 875, 517.

- Coupland v. Hardingham* (1813), 3 Camp. 398, N.P.; 7 Digest (Repl.) 289, 147. A
Firmstone v. Wheeley (1844), 2 Dow. & L. 203; 13 L.J.Ex. 361; 7 Digest (Repl.) 310, 270.
R. v. Whitney (1835), 7 C. & P. 208; 26 Digest (Repl.) 384, 929.
Jordin v. Crump (1841), 8 M. & W. 782; 11 L.J.Ex. 74; 5 Jur. 1113; 151 E.R. 1256; 2 Digest (Repl.) 875, 518.
Bird v. Holbrook (1828), 4 Bing. 628; 2 Man. & Ry.M.C. 198; 1 Moo. & P. 607; B
 6 L.J.O.S.C.P. 146; 130 E.R. 911; 43 Digest 436, 630.
Manchester, Sheffield and Lincolnshire Rail. Co. v. Wallis (1854), 14 C.B. 213;
 7 Ry. & Can. Cas. 709; 3 Saund. & M. 13; 23 L.J.C.P. 85; 18 J.P. 138; 18
 Jur. 268; 2 W.R. 194; 139 E.R. 88; sub nom. *Wallis v. Manchester, Sheffield
 and Lincolnshire Rail. Co.*, 2 C.L.R. 573; 22 L.T.O.S. 286; 38 Digest (Repl.) C
 330, 251.
Roberts v. Great Western Rail. Co. (1858), 4 C.B.N.S. 506; 27 L.J.C.P. 266; 22
 J.P. 723; 4 Jur.N.S. 1240; 140 E.R. 1188; 38 Digest (Repl.) 405, 640.

Rule Nisi obtained by the defendants to enter verdict in an action for damages under the Fatal Accidents Act, 1846, brought by the plaintiff, the widow and administratrix of Thomas Hardcastle, alleging negligence against the defendants in not having fenced a reservoir on their land. D

On the night of May 22, 1858, Hardcastle left Rotherham to walk to Sheffield along an ancient footpath which led from the one place to the other, but instead of his taking a turning to the right and going over a bridge, it appeared that he must have continued to walk straight on and went into a reservoir, which was not fenced off, belonging to the defendants, and he was drowned. The plaintiff alleged that the defendants ought, and were bound, to have properly fenced off such reservoir to prevent accidents to passengers along the public footpath. The defendants denied that they were bound to fence off the reservoir, considering its position in reference to the footpath. E

At the trial at the Yorkshire Assizes, before MARTIN, B., the jury found a verdict for the plaintiff for £50 damages. Leave was reserved to move to set the verdict aside and enter a verdict for the defendants. A rule nisi was, accordingly, obtained by the defendants. F

Overend, Q.C., for the plaintiff, showed cause against the rule.

Atherton, Q.C., and *Cleasby* for the defendants supported the rule.

Cur. adv. vult. G

Jan. 21, 1859. **MARTIN, B.**, delivered the following judgment of the court.— This was an action tried before me at the last assizes for Yorkshire. The jury found a verdict for the plaintiff, and the defendants had leave to move to enter the verdict for them upon the traverse of an averment in the declaration that the defendants were bound to fence a reservoir mentioned therein. The parties had also leave to amend the pleadings, and the plaintiff, before the argument upon the rule obtained by the defendants to enter the verdict for them, made an amendment. It is material to refer to it, because we think that, not only upon the traverse but upon the facts of the case, as proved at the trial, the defendants are entitled to our judgment. H

The plaintiff was the widow and administratrix of Thomas Hardcastle, who was drowned on May 22, 1858; the defendants are the proprietors of a navigation called the Dun Navigation. On the night of May 22, 1858, the intestate left Rotherham to walk to Sheffield, but was drowned in the place hereafter described. The action was brought against the defendants under Lord Campbell's Act [Fatal Accidents, 1846]. The defendants' predecessors were the proprietors of the navigation, and about twenty-four years ago they made a new cut, which consisted of a large reservoir, out of which there were two branches, one a canal for the boats to navigate I

A on, and the other was for the water to flow away. The division between these two branches was a buttress or projecting wall; the water for the canal passing on the one side, the water going through the bye-wash passing on the other. There was an ancient footpath from Rotherham to Sheffield, which passed along the bye-wash, was continued over it by a bridge, and then proceeded to Sheffield. The bridge was from seven to ten yards from the end of the buttress or projecting wall, and a person who continued to walk straight up the pathway along the bye-wash, and who did not turn a little way to the right in order to go over the bridge, would, unless prevented by the arm of a gate to a lock upon the canal gate, come upon a grass spot; and if he continued walking on would go over the buttress or projecting wall into the reservoir.

C It was assumed on both sides that the intestate had walked up the footway along the bye-wash, and then, instead of turning to the right and going over the bridge, continued to walk straight on, and went into the reservoir at the end of the buttress, and was drowned. At the trial a statement was made that the course of the way had been altered when the new cut was made; but no evidence was given of this, nor, indeed, in the course of the action alleged in the declaration founded upon it, and, after such a lapse of time, we think it must be taken that the present way is the lawful one. The authority relied on by the plaintiff was *Barnes v. Ward* (1), and with the judgment in that case we entirely concur. The facts there were, that the defendant, being possessed of land abutting on a public footway, excavated an area in the course of building a house immediately adjoining the footway, and left it unprotected, and a person walking in the night time fell in and was killed. The court held the defendant was liable; the principle of that decision was, that such an excavation was a public nuisance, and that an individual injury arising from such a nuisance was the subject-matter of an action to the party aggrieved.

F That private injury arising from a public nuisance is the subject-matter of an action for damages, is a doctrine as old as any in the common law, and we were of opinion that the state of the reservoir in the present case was a nuisance to the footpath, and that the plaintiff was substantially in the right, notwithstanding that we thought the terms of the declaration were defective, and that there was no such obligation to fence as is therein alleged. We should be desirous to aid the plaintiff, but we are of opinion that she has no right of action against the defendants. When an excavation is made adjoining to a public way, so that a person walking on it might, by making a false step, or being affected with sudden giddiness, or in the case of a horse or carriage, who might by the sudden starting of a horse be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man going off a road on a dark night, and losing his way, may wander to any extent; and, if the question be for the jury, no one can tell whether he was liable for the consequences of his acts upon his own land or not.

H We think the proper and true test of legal liability is whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise, and in every case it was to be left as a fact to the jury whether the excavation was sufficiently near to the highway to be dangerous. When a man dedicates a way to the public, there does not seem any just grounds in reason and good sense that he should restrict himself in the use of his land adjoining to any extent further than that he should not make the use of the way dangerous to the persons who are upon it and using it. To do so would be derogating from his grant; but he gives no liberty or licence to the persons using the way to trespass upon his adjoining land, and may in so doing come to misfortune; we think they must bear it, and the owner of the land is not responsible. If fences are to be put up, it would seem more reasonable they should be put up by those who use the way, or those who are under the obligation to repair it, than by the person who dedicates it to the public.

or his successors; and as we are clearly of opinion that there is no such obligation to fence as alleged in the declaration, and also that upon the above state of facts there is no liability, our judgment is in accordance with the principle of *Blyth v. Topham* (2) which, we think, is the true one. The rule to enter a verdict for the defendants must, therefore, be made absolute.

Rule absolute. B

GULLIVER v. COSENS

[COURT OF COMMON PLEAS (Tindal, C.J., Coltman, Maule and Cresswell, JJ.), May 31, 1845]

[Reported 1 C.B. 788; 14 L.J.C.P. 215; 5 L.T.O.S. 199;
9 Jur. 666; 135 E.R. 753]

Animal—Cattle straying—Distress damage feasant—Tender of amends—Excessive demand by distrainer—Payment by owner under protest without previous tender—Recovery of excess—Form of action.

A party whose cattle have trespassed is, in the first instance, a wrongdoer, and the risk of estimating the amount of the damage rests on him and not on the party who has suffered by the trespass. If the owner of the cattle elects to make a sufficient tender before the distress and the distrainer refuses it, the latter becomes a wrongdoer, but a tender after distress does not entitle the owner to replevy the cattle. E

Where cattle are seized for distress damage feasant, the owner should make a sufficient tender, but if he fails to do so and pays, under protest, an excessive demand by the distrainer for the damage, he cannot recover the excess amount in an action for money had and received to his use. Where a sufficient tender is made by the owner before the distress his remedy is in detinue, but after the distress his remedy is in detinue upon a tender before the impounding. F

The defendant distrained cattle belonging to the plaintiff as damage feasant and demanded £2 15s. 9d. for their release. This sum was the defendant's estimate of the damage suffered, but was an excessive demand as the actual damage was 5s. The plaintiff, without making a previous tender, paid the £2 15s. 9d. under protest and sought to recover the excess amount of £2 10s. 9d. in an action for money had and received. G

Held: the action was not maintainable as the plaintiff's remedy lay in detinue after a tender before the impounding. H

Notes. Considered: *Glynn v. Thomas* (1856), 11 Exch. 870; *Singleton v. Williamson*, [1861-73] All E.R.Rep. 859. Explained: *Maskell v. Horner*, [1914-15] All E.R.Rep. 595. Applied: *Sorrell v. Paget*, [1949] 2 All E.R. 609. Referred to: *Fell v. Whittaker* (1871), L.R. 7 Q.B. 120; *Green v. Duckett* (1883), 52 L.J.Q.B. 435. I

As to distress damage feasant and impounding the distress, see 1 HALSBURY'S LAWS (3rd Edn.) 677; and for cases see 18 DIGEST (Repl.) 443 et seq.

Cases referred to:

- (1) *Six Carpenters' Case* (1610), 8 Co. Rep. 146a; 77 E.R. 695; 18 Digest (Repl.) 314, 591.
- (2) *Lindon v. Hooper* (1776), 1 Cowp. 414; 98 E.R. 1160; 18 Digest (Repl.) 445, 1886.

- A (3) *Barrett v. Stockton and Darlington Rail. Co.* (1840), 2 Man. & G. 134; affirmed (1842), 3 Man. & G. 956, Ex. Ch.; affirmed sub nom. *Stockton and Darlington Rail. Co. v. Barrett* (1844), 11 Cl. & Fin. 590; 7 Man. & G. 870; 8 Scott, N.R. 641; 8 E.R. 1225, H.L.; 42 Digest 743, 1668.
- (4) *Parker v. Great Western Rail. Co.* (1844), 7 Man. & G. 253; 7 Scott, N.R. 835; 3 Ry. & Can. Cas. 563; 13 L.J.C.P. 105; 2 L.T.O.S. 420; 8 Jur. 194; 135 E.R. 107; 42 Digest 741, 1659.
- B (5) *Knibbs v. Hall* (1794), 1 Esp. 84; 170 E.R. 287, N.P.; 40 Digest (Repl.) 412, 74.
- (6) *Skeate v. Beale* (1840), 11 Ad. & El. 983; 3 Per. & Dav. 597; 9 L.J.Q.B. 233; 4 Jur. 766; 113 E.R. 688; 31 Digest (Repl.) 296, 4333.
- (7) *Anscomb v. Shore* (1808), 1 Taunt. 261; 18 Digest (Repl.) 444, 1877.

C Also referred to in argument:

Sheriff v. James (1823), 1 Bing. 341; 8 Moore, C.P. 334; 130 E.R. 138; sub nom.

Shirreff v. James, 2 L.J.O.S.C.P. 5; 18 Digest (Repl.) 444, 1878.

Browne v. Powell (1827), 4 Bing. 230; 12 Moore, C.P. 454; 5 L.J.O.S.C.P. 159; 130 E.R. 757; 18 Digest (Repl.) 444, 1875.

D *Hills v. Street* (1828), 5 Bing. 37; 2 Moo. & P. 96; 6 L.J.O.S.C.P. 215; 130 E.R. 973; 18 Digest (Repl.) 345, 936.

Ashmole v. Wainwright (1842), 2 Q.B. 837; 2 Gal. & Dav. 217; 11 L.J.Q.B. 79; 6 Jur. 729; 114 E.R. 325; 8 Digest (Repl.) 16, 76.

Jones v. Tarleton (1842), 9 M. & W. 675; 1 Dowl.N.S. 625; 11 L.J.Ex. 267; 6 Jur. 348; 152 E.R. 285; 8 Digest (Repl.) 163, 1048.

E **Rule Nisi** obtained by the plaintiff to enter verdict in his favour for £2 10s. 9d. in an action for money had and received by the defendant to the plaintiff's use. The plaintiff had paid, under protest, £2 15s. 9d. which was the defendant's estimate of the damage suffered. The defendant pleaded *nunquam indebitatus*. At the trial at the Sussex Assizes, the jury found that the actual damage suffered was 5s. and ALDERSON, B., directed a nonsuit, with leave to the plaintiff to enter verdict in his favour and subsequently the plaintiff obtained a rule nisi accordingly.

F A flock of sheep belonging to the plaintiff had strayed on to the defendant's land and were seized for distress damage feasant by the defendant who refused to restore them except on payment of £2 15s. 9d., which was the defendant's estimate of the damage done by the sheep. The plaintiff paid the £2 15s. 9d. under protest. The actual damage was found to be 5s., and the plaintiff sought to recover the excess £2 10s. 9d. in an action for money had and received. The defendant contended that an action for money had and received was not maintainable and that where an exorbitant demand was made for compensation the only remedy was replevin.

G *Serjeant Channell and Johnson*, for the defendant, showed cause against the rule.
Serjeant Dowling and Bovill, for the plaintiff, supported the rule.

H **TINDAL, C.J.**—I am of opinion that the rule, that has been obtained in this case, to enter a verdict for the plaintiff, ought to be discharged. The question at issue seems to me to depend upon the consideration on which of the parties has the law cast the onus of estimating the amount of damage done to the owner of the land. The party whose sheep have trespassed is, in the first instance, the wrongdoer; it is, therefore, upon him that the risk of estimating the amount of damage ought to rest, and not upon the party who has suffered by the trespass. If the owner of the cattle elects to make a tender of sufficient amends before the distress, and the distrainer refuses it, the latter becomes a wrongdoer, but a tender after distress does not entitle the owner to replevy his cattle.

I The rule of law cannot be more clearly stated than is done by LORD COKE, C.J., in *The Six Carpenters' Case* (1) (8 Co. Rep. at p. 147a):

"Vide the book in 30 Ass., fo. 179, pl. 38, John Matrever's case: it is held by the court, that, if the lord, or his bailiff, comes to distrain, and, before the

distress, the tenant tenders the arrears upon the land, there the distress taken for it, is tortious. The same law for damage feasant, if, before the distress, he tenders sufficient amends; and therewith agrees Y.B. 7 Edw. 3, fo. 8, pl. 17, in the matter of St. Mark's case; and so is the opinion of HULL to be understood, in Y.B. 13 Hen. 4, fo. 17, pl. 14, which opinion is not well abridged in [FITZHERBERT'S ABRIDGMENT] title TRESPASS, pl. 180. Note, reader, this difference, that tender upon the land before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful: tender after the impounding makes neither the one nor the other wrongful; for, then it comes too late, because then the cause is put to the trial of the law, to be there determined. But, after the law has determined it, and the avowment has return irreplevisable, yet, if the plaintiff makes him a sufficient tender, he may have an action of detinue for the detainer after, or he may, upon satisfaction made in court, have a writ for the re-delivery of his goods."

It appears to me, that, when the present plaintiff found he was too late to make a tender, so as to entitle himself to replevy the sheep and to succeed in an action of replevin, his proper course was, to make a tender of sufficient amends to cover the damage sustained; and, in the event of the defendant refusing to accept the sum tendered, and deliver up the sheep, he should have brought detinue; for they were held by the defendant merely as a pledge. In that case, the hazard of the sufficiency of the tender would fall, as it ought to do, on the owner of the cattle.

It has been urged that here a tender was unnecessary, inasmuch as the sum demanded for compensation was exorbitant. That argument, however, as it seems to me, is answered by saying that the risk of determining the real amount of damage, is not by law imposed upon the defendant. This I should be disposed to hold upon principle, and independently of the authority of *Lindon v. Hooper* (2), which I am unable to get over, and which I am not aware has been overruled; and, though cases have occurred in which it has been decided that an excessive demand dispenses with a tender, yet those were cases where the law made it incumbent on the defendant correctly to ascertain the amount of his demand. *Barrett v. Stockton and Darlington Rail. Co.* (3) and *Parker v. Great Western Rail. Co.* (4) range themselves within this class. *Knibbs v. Hall* (5) and *Skeate v. Beale* (6) follow the doctrine of *Lindon v. Hooper* (2). Upon authority, therefore, as well as upon principle, I am of opinion that the verdict which has been entered for the defendant, ought to stand.

COLTMAN, J.—I also think the law has, with sufficient distinctness, pointed out the course which the plaintiff ought to have pursued. And, if he has brought a difficulty upon himself by departing from that course, he has no right to complain. The objection to bringing an action for money had and received, instead of tendering amends and replevying, is that which has been stated by TINDAL, C.J., namely, that it would remove from the owner of the cattle the burthen of ascertaining the precise amount of compensation due, and cast it upon the other party, who, in the absence of a tender, is no wrongdoer. The case differs essentially from that of *Parker v. Great Western Rail. Co.* (4). There, the company, by refusing to carry the plaintiff's goods, without being paid an exorbitant sum, in contravention of the provisions of the acts of parliament by which their concerns are regulated, became wrongdoers. Nor can it be said that in this case the money was extorted by duress. Duress of goods implies an unlawful detention of them, which has not occurred here, the sheep having been lawfully taken. I am unable to distinguish the present case from *Lindon v. Hooper* (2), and I know of nothing to prevent its being treated as a subsisting authority. For these reasons, I think the rule should be discharged.

MAULE, J.—I also am of opinion that, under the circumstances of this case, money had and received is not the proper form of action. The defendant had an undoubted right to distrain the plaintiff's sheep, and to keep them until the damage

A done was satisfied. If a sufficient tender had been made before the impounding, the defendant would have been bound to restore them; otherwise not. The question is, whose duty it is to ascertain the amount of damage sustained. If that duty were by law cast upon the distrainer, it would manifestly be throwing a very inconvenient burthen upon the innocent party. It seems to me to be quite clear that this duty rests upon the party who inflicts, and not upon him who suffers, the injury. That
B being so, the defendant is not a wrongdoer because he may have too highly estimated the compensation due to him.

It is said that the plaintiff ought to be permitted to maintain this action, because he is, under the circumstances, precluded from bringing a replevin. The reason why he has not that remedy, is, that he has sustained no wrong. His proper course was, to make a tender of sufficient amends; and, if the defendant, upon such tender,
C refused to restore the sheep, to bring an action of detainue, as suggested by LORD COKE, C.J., in *The Six Carpenters' Case* (1). *Anscomb v. Shore* (7)—where it was held that an action on the case lay not for the detention of the goods after a tender made of sufficient amends—goes very far to show that money had and received is not maintainable in this case; inasmuch as it shows that the distrainer was not a wrongdoer.

D **CRESSWELL, J.**—The plaintiff in this case has brought an action for money had and received by the defendant to his use. The defendant, in answer, says, the payment was made voluntarily, with full knowledge of all the facts, and therefore it is not recoverable back. On the part of the plaintiff it is suggested that the payment was made under a species of duress—a wrongful detainer of his sheep. According to the rule laid down in *The Six Carpenters' Case* (1) it appears that there
E has been no such wrongful detainer of the plaintiff's sheep. That ground therefore fails. The payment appears to me to have been made for the purpose of avoiding all question or dispute as to the right to distrain. The plaintiff cannot, therefore, now turn round and recover back the money which he so paid upon an adequate consideration.

Rule discharged.

HARVEY v. POCKOCK AND OTHERS

[COURT OF EXCHEQUER (Lord Abinger, C.B., Gurney and Rolfe, BB.), June 12, 1843]

[Reported 11 M. & W. 740; 12 L.J.Ex. 434; 1 L.T.O.S. 290;
152 E.R. 1003]

Distress—For rent—Illegal distress—Seizure of weaver's looms in work—Other goods sufficient to satisfy rent due—Damages—Measure.

A landlord distrained for rent due, and among other goods seized some looms then at work which belonged to the tenant, who was a weaver. The looms were not distrainable in law as there was sufficient without them to satisfy the rent due. The tenant paid the amount of the rent and the costs of the distress in order to redeem the goods. In an action by the tenant for trespass for unlawful seizure of his goods,

Held: the landlord was a trespasser ab initio only as to the goods which were not distrainable, and the tenant was entitled to nominal damages only and not to the whole amount paid by him to redeem the goods.

Notes. Applied: *Owen and Smith (trading as Nuagin Car Service) v. Reo Motors (Britain), Ltd.*, [1934] All E.R.Rep. 734. Referred to: *Price v. Woodhouse* (1847), 1 Exch. 559; *Freeman v. Rosher* (1849), 13 Jur. 881; *Attack v. Bramwell* (1863), 9 Jur.N.S. 892; *Canadian Pacific Wine Co. v. Tuley*, [1921] 2 A.C. 417.

As to illegal distress, see 12 HALSBURY'S LAWS (3rd Edn.) 157; and for cases see 18 DIGEST (Repl.) 359 et seq. As to trespass ab initio, see 38 HALSBURY'S LAWS (3rd Edn.) 747; and for cases see 43 DIGEST 394. For s. 19 of the Distress for Rent Act, 1737, see 6 HALSBURY'S STATUTES (2nd Edn.) 155.

Cases referred to:

(1) *Dod v. Monger* (1704), 6 Mod. Rep. 215; Holt, K.B. 416; 87 E.R. 967, N.P.; 18 Digest (Repl.) 357, 1053.

(2) *Six Carpenters' Case* (1610), 8 Co. Rep. 146 a; 77 E.R. 695; 18 Digest (Repl.) 314, 591.

Also referred to in argument:

Biggins v. Goode (1832), 2 C. & J. 364; 149 E.R. 155; sub nom. *Briggins v. Goode*, 2 Tyr. 447; 1 L.J.Ex. 129; 18 Digest (Repl.) 380, 1304.

Proudlove v. Twemlow (1833), 1 Cr. & M. 326; 3 Tyr. 260; 2 L.J.Ex. 111; 149 E.R. 424; 18 Digest (Repl.) 380, 1309.

Gillard v. Brittan (1841), 1 Dowl.N.S. 424; 8 M. & W. 575; 11 L.J.Ex. 133; 151 E.R. 1168; 43 Digest 424, 493.

Sowell v. Champion (1838), 6 Ad. & El. 407; 2 Nev. & P.K.B. 627; Will. Woll. & Dav. 667; 7 L.J.Q.B. 197; 112 E.R. 156; 17 Digest (Repl.) 133, 396.

Etherton v. Popplewell (1800), 1 East, 139; 102 E.R. 55; 18 Digest (Repl.) 330, 758.

Dye v. Leatherdale and Simpson (1769), 3 Wils. 20; 95 E.R. 910; 18 Digest (Repl.) 446, 1900.

Gargrave v. Smith (1691), 1 Salk. 221; 91 E.R. 196; 18 Digest (Repl.) 446, 1895.

Rule Nisi obtained by the defendants for a new trial or a reduction of damages to 15s. or to 1s., in an action for trespass brought by the plaintiff, the tenant against the defendants, the landlord and his agents, for breaking and entering the plaintiff's dwelling house distraining for £8 rent due his goods, including six looms in work (there being sufficient without them to satisfy the rent) and impounding them until the plaintiff was obliged to pay £8 and 15s. 6d. costs, in order to release his goods. The defendants pleaded s. 19 of the Distress For Rent Act, 1737.

At the trial GURNEY, B., directed the jury that the distraining of the looms entitled the plaintiff to a verdict for the value of the goods so taken and, as no damage had been proved, it was for the jury to say whether the plaintiff should be awarded

A any greater damages than the amount the plaintiff had paid to redeem his goods. The jury found a verdict for the plaintiff and awarded £8 15s. 6d. damages. Subsequently the defendants obtained a rule nisi for a new trial or a reduction of damages to 15s. 6d. or a nominal 1s.

B The defendants' distress was made for £8 due from the plaintiff, who was a willow-weaver, for rent of the house and premises occupied by him. Among the goods included in the inventory were six looms then at work, and without which there was sufficient on the premises to satisfy the distress. Nothing was removed, nor was any injury whatever done to any of the goods. The defendants remained in possession for five days, when the plaintiff paid the rent due, together with 15s. 6d. for costs, and the distress was withdrawn.

C *Jervis* and *E. James* for the plaintiff, showed cause against the rule.
Kelly and *Hugh Hill* for the defendants supported the rule.

LORD ABINGER, C.B.—*Dod v. Monger* (1) is undoubtedly a very strong authority for the defendants. The *Six Carpenters' Case* (2) leaves it an open question how far the party becomes a trespasser ab initio as to the whole distress by an excess as to part. It is very reasonable that he should not, but that his liability should be limited according to the doctrine laid down by LORD HOLT, C.J., in *Dod v. Monger* (1). This is only a constructive trespass as to the looms, and yet the plaintiff is asking for damages to the amount of the whole rent. It is the same as if the goods had been sold, and the value of the looms had been returned to him. The rule will be absolute for a new trial, unless the plaintiff consents to reduce the verdict to nominal damages.

E GURNEY and ROLFE, BB., concurred.

Rule absolute for a new trial.

F

WILD v. HARRIS

G [COURT OF COMMON PLEAS (Wilde, C.J., Coltman, Cresswell and Williams, JJ.), April 24, June 12, 1849]

[Reported 7 C.B. 999; 7 Dow. & L. 114; 18 L.J.C.P. 297;
13 L.T.O.S. 283; 13 Jur. 961; 137 E.R. 395]

H Breach of Promise—Promise to marry by married man—Consideration—Action by promisee—Competency.

In an action for breach of promise of marriage the plaintiff said that in consideration of her promising to marry the defendant he promised to marry her, that accordingly she remained unmarried and had always been ready and willing to marry him, but that he had failed to marry her and at the time of making the promise and thenceforward had been married to another woman.

I Held: although the plaintiff was never bound by her promise to marry the defendant, he being married at all material times, her promise involved a further promise that she would remain single for a reasonable time, and that constituted a sufficient consideration to entitle her to sue on the contract and recover damages for its breach.

Notes. Followed: *Millward v. Littlewood* (1850), 5 Exch. 775. Considered: *Liverpool Adelphi Loan Association v. Fairhurst* (1854), 18 Jur. 191. Distinguished: *Spiers v. Hunt*, [1908] 1 K.B. 720; *Wilson v. Carnley*, [1908-10] All

E.R.Rep. 120; *Siveyer v. Allison*, [1935] 2 K.B. 403. Applied: *Shaw v. Shaw*, A [1954] 2 All E.R. 638. Referred to: *Hall v. Wright* (1859), E.B. & E. 765; *Beachey v. Brown* (1860), 6 Jur.N.S. 345; *Fender v. Mildmay*, [1937] 3 All E.R. 402.

As to breach of promise of marriage, see 19 HALSBURY'S LAWS (3rd Edn.) 769-774; and for cases see 27 DIGEST (Repl.) 22-35.

Cases referred to in argument :

Harvy v. Gibbons (1676), 2 Lev. 161; 83 E.R. 499; 12 Digest (Repl.) 229, 1712.

Nerot v. Wallace (1789), 3 Term Rep. 17; 100 E.R. 432; 12 Digest (Repl.) 292, 2255.

Caines v. Smith (1847), 15 M. & W. 189; 3 Dow. & L. 462; 15 L.J.Ex. 106; 6 L.T.O.S. 376; 153 E.R. 816; 27 Digest (Repl.) 27, 48.

Application by the defendant for a rule nisi to arrest judgment in an action of *assumpsit* for breach of promise of marriage.

The declaration stated that in consideration that the plaintiff, being sole and unmarried, at the request of the defendant had promised to marry him within a reasonable time, he, the defendant, then promised to marry her within a reasonable time. Confiding in this promise the plaintiff had remained unmarried and, until she had notice that the defendant was married, ready and willing to marry him. She said that, although a reasonable time had elapsed since the making of the defendant's promise, and before the commencement of the suit, yet he had wholly neglected his promise and had not married her, but, on the contrary, at the time of making his promise and from thenceforward, he had been married to a woman whose name was unknown to the plaintiff. At the trial, before MAULE, J., a verdict was found for the plaintiff, damages £10.

Huddlestone, for the defendant, moved for a rule nisi to arrest judgment.

Cur. adv. vult.

June 12, 1849. **WILDE, C.J.**, delivered the following judgment of the court.— This was a motion in arrest of judgment. The action was for breach of promise of marriage, and the declaration stated that, in consideration that the plaintiff, being sole and unmarried, at the request of the defendant, promised to marry him within a reasonable time, he promised to marry her within a reasonable time. It went on to aver that the plaintiff remained sole and unmarried and had always been ready and willing to marry the defendant, but that he disregarded his promise, and at the time of making his promise, and from thenceforward, was and continued married, and that the plaintiff was ignorant of the defendant's marriage at the time of the making of his promise.

On behalf of the defendant it has been contended that, inasmuch as the declaration discloses that he was a married man at the time of the making of the alleged promise—so that the plaintiff was not bound by her promise to marry the defendant—there was a total absence of consideration. But the declaration alleges a promise by the plaintiff to marry the defendant within a reasonable time, which involves within it a promise to remain single for a reasonable time, and this the plaintiff avers that she did do. That is consideration enough. The defendant's promise to marry the plaintiff within a reasonable time was not absolutely impossible of performance, for, his wife might have died within a reasonable time, and so he would have been in a condition to perform his promise to the plaintiff.

The authority referred to by my brother CRESSWELL in the course of the argument—BROOKE'S ABRIDGMENT, tit. CONDITIONS, pl. 119—seems to recognise the principle which must govern this case. There a woman infeoffed a man upon condition that he (being then a married man) should marry her within a reasonable time. The feoffee infeoffed another person, and he another, and so on. The man died, being still married, whereupon the original feoffor entered as for condition broken, and it was held that it was a lawful condition, for the feoffee's wife might

A have died within a reasonable time. It would be strange, indeed, to allow the defendant to rely upon his own wrong—to set up his fraudulent concealment of his marriage—in order to discharge himself from his promise, the plaintiff having performed her part of the consideration by remaining unmarried and ready to marry the defendant, until she discovered that he was already a married man. We, therefore, think there is no ground for this application.

B

Rule refused.

C

LOCKWOOD v. WOOD

D

[COURT OF EXCHEQUER CHAMBER (Tindal, C.J., Coltman, Erskine and Maule, J.J., and Gurney, B.), June 12, November 27, 1843, April 23, 1844]

[Reported 6 Q.B. 50; 13 L.J.Q.B. 365; 3 L.T.O.S. 139; 8 Jur. 543; 115 E.R. 19]

Market—Tolls—Exemption—Inclusion of stallage.

Market—Tolls—Exemption—Need to prove certain and reasonable immemorial custom—Custom contrary to general law.

E

By letters patent granted by Charles I, a weekly market and two fairs at E., with certain tolls and profits, were granted to one G.H. and his heirs, through whom the plaintiff claimed. By a deed of 1646, made between G.H., of the one part, and four persons therein described as yeomen and byelaw men for the year 1646 for the township of E. on the behalf of themselves and all the inhabitants of E. aforesaid mentioned in the schedule thereto annexed, of the other part, the byelaw men and inhabitants granted to G.H. his heirs and assigns the market-place at E., and G.H. covenanted that the byelaw men and the rest of the inhabitants, their heirs and assigns for ever, should have a free market within the town of E. to buy and sell all cattle and commodities, toll free, in as ample a manner as G.H. had by the letters patent. It was proved that the plaintiff was seized in fee of the freehold of the market-place, and that the defendant was an inhabitant of E., but it was not shown that he was either the heir or assignee of any of the grantees named in the schedule. The plaintiff claimed stallage, but the defendant contended that he was entitled under the deed of 1646 to place his stall on market days on the plaintiff's land without making any payment.

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Held: the exemption from tolls mentioned in the deed of 1646 included an exemption from stallage also; the inhabitants, qua inhabitants, of a town could not take an easement in alieno solo, or claim such a right under a modern grant not made by the Crown, such a claim as the inhabitants were making, where it had been allowed, having invariably rested on the ground of a custom which had existed from time immemorial, without interruption, in a certain place, was certain and reasonable in itself, and had obtained the force of law and was in effect the common law within the place in which it extended, though contrary to the general law of the realm; the defendant, therefore, could not, as an inhabitant of E., claim exemption from stallage under the deed of 1646.

Notes. Referred to: *Constable v. Nicholson* (1863), 14 C.B.N.S. 230; *Mercer v. Denne*, [1904-7] All E.R.Rep. 71; *Anglo-Hellenic Steamship Co. v. Dreyfus* (1913), 108 L.T. 36; *Wolstanton, Ltd.*, and *Duchy of Lancaster v. Newcastle-under-Lyme Borough Council*, [1940] 3 All E.R. 101.

As to nature of custom, see 11 HALSBURY'S LAWS (3rd Edn.) 158 et seq.; as to reasonableness, see *ibid.* 162-164; as to creation, see *ibid.* 168-169; as to prescription based on presumed grant, see 12 HALSBURY'S LAWS (3rd Edn.) 544-545; and for cases see 17 DIGEST (Repl.) 3-6.

Cases referred to:

(1) *Baker v. Brereman* (1635), Cro. Car. 418; 79 E.R. 964; 17 Digest (Repl.) 15, 159. B

(2) *Bree v. Chaplin*, 2 Eag. & Y. 270.

(3) *Gateward's Case* (1607), 6 Co. Rep. 59 b; 77 E.R. 344; sub nom. *Smith v. Gatewood*, Cro. Jac. 152; 17 Digest (Repl.) 5, 18.

(4) *Fitch v. Rawling* (1795), 2 Hy. Bl. 393; 126 E.R. 614; 17 Digest (Repl.) 15, 165.

(5) *Abbot v. Weekly* (1665), 1 Lev. 176; 83 E.R. 357; 17 Digest (Repl.) 15, 163. C

Also referred to in argument:

Day v. Savadge (1614), Hob. 85; 80 E.R. 235; 33 Digest (Repl.) 133, 874.

Wickam v. Hawker (1840), 7 M. & W. 63; 10 L.J.Ex. 153; 151 E.R. 679; 19 Digest (Repl.) 214, 1574.

Heddy v. Wheelhouse (1597), Cro. Eliz. 591; Moore, K.B. 474; 78 E.R. 834; 13 Digest (Repl.) 18, 159. D

Northampton Corp'n. v. Ward (1745), 2 Stra. 1238; 1 Wils. 107; 93 E.R. 1155; 33 Digest (Repl.) 471, 248.

Newport Corp'n. v. Saunders (1832), 3 B. & Ad. 411; 1 L.J.K.B. 147; 110 E.R. 148; 33 Digest (Repl.) 473, 269.

Norwich Corp'n. v. Swann (1776), 2 Wm. Bl. 1116; 96 E.R. 659; 33 Digest (Repl.) 455, 64. E

Lord Middleton v. Lambert (1834), 1 Ad. & El. 401; 3 Nev. & M.K.B. 841; 110 E.R. 1260; 33 Digest (Repl.) 474, 297.

Dixon v. Robinson (1686), 3 Mod. Rep. 107; 87 E.R. 68; 33 Digest (Repl.) 458, 88.

Bennington v. Taylor (1700), 2 Lut. 1517; 125 E.R. 835; 33 Digest (Repl.) 471, 255. F

Withnell v. Gartham (1795), 6 Term Rep. 388; 1 Esp. 321; 101 E.R. 610; 17 Digest (Repl.) 49, 580.

R. v. Mashiter (1837), 6 Ad. & El. 153; 1 Nev. & P.K.B. 314; Will. Woll. & Dav. 173; 6 L.J.K.B. 121; 112 E.R. 58; 13 Digest (Repl.) 206, 256.

Tyson v. Smith (1838), 9 Ad. & El. 406; 3 J.P. 65; 112 E.R. 1265; sub nom. *Smith v. Tyson*, 1 Per. & Dav. 307; 1 Will. Woll. & H. 749, Ex. Ch.; 17 Digest (Repl.) 3, 5. G

Foxall v. Venables (1590), Cro. Eliz. 180; 78 E.R. 436; 19 Digest (Repl.) 59, 321.

Shelton v. Montague (1616), Hob. 118.

Bill of Exceptions tendered by the plaintiff to a ruling of DENMAN, C.J., directing a jury to dismiss his claim against the defendant for stallage dues which, the plaintiff claimed, were due to him as proprietor of a market at Easingwold. H

At the trial of the action at the Yorkshire Summer Assizes, 1842, the plaintiff declared in debt for stallage dues, due and payable to him as the proprietor of a certain market and market-place in the county of York; to which declaration the defendant pleaded the plea of never indebted. The plaintiff gave evidence, among other things, of a grant by King Charles I, in the fifteenth year of his reign, to one George Hall and his heirs, of a weekly market and two fairs in the year, at Easingwold, in the county of York, with certain special tolls and profits. He also proved the seizin in fee of the plaintiff in the said market and fairs, and the tolls and profits thereof; and the seizin of the plaintiff in his demesne as of fee of the soil and freehold of the market-place at Easingwold, and the user of the market by the defendant, by placing a stall upon the market-place on several market-days, the defendant being, as proved by the plaintiff, an inhabitant of the town of Easingwold. I

A The defendant gave in evidence a deed, bearing date Aug. 31, 1646, being made between George Hall, the grantee of the said market, of the one part, and four persons therein named of the other part, who were therein described as of Easingwold :

B "yeoman and byelaw men for the present year (1646) for the said township of Easingwold, on the behalf of themselves and all the inhabitants of Easingwold aforesaid, mentioned in the schedule thereunto annexed, by and with the consent and appointment of all the inhabitants of Easingwold aforesaid;"

C the schedule thereto annexed was headed with the words "Inhabitants of Easingwold," and contained considerably more than 100 names subjoined thereto. By that deed, the four byelaw men, and the rest of the inhabitants, gave and granted to George Hall, his heirs and assigns, for ever, among other things, the market-place at Easingwold, as described therein by certain metes and bounds; and George Hall thereby covenanted among other things, that the four byelaw men,

D "and the rest of the inhabitants aforesaid, their heirs and assigns for ever, shall have a free market within the said town of Easingwold, to buy and sell all cattle and commodities whatsoever toll free, in as ample a manner and form as the said George Hall hath by the recited letters patent."

There was on the back of the deed an endorsement of livery of seizin having been given to George Hall, of the premises described in the deed, by the four byelaw men, by and with the consent of the inhabitants therein named.

E The whole question raised before the court turned upon the legal effect and operation of that deed. At the trial, the defendant's counsel insisted that the deed and the other matters given in evidence amounted to a bar of the plaintiff's claim; while the plaintiff's counsel, on the other hand, insisted that the deed contained a grant of an exemption from tolls only, and not from stallage, and that stallage was not included in the terms of the grant; and further insisted, that even if stallage was included within the terms of the exemption, the defendant not being one of the grantees, nor the heir or assignee of any of the grantees therein named, could not take the benefit thereof as an inhabitant of Easingwold, as such inhabitants thereof were not incorporated; therefore, he contended the deed ought not to be admitted as a bar to the plaintiff's right of action. The Lord Chief Justice thereupon told the jury, he was of opinion that stallage was included within the terms of the exemption, and that the defendant, as an inhabitant of the township of Easingwold, was entitled to such exemption, and directed the jury that the deed and matters aforesaid were a bar to the plaintiff's action. The plaintiff's counsel then excepted to each of those points so ruled by the Lord Chief Justice, and the question is, whether such ruling, as to both those points, is or is not consistent with law.

G *Erle (Tomlinson with him) for the plaintiff.*

H *Knowles (Bliss with him) for the defendant.*

Cur. adv. vult.

I April 23, 1844. **TINDAL, C.J.**, delivered the judgment of the court in which after stating the facts as set out above, he continued: It is to be observed, that the present cause has been already, in a former stage of the proceedings, before the Court of Queen's Bench upon a motion for a new trial; and that upon the arguments brought before the court upon that occasion, the same two points were made by the counsel for the plaintiff below, which form the ground of the present exception; and that the Court of Queen's Bench, after time taken to consider, in a very learned judgment, in which the principal authorities are reviewed and discussed, declared their opinion upon the first point to be, that the exemption from toll mentioned in the deed included an exemption from stallage also; and after that judgment, it is unnecessary for us to say more than that we entirely concur therein, and in the reasoning by which it is supported; and consequently we hold that the

exception, first tendered to the direction of the learned judge at the trial, is untenable. A

With regard to the second point, viz., whether the inhabitants of Easingwold could claim an exemption from stallage under the description contained in the deed, the Court of Queen's Bench appear to have studiously abstained from giving any opinion; and both that court and the Lord Chief Justice, at the trial, have been desirous that such questions should be put upon the record for the purpose of a more formal discussion, which has accordingly been done by the course taken at the trial; and we, therefore, proceed to consider this second ground of objection, as one which is altogether open and unfettered by the judgment of the court below. Upon this point we are of opinion that, under the grant in question, a modern grant, not made by the Crown, but by a subject, the inhabitants cannot take, by that name or description, such an easement as that which is now under consideration, that is, a right to place their stalls on market-days in alieno solo, without making any payment for the same. It was admitted, in the arguments before us, that the inhabitants cannot take land by that description in a modern deed; indeed the authority of *Co. Litt.*, 3a, is express to that point, for, although it is added there, apparently by way of exception, "unless it were in ancient times when such grants were allowed," yet, that exception would probably be found to be confined to grants by the Crown, and to stand upon the reasons stated in *DYER'S REPORTS*, 100a, pl. 70, that if the Queen grants land by her charter to the good men of the town of Islington without saying, to have to them their heirs, and their successors, rendering a rent, this is a good corporation perpetual to that extent only, and no other, because there a rent was reserved, etc. B C D

But the argument on the part of the defendant is that the present grant is not a grant of land, but of an easement only, or of an exemption or discharge, and that such an easement or matter of discharge may be claimed by prescription; and that as every prescription presupposes a grant, so a prescription for such a grant to the inhabitants of a town would be good to this day. If, indeed, the present claim could be considered as confined to, and resting upon, the ground of exemption and discharge, strictly so considered, there might perhaps be some authority for contending that the inhabitants of a parish or vill might claim an exemption from toll by a modern grant, and that by a private individual. For all the judges held in *Baker v. Brereman* (1) that inhabitants may prescribe for matters of discharge, as in modo decimandi, or to be quit of toll: and again, so a composition toll might have been made by a private individual, that is, by a parson with the consent of the patron and ordinary in favour of all the inhabitants before the restraining statutes: see *Bree v. Chaplin* (2). So also it would seem that a private individual might grant an exemption from toll to the inhabitants at large, and it affords some support to this argument that the writ *De essendo quietum de tolonio* lay for persons by royal grant, who could not have been impliedly incorporated by such a grant, as merchant strangers: see *FITZHERBERT'S NATURA BREVIVM*, 227 d. E F G

But the claim in this case is not simply to be exempt from toll, properly so called, but from a species of payment, which although included in the word toll in the deed in question, in this case is a compensation for the use of land; and the true nature of the claim of the inhabitants under the deed, is a claim to the grant of the easement of going on the plaintiff's land, and pitching their stalls there on market days, without paying anything for the use of the soil; and, upon referring to the several authorities which have been cited in support of the validity of such a prescription, it will be found that the claim by the inhabitants, qua inhabitants, to any easement, wherever it has been allowed, has been invariably rested on the ground of custom, and not on that of prescription; a custom which has existed from time immemorial, without interruption, in a certain place, and which is certain and reasonable in itself, obtains the force of the law, and is in effect the common law within the place in which it extends, though contrary to the general law of the realm. In the case of custom, therefore, it is unnecessary to look out for its origin, but in the case of prescription, which founds itself on the presumption of a grant that has been H I

A lost by the process of time, none can have had a legal origin, where no grant could have been made to support it. Thus, the custom for all fishermen within a certain district to dry their nets on the land of another might be a good prescription; and yet a grant of such an easement to fishermen within the district eo nomine might well be held void.

B The first case on which the defendant's counsel relied in argument was *Gatewood's Case* (3). In that case, the claim was one by all the inhabitants of Hinxwold, to have a common of pasture over a place called Horsington Holmes; but this claim was set up, not as a prescription, but as a custom; and it was held that the custom was against law. LORD COKE goes on to state (6 Co. Rep. at p. 60 b):

C "But two differences were taken and agreed on by the whole court. 1. Between a charge on the soil of another and a discharge on his own soil. 2. Between an interest or profit, to be taken or had on another's soil, and an easement on another's soil."

D But it is to be observed that all the instances put are not those of prescriptions or grants, but of customs—viz. the custom that every inhabitant of the town has paid a *modus decimandi*—a custom that every inhabitant of such a town shall have a way over such land, either to the church or market, etc.; and those, it is said, are good, for they are an easement, and no profit. Further, LORD COKE says:

E "Another difference was taken and agreed, between a prescription which is always alleged in the person, and a custom which always ought to be alleged in the land; for every prescription ought to have by common intendment a lawful beginning, but otherwise it is of a custom, for that ought to be reasonable, and *ex certâ causâ rationabili* (as LITTLETON saith) *usitata*, but need not be intended to have a lawful beginning."

F A difference which points out clearly the distinction which ought to govern the present case—viz., that such an easement for the inhabitants of Easingwold as is contended for, although it might be good by custom if it existed from time immemorial, yet it cannot be good by prescription, but must rest upon the grant to the inhabitants.

G The report of the same case in Cro. Jac., 152, will not justify the inference contended for in the argument, that the claim to an easement for the inhabitants of a town is good by prescription, merely on the ground that the reporter has used the word prescription, instead of custom, contrary to what is found in the report in LORD COKE; the question before the court, in that case, turning on the custom, and not on the prescription, and the attention of the reporter not being called to the distinction now under consideration. The same observation disposes of the weight of the dictum of HEATH, J., in *Fitch v. Rawling* (4), in which case the question before the court arose on the claim by custom, and the attention of the court was not called to the distinction between custom and prescription. *Abbot v. Weekly* (5) is a strong authority that such a claim by prescription would be bad. In trespass, the defendant prescribed that all the inhabitants of such a vill had been used time out of mind to dance on the close of the plaintiff at all times for their recreation, and so justified; and after verdict for the defendant, one objection taken in arrest of judgment was, that the claim ought to have been pleaded by way of custom in the vill, and not by way of prescription in a person; a case was cited, where it had been so adjudged on demurrer, the court held that though perhaps it would have been bad upon demurrer, yet if issue be taken upon it, and found by the verdict, it was good. No direct authority has been cited to show that such a prescription was good, and upon our consideration of those that have been brought before us, we think they negative, rather than support, the position, that the inhabitants of the town may by that name "prescription," prescribe for an easement, in *alieno solo*; and if they cannot prescribe for such rights in *alieno solo*

beyond the time of legal memory, still less can they claim such a right under a modern grant. On this ground we think that the exception secondly taken at the trial to the direction of the learned Lord Chief Justice must be allowed, and the judgment of the court below must on that ground be reversed, and a venire de novo awarded.

Venire de novo.

NIGHTINGALE v. GOULBOURN

[LORD CHANCELLOR'S COURT (Lord Cottenham, L.C.), November 18, 1847, March 3, 4, 8, 1848]

[Reported 2 Ph. 594; 17 L.J.Ch. 296; 11 L.T.O.S. 169; 12 Jur. 317;
41 E.R. 1072]

Charity—Benefit to community—Gift to “Chancellor of Exchequer for time being . . . to the benefit of my beloved country Great Britain.”

A bequest of personal estate to the Chancellor of the Exchequer for the time being for the benefit of Great Britain, **held** to be good as a charitable legacy.

Notes. Considered: *Whicker v. Hume* (1851), 14 Beav. 509; *Whicker v. Hume* (1858), 7 H.L.Cas. 124; *Re Tetley, National Provincial and Union Bank of England v. Tetley*, [1923] 1 Ch. 258. Applied: *Re Smith, Public Trustee v. Smith*, [1931] All E.R.Rep. 617. Considered: *Re Strakosch, Temperley v. A.-G.*, [1949] 2 All E.R. 6.

As to gifts beneficial to the community, see 4 HALSBURY'S LAWS (3rd Edn.) 226 et seq.; and for cases, see 8 DIGEST (Repl.) 349 et seq.

Cases referred to:

- (1) *A.-G. v. Brown* (1818), 1 Swan. 265; 1 Wils. Ch. 323; 36 E.R. 384, L.C.; 8 Digest (Repl.) 345, 262.
- (2) *A.-G. v. Heelis* (1824), 2 Sim. & St. 67; 2 L.J.O.S.Ch. 189; 57 E.R. 270; 8 Digest (Repl.) 343, 246.
- (3) *A.-G. v. Dublin Corpn.* (1827), 1 Bli.N.S. 312; 4 E.R. 888, H.L.; 13 Digest (Repl.) 287, 1060.
- (4) *A.-G. v. Earl of Lonsdale* (1827), 1 Sim. 105; 5 L.J.O.S.Ch. 99; 57 E.R. 518; 8 Digest (Repl.) 421, 1116.
- (5) *Mitford v. Reynolds* (1842), 1 Ph. 185; 12 L.J.Ch. 40; 7 Jur. 3; 41 E.R. 602, L.C.; 8 Digest (Repl.) 344, 254.
- (6) *Thellusson v. Woodford* (1799), 4 Ves. 227; 31 E.R. 117, L.C.; affirmed (1805), 1 Bos. & P.N.R. 357; 11 Ves. 112, H.L.; 44 Digest 540, 3571.
- (7) *Newland v. A.-G.* (1809), 3 Mer. 684; 36 E.R. 262, L.C.; 8 Digest (Repl.) 504, 2253.
- (8) *Moggridge v. Thackwell* (1803), 7 Ves. 36; 32 E.R. 15, L.C.; affirmed (1807), 13 Ves. 416, H.L.; 8 Digest (Repl.) 450, 1462.
- (9) *Morice v. Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, 836.

Also referred to in argument:

Townley v. Bedwell (1801), 6 Ves. 194; 31 E.R. 1008, L.C.; 8 Digest (Repl.) 371, 570.

A.-G. v. Whorwood (1750), 1 Ves. Sen. 534; 27 E.R. 1188, L.C.; 8 Digest (Repl.) 381, 740.

- A** *Vezev v. Jamson* (1822), 1 Sim. & St. 69; 57 E.R. 27; 8 Digest (Repl.) 394, 864.
Ommanney v. Butcher (1823), Turn. & R. 260; 37 E.R. 1098; 8 Digest (Repl.) 389, 823.
Williams v. Williams, *Williams v. Kershaw* (1835), 5 Cl. & Fin. 111, n.; 1 Keen, 274, n.; 5 L.J.Ch. 84; 7 E.R. 346; 8 Digest (Repl.) 398, 899.
Ellis v. Selby (1836), 1 My & Cr. 286; 5 L.J.Ch. 214; 40 E.R. 384, L.C.; 8 Digest (Repl.) 395, 871.
- B** *James v. Allen* (1817), 3 Mer. 17; 36 E.R. 7; 8 Digest (Repl.) 391, 839.
Howse v. Chapman (1799), 4 Ves. 542; 31 E.R. 278, L.C.; 8 Digest (Repl.) 364, 446.
Kendall v. Granger (1842), 5 Beav. 300; 11 L.J.Ch. 405; 6 Jur. 919; 49 E.R. 593; 8 Digest (Repl.) 394, 867.
- C** *Jones v. Williams* (1767), Amb. 651; 27 E.R. 422, L.C.; 8 Digest (Repl.) 344, 247.
A.-G. v. Carlisle Corpn. (1828), 2 Sim. 437; 57 E.R. 851; affirmed (1830), 8 L.J.O.S.Ch. 146, L.C.; 8 Digest (Repl.) 344, 251.
Powerscourt v. Powerscourt (1824), 1 Mol. 616; 8 Digest (Repl.) 365, *191.
West v. Knight (1669), 1 Cas. in Ch. 134; 22 E.R. 729; 8 Digest (Repl.) 342, 237.

D **Appeal from a decision of WIGRAM, V.-C.**

The testator in the cause, Colonel Petrie, by his will dated July 18, 1843, after bequeathing several legacies, and having given an annuity to his widow for her life, gave all his residuary estate in the following terms :

E "I now desire, that my said trustees or trustee,—shall convert all and singular my investments in the stocks, funds, and other securities, into money, and do and shall pay such money, and all other trust moneys whatever, remaining not disposed of, after payment of all and every the legacies, bequests, donations, and sums of money aforesaid, and all expenses attending the execution of the trusts of this my will, to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country, Great Britain."

F The testator's residuary estate, which consisted of pure personalty, amounted to £20,000 and a sum of £300 due upon mortgage. The Vice-Chancellor held the gift of the pure personalty to be a good charitable bequest, and from that decree the next-of-kin appealed.

G *Romilly and Bell* for the next-of-kin.
Twiss and Wray for the Attorney-General.

H Mar. 8, 1848. **LORD COTTENHAM, L.C.**—The question in this case is, whether a gift to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated for the benefit of "my beloved country" of Great Britain is a valid charitable bequest. The decree applies to personalty only, and therefore the question is not affected by the Statute of Mortmain. If the bequest is valid it must be as a charitable gift. I find that in the cases cited in argument of *A.-G. v. Brown* (1), *A.-G. v. Heelis* (2), *A.-G. v. Dublin Corpn.* (3) and several other cases, bequests for the benefit of parishes, of towns, of counties, and of provinces, have been held to be valid as charitable gifts. So also in *A.-G. v. Earl of Lonsdale* (4), a gift for a school in Lonsdale, and for such other purposes as the executors should

I think conducive to the good of the county of Westmoreland, was held to be a good charitable legacy. In *Mitford v. Reynolds* (5), a bequest for the benefit of the town of Dacca was held to be valid. In other cases, as in *Thellusson v. Woodford* (6) and *Newland v. A.-G.* (7), effect was given to gifts in aid of the public revenue. It is no objection that the particular purposes to which the gift is to be applied are not specified, as appears from *Newland v. A.-G.* (7) and in *Moggridge v. Thackwell* (8), and why, therefore, should this gift be held to be void because the purposes are not specified. *Morice v. Bishop of Durham* (9) and the other cases that were cited in support of the argument, that the gift in this will could not be supported, as

being too general in its terms, and not specific enough in its objects, are not applicable to this case. If, then, the gift to the government for public objects be good, a gift to one member of the government for public purposes must likewise be held to be good. Here a particular officer of the government is named, the Chancellor of the Exchequer for the time being, which obviates, in a great measure, the want of a specific direction as to the mode of applying the gift. It is clear the testator did not intend the gift for the Chancellor of the Exchequer's own use; but by selecting him the testator pointed out the direction for the application of the gift. I have no doubt that, upon the authorities which have been referred to, this is a good charitable gift, and that the appeal must be dismissed.

Appeal dismissed.

LYGO v. NEWBOLD

[COURT OF EXCHEQUER (Pollock, C.B., Parke, Alderson and Martin, BB.), January 13, 1854]

[Reported 9 Exch. 302; 2 C.L.R. 449; 23 L.J.Ex. 108;
22 L.T.O.S. 226; 2 W.R. 158; 156 E.R. 130]

Carriage of Passengers—Safety of passengers—Duty of care—Passenger trespasser in vehicle.

The plaintiff, a person of full age, contracted with the defendant to carry certain goods for her in his cart. The defendant sent his servant with the cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her goods. On the way, the cart broke down, and the plaintiff was thrown out and injured:

Held: as the defendant had not contracted to carry the plaintiff and she had ridden in the cart without his authority, he was not liable for the injury which she had sustained.

Lynch v. Nurdin (1) (1841), 1 Q.B. 29, distinguished.

Notes. Referred to: *Waite v. North Eastern Rail. Co.* (1858), E.B. & E. 728; *Singleton v. Eastern Counties Rail. Co.* (1859), 7 C.B.N.S. 287; *Harris v. Perry*, [1903] 2 K.B. 219; *Shrimpton v. Hertfordshire County Council* (1910), 74 J.P. 305; *Grand Trunk Rail. Co. v. Barnett*, [1911] A.C. 361; *Karavias v. Callinicos*, [1917] W.N. 323; *Glasgow Corpn. v. Taylor*, [1921] All E.R.Rep. 1; *Pratt v. Patrick*, [1923] All E.R.Rep. 512; *Haseldine v. Daw & Son, Ltd.*, [1941] 1 All E.R. 525; *Lewys v. Burnett and Dunbar*, [1945] 2 All E.R. 555.

As to a carrier's duty to trespassers, see 28 HALSBURY'S LAWS (3rd Edn.) 53-54; and for cases see 36 DIGEST (Repl.) 70-71.

Cases referred to:

- (1) *Lynch v. Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, 150.
- (2) *Wilson v. Brett* (1843), 11 M. & W. 113, 152 E.R. 737; sub nom. *Willson v. Brett*, 12 L.J.Ex. 264; 12 Digest (Repl.) 251, 1949.

Application by the plaintiff for a rule nisi to increase the amount of damages awarded in an action on the case for negligence.

The declaration stated that the plaintiff retained and employed the defendant for reward to the defendant in that behalf, to carry and convey in and by a cart of the defendant's goods and chattels of and for the plaintiff, to wit, from Carnaby

A Street, in the county of Middlesex, to New Inn Passage, in the county aforesaid; that the defendant accepted such retainer and employment, and then received and loaded the goods and chattels for the purposes aforesaid in and upon a certain cart of the defendant's; yet the defendant neglected his duty in this, to wit, that the cart so used and employed by him in the carriage and conveyance of the goods and chattels was then wholly unsafe and insecure, and in an unfit and improper state and condition for the carriage and conveyance thereof, and the defendant so negligently behaved and conducted himself in the premises, that afterwards, and while the cart was proceeding under the care and management of a certain servant of the defendant's on its way from Carnaby Street aforesaid to New Inn Passage aforesaid with the goods and chattels in and upon the same, by reason and in consequence of the negligence and improper conduct of the defendant, and of the insufficiency of the said cart, and of the same being unsafe and insecure, and in a wholly unfit and improper state and condition for the carriage and conveyance of the said goods and chattels, the said cart broke down, and by means thereof divers of the goods and chattels were broken to pieces, damaged, and spoiled; and also by means thereof the plaintiff, who was then lawfully and rightfully, and by and with the consent of the defendant riding in the cart and accompanying the goods and chattels in their way, to wit, to New Inn Passage aforesaid, was cast and thrown with great force and violence from and out of the said cart, and thereby one of the legs of the plaintiff was broken, and she was otherwise greatly bruised and injured, etc. The defendant denied liability.

E At the trial, before POLLOCK, C.B., at the London Sittings after Michaelmas Term, 1853, it appeared that the plaintiff, who was of full age, had engaged the defendant to carry her furniture from her house to New Inn Passage. The defendant sent his servant with a horse and cart to convey the goods, but did not go himself. The plaintiff asked the servant's permission to ride in the cart, to which he assented. On the road the plaintiff expressed her fears that the cart was not safe, but, the defendant's servant, having examined the cart, done some repairs to it, and expressed his opinion that all was right, the plaintiff remained in the cart, and they F proceeded. Shortly afterwards the cart broke down, the goods were thrown out and broken, and the plaintiff was also thrown out and her leg was fractured.

The Lord Chief Baron was of opinion that, although the defendant might be responsible for the loss the plaintiff had sustained for the damage done to her goods, he was not liable for the personal injury she had suffered. The defendant's counsel having admitted that the value of the goods destroyed amounted to £1 15s., the verdict was entered for that sum, with leave to the plaintiff to move for a rule nisi G to increase the amount to £25.

H *Hoggins* for the plaintiff moved for a rule nisi accordingly.—The question is whether the plaintiff is entitled to recover for the personal injury she has sustained by reason of the defendant's negligence. [POLLOCK, C.B.—The defendant had contracted to convey the plaintiff's goods only; and it was, therefore, no part of his contract to carry the plaintiff herself; and it did not appear that the defendant gave the plaintiff permission to ride in his cart, or that he had any knowledge of that fact. How can he be liable under such circumstances? Moreover, it is by no means clear that the defendant cannot maintain an action of trespass against the plaintiff for having got into the cart without his authority, and for having assisted in causing the injury to the cart.] The defendant's liability is founded I upon grounds wholly independent of any contract. *Lynch v. Nurdin* (1) is directly in the plaintiff's favour.

In that case the defendant, having negligently left his horse and cart unattended in the street, the plaintiff, a child seven years old, got upon the cart in play, and another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt. It was held, that, though the plaintiff was a trespasser, and contributed to the mischief by his own act, the defendant was nevertheless liable for the consequences of that accident. LORD DENMAN, C.J., in delivering the judgment of the court, says (1 Q.B. at p. 36):

"In the present case an additional fact appears. The plaintiff himself has done wrong: he had no right to enter the cart, and abstaining from doing so would have escaped the mischief. Certainly he was a co-operating cause of his own misfortune by doing an unlawful act; and the question arises, whether that fact alone must deprive the child of his remedy. The legal proposition, that one who has by his own negligence contributed to the injury of which he complains cannot maintain his action against another in respect of it, has received some qualifications."

After citing and commenting upon the several authorities bearing upon this point, the Lord Chief Justice says that the court have come to the conclusion that the fact of such misconduct on the part of the plaintiff is not sufficient to exempt the defendant from the consequences of his own neglect.

Although the defendant was to be paid for the carriage of the plaintiff's goods, and would not receive anything for the carriage of the plaintiff herself, that fact does not exonerate the defendant: *Wilson v. Brett* (2). [PARKE, B.—A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care. The decision in *Lynch v. Nurdin* (1) proceeded wholly upon the ground that the plaintiff had taken as much care as could be expected from a child of tender years—in short, that the plaintiff was blameless, and consequently that the act of the plaintiff did not affect the question; but here the plaintiff's conduct was blameful, as she had no business to get up into the cart without the defendant's permission. ALDERSON, B.—The negligence, in truth, is attributable to the parent who permits the child to be at large. It seems strange that a person who rides in his carriage without a servant, if a child receives an injury by getting up behind for the purpose of having a ride, should be liable for the injury.]

POLLOCK, C.B.—We are all agreed that there ought to be no rule. The case last put raises a doubt as to the authority of *Lynch v. Nurdin* (1), if it be applicable to the case where a child receives an injury from indulging in what is called "the natural instinct of a child," by getting up behind a gentleman's carriage, there being no servant there. I must admit that if this case were like *Lynch v. Nurdin* (1) we should not refuse a rule to show cause; but it differs essentially from that case, which was decided upon the ground that the plaintiff, being a child of tender years, could not be considered as causing any part of the injury it had sustained, but that the mischief was occasioned solely by the defendant's default. On the present occasion, the plaintiff brought this accident wholly upon herself. She was of full age, and she got up into the defendant's cart without any right to do so. She ought to have known that she had no authority to do that, and she must, therefore, take all the consequences of her own culpable conduct.

PARKE, B., ALDERSON, B., and MARTIN, B., concurred.

Rule refused.

A

AIKEN v. SHORT

[COURT OF EXCHEQUER (Pollock, C.B., Platt, Martin and Bramwell, BB.), June 5, 7, 1856]

B

[Reported 1 H. & N. 210; 25 L.J.Ex. 321; 27 L.T.O.S. 188; 4 W.R. 645; 156 E.R. 1180]

Mistake—Mistake of fact—Money paid under mistake—Right of payor to recover amount of payment—Proof of mistake of fact if true rendering payor liable.

C

The defendant lent A. £200 on the security of his bond and an equitable charge on certain property. Subsequently the plaintiff purchased the property, subject to the charges thereon. On an application having been made to A. for the repayment of the £200, he referred to the plaintiff as the purchaser of the property, and the plaintiff paid off the charge. It afterwards turned out that A. had no title to the property in question.

D

Held: the plaintiff could not recover back the payment of the £200 from the defendant as money had and received for his use.

Per BRAMWELL, B.: In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money.

E

Notes. Explained: *Re Bodega Co., Ltd.*, [1900-3] All E.R.Rep. 770. Distinguished: *Gasson v. Cole* (1910), 26 T.L.R. 468. Considered: *Archangel Saw Mills v. Baring and A.-G.*, *Steam Saw Mills v. Baring and A.-G.* (1921), 37 T.L.R. 857. Distinguished: *Jones v. Waring and Gillow*, [1925] 2 K.B. 612. Considered: *Morgan v. Ashcroft*, [1937] 3 All E.R. 92; *Ayres v. Moore*, [1939] 4 All E.R. 351; *Weid-Blundell v. Synott*, [1940] 2 All E.R. 580. Referred to: *Deutsche Bank (London Agency) v. Beriro* (1895), 1 Com. Cas. 255; *Maskell v. Horner*, [1915] 3 K.B. 106; *Re Thellusson, Ex parte Abdy*, [1919] 2 K.B. 735; *Larner v. L.C.C.*, [1949] 1 All E.R. 964.

F

As to the recovery of money paid voluntarily under a mistake of fact, see 26 HALSBURY'S LAWS (3rd Edn.) 921 et seq.; and for cases see 35 DIGEST (Repl.) 158 et seq.

G

Case referred to:

(1) *Pritchard v. Hitchcock* (1843), 6 Man. & G. 151; 6 Scott, N.R. 851; 12 L.J.C.P. 322; 134 E.R. 844; 26 Digest (Repl.) 155, 1157.

Also referred to in argument:

Kelly v. Solari (1841), 9 M. & W. 54; 11 L.J.Ex. 10; 6 Jur. 107; 152 E.R. 24; 35 Digest (Repl.) 164, 512.

H

Marriot v. Hampton (1797), 7 Term Rep. 269; 2 Esp. 546; 101 E.R. 969; 12 Digest (Repl.) 630, 4858.

Milnes v. Duncan (1827), 6 B. & C. 671; 9 Dow. & Ry.K.B. 731; 5 L.J.O.S.K.B. 239; 108 E.R. 598; 35 Digest (Repl.) 168, 540.

Lucas v. Worswick (1833), 1 Mood. & R. 293, N.P.; 35 Digest (Repl.) 164, 511.

I

Harris v. Loyd (1839), 5 M. & W. 432; 9 L.J.Ex. 95; 151 E.R. 182; 35 Digest (Repl.) 167, 528.

Cripps v. Reade (1796), 6 Term Rep. 606; 101 E.R. 728; 35 Digest (Repl.) 167, 537.

Cox v. Prentice (1815), 3 M. & S. 344; 105 E.R. 641; 35 Digest (Repl.) 112, 122.

Rule Nisi obtained by defendant to enter a verdict for him in an action for money had and received.

In 1850 the defendant Short, an attorney at Bristol, lent to one George Carter a sum of £200, and he took as security from George Carter and from two of his

brothers, as sureties, a bond in the penal sum of £400. Carter also gave an equitable charge upon some lands in the county of Monmouth. The equitable charge stated: A

"In consideration of Francis Short of the city of Bristol, gentleman, having this day lent and advanced to me the sum of £200 sterling upon the joint and several bond or obligation in writing, of myself and John Carter the younger, and Charles Carter, both of the parish of Clifton in the city and county of Bristol, brewers and maltsters, as my sureties, bearing even date herewith in the penalty of £400 conditioned for the payment of £200, with interest on the same at 5 per cent. per annum, and upon my undertaking to execute to him a valid and effectual legal mortgage of my one undivided eighth part or share of and in the freehold, leasehold, and copyhold estates of Edwin Carter, late of the town of Chepstow in the county of Monmouth, and also of the said parish of Clifton, Esq., deceased, to which I am entitled under and by virtue of his last will and testament in writing, dated the 12th day of January, 1846." B C

Then he bound himself at his own costs and charges, when required, to execute the mortgage.

Short died in the year 1853. Stuckey's Banking Co. (the plaintiff suing as their public officer) had transactions with the Carters. There were six or seven brothers, and there was a firm of John and Charles Carter, who carried on business as brewers in Bristol. That firm, and especially Charles Carter, who was a member of it, became largely indebted to Stuckey's Bank, and George, who had borrowed the £200 of Mr. Short, and given the bond and equitable charge, had accepted some bills in favour of his brothers, in order to secure the bank. After these bills had become due the bankers purchased from him his share and interest in the Monmouthshire estates subject to the charge, among other charges, which he had made to Mr. Short. By a conveyance which was executed on Jan. 25, 1855, George Carter conveyed and assigned and covenanted to surrender the eighth of the freehold, leasehold and copyhold estates which he had under his brother's will. D E

The deed recited, among other things, that F

"by a memorandum by way of equitable charge, bearing date on or about Oct. 19, 1850, the one-eighth part of the said George Carter of and in the hereditaments devised and bequeathed by the said recited will of Edwin Carter deceased, are made liable to the payment of the sum of £200 to Francis Short of the city of Bristol, gentleman, which sum is still due on such security"; G

then there was a recital of the agreement to purchase, which was carried out by a conveyance, and a recital that

"the said George Carter has agreed to sell his one undivided eighth part or share, and the said Peter Freeland Aiken and William Gale Coles has agreed to purchase the same, subject to the encumbrances hereinbefore mentioned." H

They, therefore, took the estate and they stood in George Carter's place.

Some time in the year 1855, an application was made to George Carter for the payment of this £200 upon the bond and the equitable charge; and he referred to the bankers at the same time, explaining the transaction. An application was then made to the bankers, who ultimately paid the amount. Subsequently it turned out that the will under which George Carter assumed to take this property, was a will made in January, 1846, that there was a later will executed in the month of April, 1846, and John Carter, one of the brothers, was executor of both wills. He had proved the former will. Thereupon the title, of course, which George assumed to have under the former will was gone, because it appeared that under the second will he only took an annuity which ceased upon his making any assignment. The bankers thereupon contended that they are entitled to recover this money back, and accordingly brought this action for money had and received for their use. I

A The action was tried before PLATT, B., at the sittings after Hilary Term, when a verdict was returned for the plaintiff, with leave for the defendant to move to enter a verdict for him. The defendant obtained a rule accordingly.

Knowles, Q.C. (Field with him), showed cause against the rule.

M. Smith, Q.C. (Gray with him), supported the rule.

B POLLOCK, C.B.—We are all of opinion that the rule must be absolute. The case, when examined, is quite clear, and the facts lie in a narrow compass. The defendant's testator, Short, had a claim on Carter—a bond and a security on property which Carter afterwards mortgaged to the bank. The defendant, who was the executrix of Short, applied to Carter for payment. He referred her to the bank, who, conceiving that the defendant had a good equitable charge, paid the debt, as they reasonably might do, to get rid of the charge affecting their interest. C In consequence of the discovery of a later will of Edwin Carter, it turned out that the defendant had no title. The bank had paid the money in one sense without any consideration, but the defendant had a perfect right to receive the money from Carter, and the bankers paid for him. They should have taken care not to have paid over the money to get a valueless security, but the defendant has nothing to do with their mistake. D Suppose it was announced that there was to be a dividend on the estate of a trader, and persons to whom he was indebted went to an office and received instalments of the debts due to them, could the party paying recover back the money if it turned out that he was wrong in supposing that he had funds in hand? The money was, in fact, paid by the bank, as the agents of Carter.

E PLATT, B.—I am of the same opinion. The action for money had and received lies only for money which the defendant ought to refund *ex æquo et bono*. Was there any obligation here to refund? There was a debt due to Short, secured by a bond and a supposed equitable charge by way of collateral security. The property on which Short had the charge was conveyed by Carter to the bank. Short having died, the defendant, his executrix, applied to George Carter for payment of the debt due to her husband, the testator. Carter referred her to the bank, who paid the debt, and the bond was satisfied. F The money which the defendant got from her debtor was actually due to her, and there can be no obligation to refund it.

BRAMWELL, B.—My brother Martin, before he left the court, desired me to say that he was of the same opinion, and so am I.

G In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money. Here, if the fact was true, the bankers were at liberty to pay or not, as they pleased. But relying on the belief that the defendant had a valid security, they, having a subsequent legal mortgage, chose to pay off the defendant's charge. It is impossible to say that this case falls within the rule. H The mistake of fact was, that the bank thought that they could sell the estate for a better price. It is true that if the plaintiff could recover back this money from the defendant, there would be no difficulty in the way of the defendant suing Carter.

I In *Pritchard v. Hitchcock* (1) a creditor was held to be at liberty to sue upon a guarantee of bills, though the bills had been in fact paid, but the money afterwards recovered back by the assignees of the acceptor, as having been paid by way of fraudulent preference. But that does not show that the plaintiffs can maintain this action, and I am of opinion they cannot, having voluntarily parted with their money to purchase that which the defendant had to sell, though no doubt it turned out to be different to, and of less value than, what they expected.

Rule absolute.

SLEIGH *v.* SLEIGH

[COURT OF EXCHEQUER (Parke, Alderson, Rolfe and Platt, BB.), December 5, 1849, June 4, 1850]

[Reported 5 Exch. 514; 19 L.J.Ex. 845; 15 L.T.O.S. 475;
155 E.R. 224]

Bill of Exchange—Accommodation bill—Payment by drawer to holder without acceptor's request and without notice of dishonour—Right of drawer to recover from acceptor.

The drawer of an accommodation bill **held** not to be entitled to sue the acceptor for money paid to his (the acceptor's) use to the holder of the bill, unless not only the money paid pro tanto discharged the liability of the acceptor, but also the payment was made at his request, either express or implied.

Notes. Explained: *Re Chetwynd's Estate, Dunn's Trust, Ltd. v. Brown*, [1937] 3 All E.R. 530. Referred to: *Re Fox, Walker & Co. v. Bishop* (1880), 15 Ch.D. 400.

As to accommodation instruments, see 3 HALSBURY'S LAWS (3rd Edn.) 178-179; and for cases see 6 DIGEST (Repl.) 120 et seq.

Cases referred to in argument:

Bacon v. Searles (1788), 1 Hy. Bl. 88; 126 E.R. 53; 6 Digest (Repl.) 322, 2342.

Pownal v. Ferrand (1827), 6 B. & C. 439; 9 Dow. & Ry.K.B. 603; 108 E.R. 513; sub nom. *Pownall v. Tenant*, 5 L.J.O.S.K.B. 176; 6 Digest (Repl.) 282, 2068.

Huntley v. Sanderson (1833), 1 Cr. & M. 467; 3 Tyr. 469; 2 L.J.Ex. 204; 149 E.R. 483; 6 Digest (Repl.) 274, 2004.

Alexander v. Vane (1836), 1 M. & W. 511; 2 Gale, 57; Tyr. & Gr. 865; 5 L.J.Ex. 187; 150 E.R. 537; 26 Digest (Repl.) 134, 954.

Simpson v. Penton (1834), 2 Cr. & M. 430; 4 Tyr. 315; 3 L.J.Ex. 126; 149 E.R. 828; 26 Digest (Repl.) 38, 240.

Exall v. Partridge (1799), 8 Term Rep. 308; 3 Esp. 8; 101 E.R. 1405; 26 Digest (Repl.) 134, 962.

Broughton's Case (1600), 5 Co. Rep. 24 a; 77 E.R. 86; 7 Digest (Repl.) 210, 469.

Hodgson v. Shaw (1834), 3 My. & K. 183; 3 L.J.Ch. 190; 40 E.R. 70, L.C.; 26 Digest (Repl.) 125, 875.

Ex parte Heath (1813), 2 Ves. & B. 240; 2 Rose, 141; 35 E.R. 310, L.C.; 6 Digest (Repl.) 271, 1984.

Rule Nisi obtained by the defendant to enter a nonsuit in an action of assumpsit for money paid to the defendant's use. Plea, non assumpsit.

At the trial, before PARKE, B., it appeared that the action was brought to recover the sum of £25 paid by the plaintiff under the following circumstances. The plaintiff drew and endorsed a bill of exchange for £100 for the defendant's accommodation. It was delivered to the defendant, who accepted it and negotiated it. When due it was not paid by the defendant, but, without being requested to do so by the defendant, the plaintiff paid £25 to the holder, and that sum he sought to recover from the defendant. The bill, not being taken up, remained in the hands of the holder in order that he might recover the balance from the defendant and other parties, and there was no proof of due presentment to the defendant, nor of notice of dishonour. The learned judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit. The defendant obtained a rule accordingly.

Martin and Bernard showed cause against the rule.

Crowder supported the rule.

Cur. adv. vult.

June 4, 1850. PARKE, B., delivered the following judgment of the court.—The question in this case is whether the plaintiff can recover, in an action for money

- A paid to the defendant's use, the sum of £25, which he paid under these circumstances. [His LORDSHIP stated the facts as above set forth.] It must be taken, therefore, for the purposes of this suit, that the plaintiff has paid the money without being compellable at law to do so. To make a person liable in this form of action for money paid to the defendant's use, the plaintiff must not merely show that the money paid pro tanto discharges the liability of the defendant to the holder of the bill, but also that it was paid at the request, express or implied, of the defendant. Here the money paid clearly discharges pro tanto the liability of the defendant, as acceptor, to the holder; and it is also clear that there was no express request from the defendant to the plaintiff to pay the money. It remains, therefore, to be seen whether there was, from the circumstances, an implied request for him to do so.
- C There is no doubt, that, if a person lends his name to another for his accommodation, the party accommodated undertakes to pay the bill at maturity, and further, to indemnify the person accommodating him, in case that person is compelled to pay the bill for him: BYLES ON BILLS OF EXCHANGE (5th Edn.), p. 94; and this, no doubt, is an implied authority to such person to pay it, if he be in that situation that he may be compelled by law to pay the bill, though the holder do not actually compel him to do so; and after payment he may sue the party accommodated for money paid on his account; for such payment is, in truth, under the implied authority given by the contract of accommodation between the parties; and whether this be a payment of the whole bill, or of only a part of it, makes no difference. But the defendant, as the person accommodated, has not, we think, undertaken to indemnify the plaintiff against the consequences of any payment which the plaintiff may voluntarily make with knowledge of the circumstances.

- Whether it is so in cases in which the legal obligation has been discharged by circumstances unknown to him, as for instance, by the creditor having given time to the principal debtor without his knowledge, it is unnecessary to determine; but where a payment is made, as in this case, with the knowledge on the part of the plaintiff that he was not bound to pay, for the want of a notice of dishonour, to which he was unquestionably entitled, we think the payment is not made with the implied authority of the defendant. It is very true, that, if the plaintiff here had voluntarily paid the whole bill, he might have sued the defendant; but this is on another principle, viz., that the plaintiff becomes the holder of the bill after it is paid by him; and a holder so situated may, according to the law-merchant, sue the acceptor upon the bill itself; for the holder may always waive the want of due presentment and notice, and sue the acceptor, who is not discharged by the want of it, but not a collateral party, who is discharged by the same laches. But the holder in such case does not sue him as for the money paid to his use, nor is a request, express or implied, in such a case at all material to his recovering the amount. But here the plaintiff cannot sue on the bill; for, not having paid it, he is not the holder; and he has on these facts only paid money to the holder voluntarily, and without request, express or implied, from the defendant. We are, therefore, of opinion that the defendant is entitled to our judgment and the rule will be absolute to enter a nonsuit.
- H

Rule absolute.

METROPOLITAN SALOON OMNIBUS CO. v. HAWKINS

[COURT OF EXCHEQUER (Pollock, C.B., Martin and Watson, BB.), January 24, 1859]

[Reported 4 H. & N. 87; 28 L.J.Ex. 201; 32 L.T.O.S. 283;

5 Jur.N.S. 226; 7 W.R. 265; 157 E.R. 769]

Company—Proceedings by—Libel—Libel by shareholder—Right of company to maintain action.

A joint-stock company registered under the Companies Acts is entitled to maintain an action for libel, and it is no answer to such an action to say that the defendant is a shareholder.

Notes. Considered: *South Hetton Coal Co. v. North-Eastern News Association, Ltd.*, [1891-4] All E.R.Rep. 548; *Willmott v. London Road Car Co., Ltd.*, [1908-10] All E.R.Rep. 908. Referred to: *Manchester Corp'n. v. Williams*, [1891] 1 Q.B. 94; *Homing Pigeon Publishing Co. v. Racing Pigeon Publishing Co.* (1913), 29 T.L.R. 389; *D. & L. Caterers, Ltd. and Jackson v. D'Anjou*, [1945] 1 All E.R. 563; *National Union of General and Municipal Workers v. Gillian*, [1945] 2 All E.R. 593.

As to torts committed against a corporation, see 9 HALSBURY'S LAWS (3rd Edn.) 90; and for cases see 13 DIGEST (Repl.) 326, 327.

Cases referred to:

- (1) *Longman v. Pole* (1828), Dan. & Ll. 126; Mood. & M. 223, N.P.; 36 Digest (Repl.) 480, 498.
- (2) *Williams v. Beaumont* (1833), 10 Bing. 260; 3 Moo. & S. 705; 3 L.J.C.P. 31; 131 E.R. 904; 10 Digest (Repl.) 1269, 8970.

Also referred to in argument:

Ernest v. Nicholls (1857), 6 H.L.Cas. 401; 30 L.T.O.S. 45; 3 Jur.N.S. 919; 6 W.R. 24; 10 E.R. 1351, H.L.; 9 Digest (Repl.) 96, 429.

Smith v. Hull Glass Co. (1852), 11 C.B. 897; 7 Ry. & Can. Cas. 287; 21 L.J.C.P. 106; 16 Jur. 595; 138 E.R. 729; 11 Digest (Repl.) 562, 3715.

Ridley v. Plymouth Grinding and Baking Co., Kingsbridge Flour Mill Co. v. Plymouth Grinding and Baking Co. (1848), 2 Exch. 711; 17 L.J.Ex. 252; 11 L.T.O.S. 107; 12 Jur. 542; 9 Digest (Repl.) 676, 4469.

Moffat (Moffatt) v. Millengen (Mullengen) (1787), 2 Bos. & P. 125, n.; 2 Chit. 539; 126 E.R. 1193, n.; 1 Digest (Repl.) 61, 451.

Neale v. Turton (1827), 4 Bing. 149; 12 Moore, C.P. 365; 5 L.J.O.S.C.P. 133; 130 E.R. 725; 1 Digest (Repl.) 62, 462.

Paine v. Strand Union (1846), 8 Q.B. 326; 15 L.J.M.C. 89; 6 L.T.O.S. 432; 10 J.P. 391; 10 Jur. 308; 115 E.R. 899; 13 Digest (Repl.) 312, 1229.

Demurrer in an action for libel.

The declaration contained a count for libel, and two counts for slander, each imputing to the plaintiff company insolvency, mismanagement, and an improper and dishonest carrying on of its affairs; concluding with a breach, that by means of committing of those several grievances by the defendant the company were greatly damaged, injured, and brought into public disgrace and contempt, and the value of the property of the company, and of the shares therein, was much depreciated, and the company were otherwise greatly damnified, to the damage, etc. The defendant pleaded to the first count, that before and at the time of the committing of the grievances in that count he was a shareholder in the company, to wit, to the amount of 150 shares, and that he had ever since continued to be, and was at the commencement of the suit, a shareholder in the company. To this plea the plaintiffs demurred.

Edwardes for the plaintiffs.

Stammers for the defendant.

A POLLOCK, C.B.—We are all of opinion that the plea cannot be sustained. That a corporation at common law can sue in respect of a libel there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may. But it would be very odd if a corporation had no means of protecting itself against wrong; and if its property is injured by slander it has no means of redress except by action. Therefore, it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured.

C Then, has a corporation created under the Joint Stock Companies Act, 1856, the same power? Though that Act makes the partnership a corporation, counsel for the defendant says that this is merely for the purpose of carrying on the business mentioned in it, and that it can only sue in respect of matters necessarily incident to that purpose. But in order to carry on business it is necessary that the reputation of such a corporation should be protected, and, therefore, in the case of libel or slander it must have a remedy by action. With respect to the question of partnership, that raises a different consideration. An action cannot be brought by several partners against one of them, for a party cannot be both plaintiff and defendant.

E Then, can a quasi corporation, which as a body may sue other people, maintain an action for libel against one of its own members? There is no doubt that a corporation at common law can sue one of its members for a penalty incurred by breach of a byelaw; and why should not a quasi corporation possess similar powers? Such a corporation may recover a debt from one of its own members—indeed that is a very common form of action, and the money when recovered belongs to the whole body of which the defendant is a member. Then, if a quasi corporation may sue for the recovery of money, surely it must also have the power to protect itself against injury by an action for libel? Upon these grounds I think that the action is maintainable.

G MARTIN, B.—I am of the same opinion. This is an action for libel, in which a joint stock company is plaintiff; and it is argued that such an action cannot be maintained. No doubt, in looking into the old books, nothing on the subject will be found; but in modern times there has sprung up a class of corporations which are trading bodies, such as dock and canal companies, and it is nowhere laid down that such corporations are deprived of the protection of the law in case they are libelled. If so, the Hull Dock Co. might be libelled with impunity by one of its members asserting that a dock was in such a state that no vessel could come into it; but there is no pretence for saying that in such case the company could not sue in respect of the injury done to its trade by the libel. As my Lord said, there may be particular kinds of libel which cannot affect a corporation, but in respect of such libels as are injurious to it an action may be maintained.

I Then is it any answer that the libeller is a member of the corporate body? By the Joint Stock Companies Act, 1856, s. 4, the company became in effect "a body corporate," that is, it has an existence separate and distinct from that of its members; and there is nothing to make an action by the body corporate an action by the individual members. If the defendant had been run over by an omnibus of the company, according to the argument of counsel for the defendant, he could have maintained no action for the injury done to him. But if a member of the corporation may maintain an action against it for injury to him, the corporation may maintain an action against him for injury to it. I said, in the course of the argument, that I did not see why, in the case of an ordinary partnership, the other members might not maintain an action against one partner who libelled it; and *Longman v. Pole* (1) supports that view.

That was an action by five members of a partnership firm, charging the defendant with colluding with the other partner to injure them. It was objected that the plaintiffs could not maintain the action in their joint names, they having no joint capacity independent of the other partner, and no joint partnership fund of their own distinct from him, at the time of the tort charged, and, therefore, it could not be to their joint damage. But LORD TENTERDEN said (Mood. & M. at p. 225):

"I think in point of law this action is maintainable; if a person colludes with one partner in a firm to enable him to injure the other partners, I think they can maintain a joint action against the person so colluding."

Here the defendant is a distinct person from the corporation who sues.

WATSON, B.—I am also of opinion that the plaintiffs are entitled to judgment. It is said that no action for libel will lie by a quasi corporation, because it is created for certain purposes only, and does not differ from an ordinary partnership. But it is clear that an ordinary partnership would have a right to maintain an action against one of its members for injury to their real or personal property, and for all wrongs done to them. Then suppose the firm becomes incorporated, but not for all purposes, is the law to afford no protection to them? One of the safeguards to individuals against libel is the remedy by action; and I cannot conceive a proposition more dangerous than this, that because a company is incorporated they have no appeal to a court of justice if they are libelled. During the argument I referred to the case in the Common Pleas of *Williams v. Beaumont* (2), where a joint stock company were empowered to sue in the name of their chairman, and it was held that they might sue in his name for a libel on the company.

As to the plea of the defendant, it is difficult to deal with it. He says, in effect: "I am a member of the corporation, and, therefore, I have a right to libel it." That is a startling proposition. If it were true, a person might buy a single share in a banking company and libel it with impunity. Such a state of the law would utterly destroy the business of these companies. In this respect I cannot distinguish between corporations created for certain purposes and corporations at common law; they all have a perpetual succession and a common seal. Why are we to make a distinction when the legislature says that these joint stock companies shall be corporations? It is one of the incidents of a corporation that it may sue and be sued in the corporate name, and for the purposes of the suit a member of the corporation is a mere stranger. It would make strange work in the law if we were to hold that the ordinary incidents of a corporation did not attach to companies incorporated by Act of Parliament.

Judgment for plaintiffs.

KEATES v. EARL CADOGAN

[COURT OF COMMON PLEAS (Jervis, C.J., Maule, Cresswell and Williams, JJ.),
January 20, 1851]

[Reported 10 C.B. 591; 20 L.J.C.P. 76; 16 L.T.O.S. 367;
15 Jur. 428; 138 E.R. 284]

*Landlord and Tenant—Liability of landlord—House let in dangerous condition—
No notice by landlord to tenant—No misrepresentation by landlord.*

The tenant of premises alleged that at the time of the agreement for letting the premises were dangerous, that this fact was known to the landlord but not to the tenant, and that the landlord failed to give notice to the tenant that the premises were in a dangerous state.

Held: there being no allegation that the landlord made any misrepresentation, or that he knew that the tenant was acting under an improper belief as to the state of the premises, or that he did not believe that the tenant would make an investigation and satisfy himself as to the state of the premises, there was no obligation on him (the landlord) to give the tenant notice of the state of the premises.

Notes. For statutory obligations of lessors as to the state of premises in certain cases, see the Housing Act, 1957, ss. 6, 7 (37 HALSBURY'S STATUTES (2nd Edn.) 323, 325), and the Housing Act, 1961, ss. 32, 33 (41 HALSBURY'S STATUTES (2nd Edn.) 503, 505). Section 6 of the Housing Act, 1957, has been amended by the London Government Act, 1963, s. 21 (12), Sched. VIII, para. 2 (see 43 HALSBURY'S STATUTES (2nd Edn.), 697, 829).

Referred to: *Peek v. Gurney*, [1861-73] All E.R.Rep. 116.

As to warranty of fitness for habitation, see 23 HALSBURY'S LAWS (3rd Edn.) 574-578; as to misrepresentation by silence, see 26 HALSBURY'S LAWS (3rd Edn.) 839; and for cases see 31 DIGEST (Repl.) 191-192.

Case referred to:

(1) *Hill v. Gray* (1816), 1 Stark. 434, N.P.; 35 Digest (Repl.) 50, 448.

Also referred to in argument:

Parnaby v. Lancaster Canal Co., Lancaster Canal Co. v. Parnaby (1839), 11 Ad. & El. 223; 1 Ry. & Can. Cas. 696; 3 Per. & Dav. 162; 9 L.J.Ex. 338; 113 E.R. 400, Ex. Ch.; 36 Digest (Repl.) 57, 311.

Hodgson v. Richardson (1764), 1 Wm. Bl. 463; 96 E.R. 268; 29 Digest (Repl.) 200, 1406.

Pilmore v. Hood (1838), 5 Bing.N.C. 97; 7 Dowl. 136; 1 Arn. 390; 6 Scott, 827; 8 L.J.C.P. 11; 2 Jur. 991; 132 E.R. 1042; 35 Digest (Repl.) 53, 475.

Langridge v. Levy (1837), 2 M. & W. 519; 6 L.J.Ex. 137; affirmed sub nom. *Levy v. Langridge* (1838), 4 M. & W. 337; 150 E.R. 1458; sub nom. *Levy v. Langridge*, 1 Horn & H. 325; 7 L.J.Ex. 387, Ex. Ch.; 35 Digest (Repl.) 53, 472.

Cornfoot v. Fowke (1840), 6 M. & W. 358; 9 L.J.Ex. 297; 4 Jur. 919; 151 E.R. 450; 31 Digest (Repl.) 192, 3229.

Williams v. East India Co. (1802), 3 East, 192; 102 E.R. 571; 41 Digest 314, 1749.

Demurrer by the plaintiff in an action on the case, in which the plaintiff, a tenant, claimed against his landlord for the failure of the landlord to disclose at the time of the letting that the premises were dangerous; the landlord pleaded he was under no duty to disclose the same, and the plaintiff demurred to this plea.

The first count of the declaration stated that the defendant was possessed of a dwelling-house which, at the time of the agreement thereafter mentioned, and thence until the plaintiff entered into, and occupied, and dwelt therein, was in such

a ruinous and dangerous state and condition as to be dangerous to enter, occupy, or dwell in, and was likely wholly or in part to fall down, and thereby do damage and injury to the persons and property therein, and which the defendant then well knew; and that the plaintiff without any knowledge or notice that the house was in that state and condition, to wit, on Nov. 20, 1848, proposed to the defendant that the defendant should demise to him, and that the plaintiff should take of him as his tenant for the purpose of the plaintiff's immediately occupying and dwelling in the same, the house, and for the term of three years, at a certain rent and upon certain terms to be agreed upon. Thereupon the defendant, well knowing the premises, by an agreement in writing between the defendant, by P., his agent of the one part, and the plaintiff of the other part, the defendant did demise to the plaintiff the dwelling-house for the term of three years at a yearly rent; and the plaintiff thereby also agreed with the defendant to take, and did thereby take the dwelling-house for the agreed term. And the plaintiff thereupon then entered into and upon the dwelling-house, and commenced occupying and dwelling therein. The plaintiff further says, that he did not have any knowledge or notice that the house was in the said state and condition, so as to be dangerous to enter, occupy or dwell in, or that it was likely wholly or in part to fall down; and the defendant, during all the time aforesaid, well knew that the plaintiff had not any such knowledge or notice; and, although the defendant might and ought to, before the plaintiff entered upon and commenced occupying or dwelling in the house, have given to the plaintiff notice that the house was in such state and condition, and likely, wholly or in part, to fall down; yet the defendant, not regarding his duty, did not give notice to the plaintiff that the house was in the said state and condition, by means of which premises, while the plaintiff and his family were occupying the house, a great part of the said house, by reason of its being in such a ruinous and dangerous state and condition, fell down, and was no longer habitable, and thereby the lives of the plaintiff and his family were greatly endangered. This count concluded with an allegation of special damage; of the illness of plaintiff's wife, caused by the premises; of injury to the plaintiff's goods and chattels, and to his trade of a tobacconist.

To the first count the defendant pleaded that it was not his duty to have given to the plaintiff such notice as in the first count mentioned. Special demurrer to this plea.

Cleasby for the plaintiff.

Needham for the defendant.

JERVIS, C.J.—I have felt some difficulty in consequence of *Hill v. Gray* (1), which has been cited as if it had decided without more that the mere allowing a party to act upon a delusion was sufficient to set aside a contract of sale. But in *Hill v. Gray* (1) there was what may be termed a positive aggressive deceit, as appears from the judgment of LORD ELLENBOROUGH, who says (1 Stark. at p. 435):

"He [the plaintiff's agent] saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it."

That difficulty being removed, I think that this declaration does not disclose a sufficient cause of action. It is not contended that there is any implied warranty on the part of the defendant that the house should be fit for immediate occupation, but it is said that because the defendant knew it was in a ruinous state, and did not give notice to the plaintiff of it, he is liable. The plaintiff has not been guilty of any active deceit. It is consistent with the declaration that the defendant knew that the house was in want of repairs, and that the plaintiff might have gone to the defendant and said, "I wish to take that house; will you lease it to me?" and that the defendant said, "Yes, I will." It is not alleged that the defendant made any misrepresentation, or that he knew that the plaintiff was acting under an improper belief as to the state of the house, or that he did not believe that the plaintiff would

A make an investigation and satisfy himself as to the state of the house. This is an ordinary case of letting, and there was no obligation on the party to make a communication as to the state of the house, and there is nothing amounting to deceit on the part of the defendant.

MAULE, CRESSWELL and WILLIAMS, JJ., concurred.

B *Judgment for defendant.*

C ROYAL BRITISH BANK v. TURQUAND

[COURT OF EXCHEQUER CHAMBER (Jervis, C.J., Pollock, C.B., Alderson, B., Cresswell and Crowder, JJ., and Bramwell, B.), May 1, 1856]

D [Reported 6 E. & B. 327; 25 L.J.Q.B. 317; 2 Jur.N.S. 663; 119 E.R. 886]

Company—Borrowing—Authority—Directors given power to borrow subject to resolution of company—Right of lender to assume resolution passed.

E The deed of settlement of a company registered under the Joint Stock Companies Act, 1844, allowed the directors to borrow on bond such sum or sums of money as might from time to time, by a resolution passed at a general meeting of the company, be authorised to be borrowed. By a bond under the seal of the company and signed by two directors, the company acknowledged themselves to be bound to the plaintiffs for £2,000. In an action on the bond, the company pleaded that there had been no resolution authorising the making of the bond.

F **Held:** persons dealing with the company were bound to make themselves acquainted with the statute and the deed of settlement of the company, but they were not bound to do more; a person, on reading the deed of settlement, would find, not a prohibition against borrowing, but a permission to borrow on certain conditions, and, learning that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done; and, therefore, the company was liable whether or not a resolution had been passed.

G **Notes.** Under the Joint Stock Companies Act, 1844 (7 & 8 Vict., c. 110), s. 25 (repealed) upon the complete registration of any company being certified by the Registrar of Joint Stock Companies, such company was empowered (inter alia),
H "to borrow or raise money within the limitations prescribed by any special authority."

I Applied: *Agar v. Athenæum Life Assurance Society* (1858), 3 C.B.N.S. 725. *Athenæum Life Insurance Co. v. Pooley* (1858), 28 L.J.Ch. 119; *Prince of Wales Assurance Co. v. Harding* (1858), E.B. & E. 183. Considered: *Re Athenæum Society, Ex parte Eagle Co.* (1858), 4 K. & J. 549; *Balfour v. Ernest* (1859), 5 C.B.N.S. 601. Distinguished: *Commercial Bank of Canada v. Great Western Rail. Co. of Canada* (1865), 3 Moo.P.C.C.N.S. 295. Considered: *Totterdell v. Fareham Blue Brick and Tile Co.* (1866), L.R. 1 C.P. 674. Explained and Applied. *Fountain v. Carmarthen Rail. Co.* (1868), L.R. 5 Eq. 316. Considered: *Re Land Credit Co. of Ireland, Ex parte Overend, Gurney & Co.* (1869), 4 Ch. App. 460; *Re London, Hamburg and Continental Exchange, Zulueta's Claim* (1870), 5 Ch. App. 444; *East Holyford Mining Co. v. Costelloe* (1871), 19 W.R. 1010. Approved: *Re Bank of Hindustan, China and Japan, Campbell's Case, Hippisley's Case, Alison's Case* (1873), 9 Ch. App. 1. Distinguished: *Re County Palatine Loan and Discount Co.*,

Cartmell's Case (1874), 9 Ch. App. 691. Considered: *Colonial Bank of Australasia v. Willan* (1874), L.R. 5 P.C. 417; *Mahony (Public Officer of National Bank of Ireland) v. East Holyford Mining Co., Ltd.*, [1874-80] All E.R.Rep. 427. Distinguished: *Irvine v. Union Bank of Australasia* (1877), 2 Ch. App. 366. Considered: *Melbourne Banking Corp'n. v. Brougham* (1878), 4 App. Cas. 156. Applied: *Re Briton Medical and General Life Assurance* (1889), 5 T.L.R. 502; *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895-9] All E.R.Rep. 847. Considered: *Duck v. Tower Galvanizing Co.*, [1901] 2 K.B. 314; *Premier Industrial Bank v. Carlton Manufacturing Co. and Crabtree*, [1909] 1 K.B. 106; *Dey v. Pullinger Engineering Co.*, [1920] All E.R.Rep. 591; *A. L. Underwood, Ltd. v. Bank of Liverpool and Martins, Same v. Barclays Bank*, [1924] All E.R.Rep. 230; *Kreditbank Cassel G.m.b.H. v. Schenkers, Ltd.*, [1927] All E.R.Rep. 421; *B. Liggett (Liverpool), Ltd. v. Barclays Bank, Ltd.*, [1927] All E.R.Rep. 451; *British Thomson-Houston Co., Ltd. v. Federated European Bank, Ltd.*, [1932] All E.R.Rep. 448; *Morris v. Kanssen*, [1946] 1 All E.R. 586; *I.R.Comrs. v. Heaver, Ltd.*, [1949] 2 All E.R. 367. Referred to: *Curteis v. Anchor Insurance* (1857), 2 H. & N. 537; *Guest v. Poole and Bournemouth Rail. Co.* (1870), L.R. 5 C.P. 553; *Riche v. Ashbury Railway Carriage and Iron Co.* (1874), L.R. 9 Exch. 224; *Yorkshire Railway Wagon Co. v. MacCure* (1881), 30 W.R. 288; *Ward v. Royal Exchange Shipping Co., Ex parte Harrison* (1887), 58 L.T. 174; *Re Hampshire Land Co.*, [1896] 2 Ch. 743; *Houghton v. Nothard, Lowe and Wills, Ltd.*, [1927] 1 K.B. 246; *Rama Corp'n., Ltd. v. Proved Tin and General Investments, Ltd.*, [1952] 1 All E.R. 554.

As to contracts of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 58-60, 430-432; as to condition precedent to borrowing, see *ibid.* 462-463; and for cases see 9 DIGEST (Repl.) 94-97, 660-661; 10 DIGEST (Repl.) 758-762.

Cases referred to in argument:

Ridley v. Plymouth Grinding and Baking Co., Kingsbridge Flour Mill Co. v. Plymouth Grinding and Baking Co. (1848), 2 Exch. 711; 17 L.J.Ex. 252; 11 L.T.O.S. 107; 12 Jur. 542; 9 Digest (Repl.) 676, 4469.

Smith v. Hull Glass Co. (1852), 11 C.B. 897; 7 Ry. & Can. Cas. 287; 21 L.J.C.P. 106; 16 Jur. 595; 138 E.R. 729; 9 Digest (Repl.) 562, 3715.

Re Sea, Fire and Life Assurance Co., Greenwood's Case (1854), 3 De G.M. & G. 459; 2 Eq. Rep. 260; 23 L.J.Ch. 966; 22 L.T.O.S. 338; 18 Jur. 387; 2 W.R. 322; 43 E.R. 180, L.C. & L.J.J.; 36 Digest (Repl.) 480, 503.

Collins v. Blantern (1767), 2 Wils.K.B. 342; 95 E.R. 847; 7 Digest (Repl.) 254, 927.

Paxton v. Popham (1808), 9 East, 408; 103 E.R. 628; 7 Digest (Repl.) 254, 928.

East Anglian Railways Co. v. Eastern Counties Rail. Co. (1851), 11 C.B. 775; 7 Ry. & Can. Cas. 150; 21 L.J.C.P. 23; 18 L.T.O.S. 138; 16 Jur. 249; 138 E.R. 680; 10 Digest (Repl.) 1255, 8850.

Hill v. Manchester and Salford Waterworks Co. (1833), 5 B. & Ad. 866; 2 Nev. & M.K.B. 573; 3 L.J.K.B. 19; 110 E.R. 1011; 10 Digest (Repl.) 1246, 8734.

Horton v. Westminster Improvement Comrs. (1852), 7 Exch. 780; 21 L.J.Ex. 297; 19 L.T.O.S. 219; 155 E.R. 1165; 7 Digest (Repl.) 201, 361.

Appeal by the defendant from a decision of the Court of Queen's Bench (LORD CAMPBELL, C.J., COLERIDGE and ERLE, JJ.), reported 5 E. & B. 248, on demurrer, in an action brought by the plaintiffs against the defendant, as official manager of Cameron's Coalbrook Steam, Coal, and Swansea and London Rail. Co., according to the Joint Stock Companies Winding-Up Acts (the company being completely registered under the statute 7 & 8 Vict., c. 110) for the non-payment of the sum of £2,000 for which they alleged the company, before the defendant became official manager, to wit on Mar. 6, 1850, by their writing obligatory, sealed with their common seal, acknowledged themselves to be held and firmly bound to the plaintiffs, to be paid to the plaintiffs on request; for which payment the company did bind themselves and their successors.

A The first plea set out the condition, which appeared to be for securing to the plaintiffs, who were bankers, such sum as the company should, to the amount of £1,000, owe to plaintiffs on the balance of the account current, from time to time, and for indemnifying plaintiffs to that amount from losses incurred by reason of the account between plaintiffs and the company. The plea further set out clauses of the registered deed of settlement of the company, by which it appeared that the directors were authorised, under certain circumstances, to give bills, notes, bonds or mortgages: and one clause provided that the directors might borrow on bond such sums as should, from time to time, by a general resolution of the company, be authorised to be borrowed. The plea averred that there had been no such resolution authorising the making of the bond, and that the same was given and made without the authority or consent of the shareholders of the company.

C The replication set out the deed of settlement further, by which it appeared that the company was formed for the purpose of carrying on mining operations and forming a railway. It then alleged that, at a general meeting of the company, it was resolved

D "that the directors of the said company should be, and they were thereby, authorised to borrow on mortgage, bond or otherwise, such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the provisions of the deed of settlement and Act of Parliament. And the said resolution and determination has thence hitherto remained unrescinded."

E The replication then alleged that afterwards, in accordance with the authority granted by the general meeting, the directors agreed to enter into the bond, and appointed two directors to affix their seal, and the secretary to sign the bond, which bond, so sealed and signed, plaintiffs took

"in full faith and belief of the validity of the said resolutions, and that the said bond was authorised by, and would be a valid and binding security upon, the said company."

F The plaintiffs also demurred to the plea. The defendant joined in demurrer, and also demurred to the replication. Joinder. The Court of Queen's Bench gave judgment for the plaintiffs. The defendant appealed.

Phipson for the defendant.
Bovill for the plaintiffs.

G **JERVIS, C.J.**—I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. I incline to think that the question which has been principally argued both here and in that court does not necessarily arise, and need not be determined. My impression is (though I will not state it as a fixed opinion) that the resolution set forth in the replication goes far enough to satisfy the requisites of the deed of settlement. The deed allows the directors to borrow on bond such sum or sums of money as shall from time to time, by a resolution passed at a general meeting of the company, be authorised to be borrowed: and the replication shows a resolution, passed at a general meeting, authorising the directors to borrow on bond such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the deed of settlement and the Act of Parliament; but the resolution does not otherwise define the amount to be borrowed.

I That seems to me enough. If that be so, the other question does not arise. But whether it be so or not we need not decide; for it seems to us that the plea, whether we consider it as a confession and avoidance or a special non est factum, does not raise any objection to this advance as against the company. We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. The party here, on reading the deed of settlement, would find, not a prohibition from borrowing,

but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done. A

POLLOCK, C.B., ALDERSON, B., CRESSWELL, J., CROWDER, J., and BRAMWELL, B., concurred. B

Appeal dismissed.

Re BRIDGMAN

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), June 29, 1860] C

[Reported 1 Drew. & Sm. 164; 29 L.J.Ch. 844; 2 L.T. 560;
6 Jur.N.S. 1065; 8 W.R. 598; 62 E.R. 340] D

Trustee—Removal—Bankruptcy—Discretion of court.

The powers of removing bankrupt trustees are not imperative, but discretionary. Bankruptcy of a trustee is good ground for his removal if the bankruptcy in the smallest degree endangers the trust property in his hands, but the mere fact of a trustee having, at some time or other during his trusteeship, been a bankrupt, is not, in itself, a ground for his removal. E

Notes. The Bankruptcy Law Consolidation Act, 1849, s. 130, has been repealed: under the Bankruptcy Act, 1914, s. 38 (2 HALSBURY'S STATUTES (2nd Edn.) 373) the property of the bankrupt divisible among his creditors shall not comprise property held by the bankrupt on trust for any other person. The Trustee Act, 1850, s. 32, has been repealed and replaced by the Trustee Act, 1925, s. 41. F

Distinguished: *Re Adams' Trust* (1879), 12 Ch.D. 634.

As to removal of trustee, see 38 HALSBURY'S LAWS (3rd Edn.) 941-943; as to trust property on bankruptcy of trustee, see 2 HALSBURY'S LAWS (3rd Edn.) 435-436; as to whether exercise of statutory powers are obligatory or permissive, see 36 HALSBURY'S LAWS (3rd Edn.) 433 et seq.; and for cases see 43 DIGEST 755-758. For the Trustee Act, 1925, s. 41, see 26 HALSBURY'S STATUTES (2nd Edn.) 118. G

Case referred to:

(1) *Re Elford, Ex parte Gennys* (1829), Mont. & M. 258; 43 Digest 704, 1438. H

Also referred to in argument:

Bainbrigge v. Blair (1841), 3 Beav. 421; 43 Digest 757, 2002.

Macdougall v. Paterson (1851), 11 C.B. 755; 6 Exch. 337, n.; 2 L.M. & P. 681; Cox, M. & H. 544; 21 L.J.C.P. 27; 18 L.T.O.S. 139; 15 J.P. 803; 15 Jur. 1108; 138 E.R. 672; 42 Digest 720, 1401. I

Petition presented under the Bankruptcy Law Consolidation Act, 1849, praying the removal of a Mr. Bridgman from the trusteeship of settlement funds, and the appointment of a new trustee in his place.

The petitioners were some of Mr. Bridgman's cestuis que trust, and the grounds on which it was sought to remove Mr. Bridgman and to appoint a new trustee were that Mr. Bridgman had some time since been a bankrupt, although it was admitted that he was now perfectly solvent, and that he had been guilty of vexatious conduct in the management of the trust. The bankruptcy occurred in 1855. In 1856, Mr.

A Bridgman had obtained a first class certificate in bankruptcy. There was no suggestion that his continuing as a trustee would endanger the trust property. But for the expense of realising his estate, his creditors would have been paid in full; and since his bankruptcy he had been appointed to an official situation of some importance.

B By the statute 6 Geo. 4, c. 16, s. 79, it was enacted, and by the Bankrupt Law Consolidation Act, 1849, s. 130, it is re-enacted,

C "that if any bankrupt shall as trustee be seised, possessed of, or entitled to, either alone or jointly, any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any government stocks, funds or annuities, or any of the stock of any public company either in England, Scotland or Ireland, it shall be lawful for the Lord Chancellor, on the petition of the person entitled in possession to the receipt of the rents, issues and profits, dividends, interest, or produce thereof, on due notice given to all other persons (if any) interested therein, to order the assignees and all persons whose act or consent thereto is necessary, to convey, assign, or transfer the said estates, interest, stock, funds, or annuities to such person as the Lord Chancellor shall think fit, upon the same trusts as the said estates, interests, stocks, funds, or annuities, were subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect, and also to receive and pay over the rents, issues and profits, dividends, interest, or produce thereof as the Lord Chancellor shall direct."

E By the Trustee Act, 1850, s. 32, it was enacted,

"that whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee, or new trustees, either in substitution for, or in addition to any existing trustee or trustees."

F *Glasse, Q.C. (Baggallay with him)*, supported the prayer of the petition. *Karslake* for Mr. Bridgman. *Shapter, Q.C.*, for other parties.

G **KINDERSLEY, V.-C.**—I must say, under all the circumstances of this case, I very much regret that this petition should ever have been presented; the more so as it appears to me to contain charges which are wholly irrelevant to its real object. The intention of the legislature, when it enacted the statute 6 Geo. 4, c. 16, was to protect property of cestuis que trust in the hands of their trustees, and if the trustees became bankrupt, to secure it to the cestuis que trust in the same state as it was before the trustee's bankruptcy. No doubt that was the intention of the legislature. The language of that Act was adopted, and is the same as that used in the Bankrupt Law Consolidation Act, 1849. [His Honour read the two sections as above stated.] Those Acts give this court a power—irrespective of the question whether the power so given is imperative or discretionary—but they give this court a power to remove a bankrupt trustee—a trustee who has been a bankrupt—and to appoint a new one in his place. Long before these Acts, it was settled law that property in the hands of a trustee, merely as such, did not vest in his assignees on the bankruptcy. But then there arose a doubt whether the assignees were necessary parties to a conveyance of the trust property; and upon that *Ex parte Gennys* (1) was decided. There was also another doubt, which was, whether this court—that is, whether a vice-chancellor—could exercise any jurisdiction in the bankruptcy, independent of the Lord Chancellor's jurisdiction in such cases. That doubt was resolved in the affirmative.

This court, then, having jurisdiction, both by these statutes and upon the authorities, to deal with the matter, is it the law of the land that if application is made to this court for the removal of a trustee who has some time or other during his

trusteeship been a bankrupt—is it, I repeat, the law of the land that this court must remove him from the trust? Do the words of the bankruptcy statutes impose any such imperative obligation on this court? I am clearly of opinion that they impose no such imperative duty. When these Acts say that “it shall be lawful” for this court to do or abstain from doing a particular thing, they clearly give the court a discretionary power, and the mere fact of the bankruptcy of a trustee does not enable this court to remove him from the trust, while he is performing his duty in it. Just look at what the consequences might be if it were so: a quarrel might arise between the parties, any one of them might come to this court, and might get a compulsory order, on an ex parte case, for the removal of the trustee. I am quite of opinion that in all such cases as these, the powers given to this court by the Bankruptcy Acts are discretionary, and not imperative. A

Now we come to the other part of this case, the conduct of Mr. Bridgman in this trust. In the month of November, 1856, Mr. Bridgman obtained a first-class certificate in bankruptcy. At that time his assets consisted of a sum of £10,000 or £12,000, which was due to him in this very trust, he having advanced that sum for the benefit of the petitioners, who now seek to have him removed from the trust. I believe he claimed some other small sums, but his assets may be stated to have then been about £10,000 or £12,000. Evidence has been adduced to show that, but for the expense of realising his estate, it would have paid all his creditors in full. A circumstance which, I think, proves that the bankruptcy alone did not render him an unfit person to be a trustee. Since the bankruptcy he has been appointed to some official situation, which he still holds, a situation I believe of considerable importance. There is no sort of suggestion that the continuing him in the trust will endanger the trust property, and I assume that there is no ground for anything of the sort; for most assuredly I think, if such a suggestion could have been, it would have been made in this case. What was said, however, is this, that since the bankruptcy Mr. Bridgman has been guilty of vexatious conduct, and that that conduct related to certain sales of part of the trust property. B C D E

[His Honour then considered the allegation that Mr. Bridgman had been vexatious in improperly impeding the sale of part of the trust property, and continued:] F No real case of vexatious conduct has been established against him. And even if it had been, inasmuch as this petition is presented under the bankruptcy statute, the question of vexatious conduct is altogether irrelevant. To say that he has been guilty of vexatious conduct as trustee, is in no sort of way connected with the objection that is based on the fact of his having been a bankrupt. If any charge of vexatious conduct is made against a trustee, it must be by bill, and not by petition G under the Bankruptcy Act. Bankruptcy is a good ground for the removal of a trustee when it, in the smallest degree, endangers the property in his hands. But there is, as I have already said, no suggestion in this case of anything of the sort, and I may observe also, there is no suggestion that Mr. Bridgman had any difficulty in obtaining his first-class certificate. Moreover, after he has obtained it, in 1856—up to the presentation of this petition—all parties deal with him as trustee, and never, until they actually present this petition, dream of suggesting the bankruptcy as a ground for his removal. Now they only allege it as an additional ground. It appears to me, upon the whole of this case, that even if vexatious conduct be in itself a ground for the removal of a trustee, no such conduct has been established here; that the Bankruptcy Act does not render it imperative upon this court to remove a bankrupt trustee, merely on that ground; that the circumstances in this case do not call for the exercise of the discretionary power of this court for Mr. Bridgman's removal from this trust; and that all I can, therefore, do, is to dismiss this petition with costs. H I

Petition dismissed.

A

HOPE v. HOPE

[COURT OF APPEAL IN CHANCERY (Lord Cranworth, L.C.), May 27, June 3, 5, 7, August 5, 1854]

B

[Reported 4 De G.M. & G. 328; 2 Eq. Rep. 1047; 23 L.J.Ch. 682;
24 L.T.O.S. 29; 2 W.R. 698; 43 E.R. 534]

Infant—Custody—Jurisdiction of court—Children of English father born and resident abroad.

C

The husband, an English subject, and the wife, a French subject, were married in 1836; both were resident in France and all the children were born in France. In February, 1853, the parties separated, and the husband came to reside in England. The wife continued to reside in France and retained two of the children under interim orders for their custody obtained in the French courts, the remainder of the children being resident in England. In August, 1853, the wife commenced proceedings for divorce in England. The husband having settled a sum on trust for the children, on Nov. 14, 1853, a petition was filed in the name of the infant children against both the husband and the wife to make the children wards of court. The wife was served with an order directing her to concur with her husband in taking such steps as should be necessary according to the laws of France to authorise the delivery up of the two children to the husband. The wife opposed the husband's application in the French courts for such delivery up, and she obtained a further interim order for their custody. The husband now applied for a further order to be made on the wife that within one week she deliver up the two children to him or otherwise concur with the husband in taking such steps, etc. The wife opposed this application on the point of jurisdiction.

D

E

Held: the Court of Chancery had jurisdiction over the custody of infants born of an English subject although such children were born and resident abroad.

F

Notes. The wardship of infants is assigned to the Chancery Division by s. 56 (1) (b) of the Supreme Court of Judicature (Consolidation) Act, 1925 (18 HALSBURY'S STATUTES (2nd Edn.) 490). An order of court is required to make an infant a ward of court by s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949 (28 HALSBURY'S STATUTES (2nd Edn.) 777).

G

Considered: *Brown v. Collins* (1883), 25 Ch.D. 56. Followed: *Re Willoughby* (1885), 30 Ch.D. 324. Considered: *Re Liddell's Settlement Trusts, Liddell v. Liddell*, [1936] 1 All E.R. 239. Applied: *Harben v. Harben*, [1957] 1 All E.R. 379. Referred to: *Ex parte Blyth*, [1944] K.B. 532.

As to wards of court and who may be made wards, see 21 HALSBURY'S LAWS (3rd Edn.) 217 et seq.; and for cases see 28 DIGEST (Repl.) 707 et seq.

H

Motion by the husband that his wife within one week after service of the order be ordered to deliver up to the husband the two sons of the marriage which were residing with the wife in France and that the wife be ordered to concur with the husband in taking all such steps as might be necessary and proper according to the laws of France for causing the children to be so delivered up to the husband, their father.

I

This motion originally came before LORD ROMILLY, M.R., on May 9, 1854, when His Lordship expressed a strong view that he had jurisdiction to make such an order. Both parties being unwilling to go into the merits, it was arranged, by leave of the court, that the motion should be heard by LORD CRANWORTH, L.C., as an original motion on the point as to jurisdiction.

The husband, a British subject, and the wife, a French subject, were married in July, 1836. Both resided in France and there were five children of the marriage, all born in France. Differences arose between the parties and in February, 1853, the husband brought the five children to England and placed them in the care of relatives. Shortly afterwards the husband permitted his two sons to reside with his

wife in France on her written undertaking to return them to her husband at the end of three months. On June 29, 1853, the French Appeal Court confirmed previous interim orders for the two sons to remain with the wife but decreed that they should be delivered to the husband on Sept. 15, 1853 "if it had not been otherwise ordered on this head by the English tribunals." In August, 1853, the wife commenced proceedings in England for divorce and these proceedings were still pending. On Oct. 5, 1853, on the wife's application, the French court decreed that the two sons should remain in her custody for four months. The husband having settled a sum in trust for the children, on Nov. 14, 1853, a petition was filed on behalf of the children against both husband and wife to make the infant children wards of court. On Nov. 22, 1853, an order was obtained for substituted service on the wife and an order was made prefaced by a declaration that by the law of England the custody of the children belonged to the husband and directing the wife to concur with her husband in taking all such steps as might be proper and necessary according to the laws of France to cause the delivery up of the children to the husband. This order was served on the wife in France. The husband applied to the French court for delivery up of the children, and the application was opposed by the wife and by a representation that she had appealed against the order to the House of Lords and that pending such an appeal the order was in abeyance. The French court thereupon declined to interfere with a further interim order made as to the children remaining with the wife. The husband now applied that notwithstanding the previous order served on the wife, a further order, in similar terms, for delivery up of the children within one week, be made against the wife. This application was opposed by the wife on the point of jurisdiction.

Roundel Palmer and Amphlett for the children.

Sir Richard Bethell, and Terrel and Wise, for the wife.

J. W. Stephen for the husband.

LORD CRANWORTH, L.C.—I do not think this case admits of any doubt. In my former order I declared that by the law of England the custody of the children belonged to the husband; and in order that nothing in that former order might, by any possibility, lead the parties into conflict with the laws of France, the order, was upon deliberation, cautiously worded, directing the wife to concur with the husband in taking all such steps as might be necessary, according to the laws of France, to cause the delivery up of the children to their father. What has been done is this. In the first instance the father made an application to the French tribunal to obtain the delivery up of the children; and as this question was there treated not altogether as a private one, but one in which the state had an interest in the protection of the children, an interim order had been made for their remaining with their mother. Then came the application of the husband to this court, when an order was made of such a nature as could not lead this court into any conflict with the French courts. The course which the wife ought to have taken was to have instructed counsel, if necessary, to consent on her part to the delivery up of the children. If then she had so acted, and then the French courts had said, "For certain reasons, that cannot be acceded to," I should have been the last individual to have pretended to exercise any jurisdiction over what was done by the French tribunals, for whose decisions I have the most profound respect.

The wife, however, has not thought fit to adopt that course, and an argument has been raised by her against the application made by her husband. She does what my former order in substance forbids her to do—she appears upon the application of her husband and opposes it. The question is, what course am I now to adopt? If the parties were within this court's jurisdiction, I should make a short order upon the wife to do what she was ordered to do by my former order within a few days, or to stand committed. The course which I shall take as dictated by the peculiar circumstances of the case is this. I shall preface my order by declaring that, according to the laws of this country, an appeal to the House of Lords does not suspend the execution of an order of the Lord Chancellor, unless, under special

- A circumstances, a special order had been previously obtained to suspend it. No application for such an order has been made, nor do I think that I should have acceded to it if it had been. I shall then go on to order that the wife do, within a week from the service of this order, deliver up the children to the husband, or otherwise concur with him in taking such steps as may be necessary according to the laws of France to authorise her to deliver up the children to him. I have no
- B doubt that the effect of this declaration, when the case comes again before the French courts, will be that they will give me credit for having correctly enunciated the law of this country, as I undoubtedly give them credit of correctly stating the French law. To so much of the notice of motion as asks that the wife may be restrained from making any application to the French courts, I shall not accede, inasmuch as such an order may be misunderstood in those courts.

C

Order accordingly.

D

JONES v. PROVINCIAL INSURANCE CO.

[COURT OF COMMON PLEAS (Sir Alexander Cockburn, C.J., Cresswell, Willes and Williams, JJ.), May 30, July 4, 1857]

E

[Reported 3 C.B.N.S. 65; 26 L.J.C.P. 272; 30 L.T.O.S. 102;
8 Jur.N.S. 1004; 5 W.R. 885; 140 E.R. 662]

Insurance—Life assurance—Proposal—Non-disclosure by assured of material facts—Facts not believed by assured to be material—Illness of which assured knew, without being aware it tended to shorten life—Limitation by underwriter of right to be informed.

F

In the personal declaration made and signed by the assured, which was to form the basis of a contract of life assurance, he stated that he was not aware of any circumstance, or that he had any disorder, tending to shorten his life, or to make an assurance on his life more than ordinarily hazardous. The question arose whether the policy could be avoided if the assured had to his knowledge had attacks of ill-health without being aware that their effect was to tend to shorten his life or to render an assurance on his life more than usually hazardous.

G

Held: the underwriters had so limited their rights that the declaration would only be untrue if the assured not only was aware of some circumstance or disorder, but also was aware that its effect was to tend to shorten life or to render an assurance on his life more than usually hazardous, and, those not being the facts, an action on the policy by the personal representative of the deceased assured succeeded.

H

Notes. Applied: *British Equitable Insurance v. Great Western Rail. Co.* (1868), 38 L.J.Ch. 132.

As to non-disclosure and misrepresentation in relation to insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 185 et seq. As to material facts affecting life insurance, see *ibid.*, pp. 275-277. For cases, see 29 DIGEST (Repl.) 384-386.

I

Case referred to:

- (1) *Lindenau v. Desborough* (1828), 8 B. & C. 586; 108 E.R. 1160; sub nom. *Von Lindenau v. Resborough*, 3 C. & P. 353; 3 Man. & Ry.K.B. 45; 7 L.J.O.S.K.B. 42; 29 Digest (Repl.) 380, 2890.

Also referred to in argument:

- Anderson v. Fitzgerald* (1853), 4 H.L.Cas. 484; 21 L.T.O.S. 245; 17 Jur. 995; 10 E.R. 551, H.L.; 29 Digest (Repl.) 382, 2895.

Carter v. Boehm (1766), 3 Burr. 1905; 1 Wm. Bl. 593; 97 E.R. 1162; 29 Digest (Repl.) 42, 3. A

Mayne v. Walter (1782), 3 Doug.K.B. 79; 99 E.R. 548; 29 Digest (Repl.) 211, 1519.

Bufe v. Turner (1815), 6 Taunt. 338; 2 Marsh. 46; 128 E.R. 1065; 29 Digest (Repl.) 471, 3398.

Duckett v. Williams (1834), 2 Cr. & M. 348; 4 Tyr. 240; 3 L.J.Ex. 141; 149 E.R. 794; 29 Digest (Repl.) 402, 3018. B

Rule Nisi obtained by the defendant for a new trial in an action on a policy of life assurance brought by the personal representative of John Powell Jones, deceased, against the Provincial Insurance Co. upon a policy of insurance for £1,000. The cause was tried before MARTIN, B., who gave a verdict for the plaintiff for the amount claimed. C

Knowles, Q.C., Edward James, Q.C., and Colin Blackburn for the plaintiff showed cause against the rule.

Hugh Hill, Q.C., and Manisty for the defendant in support of the rule.

Cur. adv. vult.

July 4, 1857. **WILLIAMS, J.**, delivered the following judgment of the court.— D
This was an action brought by the plaintiff as administrator of John Powell Jones, deceased, against the Provincial Insurance Co. upon a policy of insurance for £1,000, effected by the intestate upon his own life in the office of the defendants on Feb. 28, 1855. The policy stated that the intestate had delivered into the office of the defendants a declaration in writing, signed by him and being of the same date as the policy, and which it was agreed should be the basis of the contract of E
assurance. By this declaration, actually signed, it was declared that the age of the assured did not exceed twenty-nine years; that he had had the smallpox or cowpox; that he had not certain specified diseases; that no proposal to insure his life had been declined at any office; that he was then in good health, and did ordinarily enjoy good health, and that he was not aware of any circumstance or disorder tending to shorten his life or to render an assurance on his life more than ordinarily F
hazardous, unless anything stated in answer to certain questions which preceded the declaration might be so considered. The assured also thereby declared that the medical and private referees named by him in answer to two of those questions were competent to give information as to his past and present state of health and habits of life. The declaration so made was, in some respects, erroneously recited in the policy, particularly in adding to the statement that the assured had never been G
afflicted with the specified diseases, the words "or any other disease, ailment, or infirmity tending to the shortening of life." It, however, also contained the statement that the intestate

"was not aware of any circumstance, or that he had any disorder tending to shorten his life or to make an assurance on his life more than usually hazardous." H

The declaration in the cause is in the usual form, stating the policy, the payment of the premiums, the death of the assured, and the performance of conditions precedent. The important pleas were the second, fourth and fifth. The second plea stated, that the declaration in the policy mentioned was untrue in this, that at the time of making it the assured had been and was afflicted with a disease, ailment or infirmity tending to the shortening of life. The fourth plea was, that the declaration I
was untrue in this, that at the time of making it the assured was aware of circumstances which rendered an assurance on his life more than usually hazardous. The fifth plea was, that the declaration was untrue in this, that at the time of making it the assured was aware that he had a disorder tending to shorten his life, or to render an assurance on it more than commonly hazardous. Issues in fact were joined upon these pleas.

At the trial before MARTIN, B., it appeared that the assured had had a bilious attack, not being one of the specified illnesses, in November, 1853, and another in

A May and June, 1854. The evidence as to the character of these attacks was contradictory. According to the evidence of Mr. Parry, a medical man who attended the assured in both those illnesses, and also in that which caused his death in 1856, there was nothing in the illnesses of 1853 and 1854 to injure, to shorten or affect the life of the assured or make it less good. He stated that the assured recovered rapidly from them, and that his state of health afterwards was as good as ever. The evidence of other medical men conflicted with that of Mr. Parry, but it did not appear that their opinion had ever been communicated to the assured. We are informed by the learned judge that the defendants at the trial relied altogether upon the statement at the foot of the proposal and declaration actually signed by the defendant, commencing, "I, the above-mentioned John Powell Jones," and insisted that under the words

C "I am not aware of any disorder or circumstance tending to shorten my life, or to render an assurance on my life more than usually hazardous,"

it was enough for them to show that the illnesses of 1853 and 1854 did, in fact, tend to shorten the life of the assured, or to render an assurance upon it more than usually hazardous, without showing that the assured was aware that they were of that character. The defendants did not at the trial rely upon the declaration recited in the policy as being more stringent than that actually signed; nor did they refer to or rely upon the answers to the questions preceding the declaration commencing "I the above named," etc. The learned judge ruled, and directed the jury that if the assured honestly believed at the time he made the declaration that the bilious attacks had no effect upon his health, and did not tend to shorten his life, or to render an assurance upon his life more than usually hazardous, the fact that he was aware that he had had those attacks, even though (without his knowledge) they had such a tendency, would not defeat the policy. The jury found for the plaintiff for the amount of the policy.

In Easter Term last a rule was obtained for a new trial upon the ground of misdirection, with reference to the issues raised on the first, second, fourth and fifth pleas in this, that it was immaterial as regards the issues on the first and second pleas, whether John Powell Jones was aware of the untruth of his declaration, provided it was untrue in fact, and in this that as regards the issues on the fourth and fifth pleas, it was immaterial whether John Powell Jones knew of the consequences or effect of the attacks of 1853 and 1854, if he knew of such attacks in point of fact. The rule was fully argued before the Lord Chief Justice, CRESSWELL and WILLES, JJ., and we took time to consider.

In our opinion the course taken at the trial renders it unnecessary to pronounce an opinion on any of the points argued, except the construction of the declaration actually signed. No point was made at the trial as to the effect of the answers to the question preceding the declaration signed, or as to the plaintiff being bound by the recital in the policy though untrue, and there was an obvious good reason for abstaining from insisting upon those matters, inasmuch as they would unquestionably have been distasteful to the jury, who would, after all, assuming the defendants to be right upon those points, have had to pronounce upon the question of materiality. The defendants, therefore, cannot now be heard to argue any such points not raised at the trial; and the only one there raised and decided was, that the declaration "I am not aware of any disorder or circumstance tending to shorten my life," referred not merely to the knowledge of the assured of the disorder or circumstance but also to his knowledge that it tended to shorten life, etc.

In the argument we were referred by the defendants' counsel to several authorities, among others, *Lindenau v. Desborough* (1), as establishing the proposition within his knowledge, touching the subject-matters of the insurance, and that it is insurance on life or property to communicate to his underwriter all material facts within his knowledge, touching the subject-matters of the insurance, and that it is a question for the jury whether any particular part was or was not material to be communicated. It is, however, equally clear that the underwriters may, in any

particular case, limit their right in this respect to that of being informed of what is in the knowledge of the assured, not only as to its existence in point of fact, but also as to its materiality, and in our opinion that is the effect of the limited declaration required in the present case, as to disorder, or circumstances tending to shorten life, or to render an insurance upon the life insured more than ordinarily hazardous. Therefore, upon the construction of that clause which alone was relied upon at the trial, we are of opinion that the direction of the learned judge was right, and that the rule for a new trial ought to be discharged.

Rule discharged.

COOPER v. SLADE

[COURT OF EXCHEQUER CHAMBER (Alderson and Bramwell, BB., Cresswell and Williams, JJ.), February 1, May 9, 1856]

[Reported 6 E. & B. 447; 25 L.J.Q.B. 324; 2 Jur.N.S. 1016]

Elections—Bribery—Payment to voter of expenses of travelling to poll—Legality.

A promise to a voter that he will be paid his expenses of travelling by railway to the poll **held** to be illegal under s. 2 of the Corrupt Practices Prevention Act, 1854 [see now Representation of the People Act, 1949], if the promise is made conditionally on the voter voting for the promisor, but valid if the promise is unconditional. The honesty of the promisor if he does the act prohibited is immaterial.

Notes. As to a voter's travelling expenses, see 14 HALSBURY'S LAWS (3rd Edn.) 216; and for cases see 20 DIGEST (Repl.) 77, 78. For the Representation of the People Act, 1949, see 8 HALSBURY'S STATUTES (2nd Edn.) 573.

Cases referred to:

- (1) *Bayntun v. Cattle* (1833), 1 Mood. & R. 265, N.P.; 20 Digest (Repl.) 120, 999.
- (2) *Brembridge v. Campbell* (1831), 5 C. & P. 186, N.P.; 20 Digest (Repl.) 77, 581.
- (3) *Lord Huntingtower v. Gardiner* (1823), 1 B. & C. 297; 1 L.J.O.S.K.B. 120; 107 E.R. 111; sub nom. *Huntingtower v. Ireland*, 2 Dow. & Ry.K.B. 450; 20 Digest (Repl.) 84, 662.

Also referred to in argument:

Hughes v. Marshall (1831), 2 Cr. & J. 118; 2 Tyr. 134; 1 L.J.Ex. 16; 149 E.R. 49; 20 Digest (Repl.) 89, 709.

Allen v. Hearn (1785), 1 Term. Rep. 56; 99 E.R. 969; 20 Digest (Repl.) 81, 619.

Appeal by the defendant on a bill of exceptions in an action for penalties under the Corrupt Practices Prevention Act, 1854 [repealed by the Representation of the People Act, 1949]. The declaration contained a preliminary averment that, after the passing of the Corrupt Practices Prevention Act, 1854, an election for two members was holden at Cambridge. It then contained seventy-nine counts, all of which were abandoned except the seventh and eighth. The seventh count was for a penalty, "for that defendant promised money to or for one Richard Carter," a voter, "in order to induce" him "to vote at the said election." The eighth count for a penalty, for that defendant "corruptly gave money to or for the said Richard Carter," then being a voter, "on account of the said Richard Carter having voted at the said election."

The action came on for trial at the Cambridge Summer Assizes, 1855, before PARKE, B. It was proved that George Brimley was the election auditor for Cambridge for the year 1854; that the election of two members took place in August, 1854, and was duly held; that Viscount Maidstone and the defendant Slade were

A two candidates on one side; that Samuel Peed was appointed the defendant's agent for election expenses; that Carter was a voter, who at the time of the election was at Huntingdon; and that he received the following letter :

"Cambridge Borough Election. Committee Room, Lion Hotel, Aug. 12, 1854.

B Sir, The Mayor having appointed Wednesday next for the nomination, and Thursday for the polling, you are earnestly requested to return to Cambridge, and record your vote in favour of Lord Maidstone and F. W. Slade, Esq., Q.C.
Yours truly, Charles Balls, Chairman. Your railway expenses will be paid."

C This letter was a printed circular, with the exception of the words "Your railway expenses will be paid," which were in manuscript. Carter, in consequence, went to Cambridge, and voted for Maidstone and Slade. The auditor, Brimley, produced the letter of Aug. 12, with a memorandum written on it: "Allowed 8s. for expenses from Huntingdon, William Thirkettle"; and another: "I allow Mr. R. Carter's claim to have 8s. for travelling expenses, S. Peed." Brimley gave evidence that it was brought to him with only the first memorandum and that he sent it back to have it vouched by Peed, and, on its being brought back with the memorandum signed by Peed, he paid Carter 8s. out of the money deposited with him on account of the defendant.

D William Thirkettle was called as a witness for the plaintiff. He stated that he was clerk to the said Samuel Peed at the election in 1854; there was a committee for conducting the election of Viscount Maidstone and Mr. Slade; Charles Balls acted as chairman of that committee; he, Thirkettle, saw Slade at the committee room, and had, in Slade's presence, heard the question of travelling expenses discussed; Slade said it was legal to pay travelling expenses to bring up the outvoters; Slade gave his opinion that such travelling expenses might be paid for the guidance of Samuel Peed; Peed asked Slade whether it would be legal to get up the outvoters and pay their legal travelling expenses, what they paid out of pocket; and he, Thirkettle, wrote the words "your railway expenses will be paid" at the bottom of the letter after Slade had said that the payment of travelling expenses was legal.

E Counsel for the defendant did not offer any evidence on his behalf, but insisted that upon the evidence so given the defendant was entitled to a verdict on the seventh and eighth counts, and prayed the learned judge so to direct the jury, but the judge held that the several matters so produced and given in evidence on the part of the plaintiff, Charles Henry Cooper, ought to be left to the jury for their consideration. His Lordship directed the jury that, if they were satisfied upon the evidence that the defendant did, by himself or any other person on his behalf
G authorised by him so to do, promise money to Richard Carter in order to induce him to vote for the defendant, they should find the seventh count for the plaintiff, although the sum of money so promised was no more than the fair and reasonable expenses of Carter's travelling from Huntingdon to Cambridge, on the day of the election, and back. The judge further said that, if the jury were satisfied upon the evidence that the defendant did, by himself or any other person on his behalf
H authorised by him so to do, give money to Carter on account of, i.e., that the moving cause of his giving such money was Carter's having voted for the defendant, they should find the eighth count for the plaintiff although the defendant honestly believed he was committing no offence thereby.

I The jury returned a verdict for the plaintiff on the seventh and eighth counts, and the defendant appealed.

Knowles for the defendant.

O'Malley for the plaintiff.

Cur. adv. vult.

May 9, 1856. **ALDERSON, B.**, read the following judgment of the majority of the court.—This case comes before us on a bill of exceptions, and the sole question to be determined is whether the exception taken to the ruling of the learned judge can be sustained. That exception is that the matters produced and given in

evidence on the part of the plaintiff below are not sufficient to entitle the plaintiff to a verdict, and ought not to be left to the jury. In determining this question we are to look to the declaration, and, as that follows the words of the Corrupt Practices Prevention Act, 1854, on which it is founded, we have to construe that statute. We are not called on to go into any general considerations as to what would be bribery if the statute had simply prohibited that offence by that word; what we have to do is to construe a positive law which enacts (by s. 2 of the Act) that to "promise" "money" to a voter "in order to induce any voter to vote," and "corruptly" to give money to a voter "on account of such voter having voted" [see now Representation of the People Act, 1949, s. 99] are severally matters which subject to a penalty the person so promising or giving. A B

On the construction of this statute we are of opinion that a promise to a voter of his travelling expenses, conditionally on his coming and voting for the promisor, is within the first cited part of the enactment, but that a promise of travelling expenses not so conditioned is not. What the statute meant to prohibit was an act directly calculated to influence the vote, and it is impossible to say that a voter finding himself under the necessity of voting for a particular person or losing his travelling expenses, which he has been promised if he does vote, is not under an inducement to vote. The statute cannot mean to regard the condition of the promisor's mind; otherwise such a promise made to A., who has clearly already determined to vote for the promisor and whom the promisor did not propose in any respect to influence, would be out of the statute, while a promise made in the same words to B., who was not in that situation and whom it was intended to influence, would subject the promisor to the penalty. Nor can it be supposed to regard the voter's mind, as, in like way, the same promise might or might not be lawful according to the disposition of the different persons to whom it was made with the same intent. It is the act itself which the statute intended to prohibit. On the other hand, an unconditional promise of travelling expenses to a voter to go to the place of polling, with leave to him to vote or not, as and how he likes, seems to us certainly not a promise of money to induce the voter to vote, being neither a promise with that view nor directly calculated to cause it. D E F

This construction is confirmed by s. 3 of the Act [persons receiving bribes to be deemed guilty of bribery], which must have a corresponding meaning to s. 2, and which certainly would include a voter contracting for travelling expenses for his vote or his agreement to vote, and would exclude the mere unconditional receipt of those expenses. So again s. 4 only prohibits the corruptly giving of meat, etc., for the purpose of corruptly influencing a voter to give a vote. It does not prohibit the bona fide giving of such meat, etc., unconditionally, while s. 23 absolutely prohibits any giving of refreshment to any voter on the day of nomination or day of polling on account of his having polled, or being about to poll, without using any such words as "in order to induce." A giving of refreshment might clearly be within s. 23 and not within s. 2 because not given in order to induce the voter to vote, and it is difficult to see why a promise of travelling expenses should inevitably be within s. 2 when a promise of refreshment may not be. Again, consider the consequence of holding that an unconditional promise to pay travelling expenses is within the statute. Would giving a free passage by railway be so, as a gift of valuable consideration? If not, there seems an absurdity, viz., that to give the price paid for the place is illegal, but to give the place itself is not. If the free passage is within the statute, so also would be taking a person in a private carriage; and the result would be, that any one taking in his own carriage a voter to the place of election without any bargain that he should vote would be guilty of a crime or misdemeanour, punishable by fine and imprisonment, subject to a penalty of £100, and liable to be disqualified for life from voting; which is an alarming and almost an absurd consequence. [As to restrictions on the conveyance of voters to and from the poll and treating see ss. 88-90, 100 of Act of 1949.] G H I

There is no authority on the construction of this Act, and the words of previous Acts are different. The Corrupt Practices Act, 1728 (2 Geo. 2, c. 24) [repealed by

A various Acts], s. 1, required an oath to be taken by the voter that he had received no money or reward or promise for money "in order to give my vote"; and s. 7 imposed a penalty on a voter who agreed for "money or other reward" "to give his vote," and on a person who by gift or reward, or promise of gift or reward, corrupted or procured a person to vote. The Parliamentary Elections Act, 1809 (49 Geo. 3, c. 118) [repealed] prohibited agreements to give money to procure a return; B and see the Corrupt Practices Prevention Act, 1695 (7 & 8 W. 3, c. 4) [repealed by Corrupt Practices Prevention Act, 1854]. Under these Acts some election committees have held the payment of travelling expenses legal, and some illegal, and different opinions have been expressed by judges: see per ALDERSON, B., in *Bayntun v. Cattle* (1), and per TINDAL, C.J., in *Bremridge v. Campbell* (2), ROGERS ON ELECTIONS (7th Edn.), p. 256. But probably the apparent difference of opinion may C have arisen from the difference of the circumstances of the particular cases. It must have been known to the legislature that such payments had been held legal, and it seems strange that, if intended to be absolutely prohibited, they should not have been prohibited in express terms. It will be seen we attach no weight to the proviso at the end of s. 2 of the Act of 1854 [providing that the provisions of the section should not extend to any money paid or agreed to be paid for legal expenses D bona fide incurred at an election]. The same proviso was in the Act of 1809, s. 2, but it is nugatory, as may be seen by reading it affirmatively instead of negatively, viz., "this Act shall only extend to money paid" "for legal expenses." It is an instance of what is very common, viz., a superfluous provision *ex majori cautela*, or, if it has any meaning, it is that given to it by the learned counsel for the plaintiff, viz., payment to a printer or innkeeper of lawful expenses with a view indirectly to induce E him to vote. It cannot mean to legalise a promise made directly to induce a voter to vote, and no other promise is within the statute.

We are further of opinion that if the letter of Aug. 12, 1854, is evidence of a promise within the statute, viz., a promise to pay conditionally on the voter voting, and made to induce him to vote for Lord Maidstone and the defendant, then there is no evidence against the defendant that he authorised it. For we agree with the opinion he expressed, viz., that it is lawful to defray travelling expenses to bring up the outvoters, F and we cannot see that that opinion, which does not imply that the voting may be made a condition, authorised the making of a promise so conditioned, and, therefore, a promise prohibited by law. This of course would necessitate a *venire de novo*. But we entertain a similar opinion as to the second count. We agree with the learned judge that the pravity or honesty of intention of the defendant is immaterial if he does G the thing prohibited. But we think the word "corruptly" has a definite meaning. If, for instance, there had been a previous unlawful promise, conditional on the voter voting, or if there had been a previous understanding to that effect, or a corrupt bargain for the future, we think the case would have been within the statute. But we are clearly of opinion that merely paying the travelling expenses, honestly, with no previous engagement, is not prohibited. It was not within the former H statute: *Lord Huntingtower v. Gardiner*, (3), and to hold that it is within the present is to give no meaning to the word "corruptly" which appears so emphatically used in relation to the subsequent doing of an act and omitted as to the previous promise to do it—a construction which, if correct, would make a person giving money or procuring an employment within the second branch of s. 2, at any distance of time after the election, the receiver and giver being then equally unconnected with the same constituency, or any other, liable to the several penal consequences we have before referred to. We think this cannot be, and that, as I there was (for the reason above given) no evidence of a previous promise or other matter to make the gift corrupt, there was no evidence in support of the second count. On this ground also there should be a *venire de novo*.

WILLIAMS, J. (read by BRAMWELL, B.)—I have the misfortune to differ from the rest of the court in this case. As to the seventh count, I think there was evidence for the jury that Mr. Slade promised a voter to pay his travelling expenses, and that the

object of such promise was to prevail on him to come and vote for Mr. Slade at the election. I am, therefore, of opinion that there was some evidence of a promise of money to a voter to induce him to vote, according to the allegation of that count, and the language of s. 2 of the Act of 1854. As to the eighth count, I think also that there was some evidence that Mr. Slade, in performance of a previous promise, had paid the travelling expenses of a voter who had come and voted for him at the election. This, I think, amounted to some evidence, not only that Mr. Slade had given money to the voter on account of his having voted, but that he had given it corruptly, because the promise, in my view of the statute, is to be deemed bribery. If so, a payment in performance of it is, I apprehend, a corrupt payment within the meaning of the Act. I am quite aware that the statute, as I have construed it, will act harshly, and apply to cases which can hardly have been in the contemplation of the legislature. But the language of the Act appears to me so plain and unambiguous that these considerations afford only an argument to prove that the statute was inconsiderately passed and ought to be amended.

Venire de novo.

The plaintiff appealed to the House of Lords (6 H.L.Cas. 746) who allowed the appeal on the facts, holding that, assuming the letter of Aug. 12, 1854, to be sent by the authority of the defendant Slade, there was evidence for the jury that Slade was guilty of bribery within s. 2 of the Act of 1854, for the letter meant that the payment was to be conditional on the voter voting for Slade; there was evidence for the jury of Slade having authorised the letter to be sent; and there was evidence for the jury of Slade having corruptly paid money to the voter in consequence of his voting within s. 2.

WHICKER v. HUME

[HOUSE OF LORDS (Lord Chelmsford, L.C., Lord Cranworth and Lord Wensleydale), July 1, 8, 12, 13, 16, 1858]

[Reported 7 H.L.Cas. 124; 28 L.J.Ch. 396; 31 L.T.O.S. 319; 22 J.P. 591; 4 Jur.N.S. 933; 6 W.R. 813; 11 E.R. 50]

Probate—Grant—Effect—Validity of instrument as will—Domicil of testator.

The effect of a grant of probate of a will is to establish conclusively the validity of the instrument as a will, but not the domicil of the testator, a question which remains open for consideration.

Charity—Education—Gift for benefit and advancement of “education and learning in every part of the world.”

A testator gave to trustees a fund upon trust to apply and appropriate the same in such manner as they thought proper and expedient “for the benefit, advancement and propagation of education and learning in every part of the world.”

Held: the word “learning” was susceptible of various meanings, and, when given some of those meanings, it could indicate something which might be benefited by applying a fund in a way which would not be charitable, but, coupling “learning” with “education” as in the present case, it meant imparting knowledge by instruction or teaching and so was practically synonymous with education; the mere circumstance of the whole world being open to the discretion of the trustees did not prevent the gift being available as a good charitable bequest, the discretion being sufficiently specific; and, therefore, the gift was a good charitable gift.

A *Will—Construction—Word with two meanings—Preference for word effectuating testator's object.*

Per LORD CHELMSFORD, L.C.—If there are two meanings of a word [in a will], one of which will effectuate and the other will defeat a testator's object, the court is bound to select that meaning of the word which will carry out the intentions and objects of the testator.

B *Domicil—Definition—Intention permanently to inhabit place.*

Per LORD WENSLEYDALE.—A very good definition of "domicil" is habitation in a place with the intention of remaining there for ever unless some circumstance should occur to alter the intention.

Domicil—Change of domicil—Presumption against.

C Per LORD CRANWORTH.—All courts ought to look with the greatest suspicion and jealousy at any suggested change by a person domiciled in England to a domicil in a foreign country where he must for ever be a foreigner and there must always be those difficulties which arise from the complication which exists and the conflict between the duties owed to the one country and the other.

D Per LORD WENSLEYDALE.—One must look very narrowly into the nature of the residence abroad before an Englishman living abroad is deprived of his English domicil.

Notes. Considered: *Drevon v. Drevon* (1864), 34 L.J.Ch. 129; *Beaumont v. Oliveira* (1869), 4 Ch. App. 309. Followed: *Bradford v. Young* (1884), 26 Ch.D. 656; *Concha v. Concha* (1886), 11 App. Cas. 541. Considered: *Re Berridge, Berridge v. Turner* (1890), 62 L.T. 365; *Re Macduff, Macduff v. Macduff*, [1895-9] All E.R.Rep. 154; *Winans v. A.-G.*, [1904-7] All E.R.Rep. 410. Referred to: *Lord v. Colvin* (1859), 4 Drew. 366; *Moorhouse v. Lord* (1863), 10 H.L.Cas. 272; *Jopp v. Wood* (1865), 4 De G.J. & Sm. 616; *Bradford v. Young* (1884), 26 Ch.D. 656; *Re Patience, Patience v. Main* (1885), 29 Ch.D. 976; *Re Priest, Belfield v. Duncan*, [1944] 1 All E.R. 51; *Re Shaw, Public Trustee v. Day*, [1957] 1 All E.R. 745.

E As to the effect of a grant of probate, see 16 HALSBURY'S LAWS (3rd Edn.) 269-272; as to charitable purposes, see *ibid.*, vol. 4, p. 213 et seq.; as to the principles of the construction of wills, see *ibid.*, vol. 39, p. 973 et seq.; as to domicil, see *ibid.*, vol. 7, p. 14 et seq. For cases see 23 DIGEST (Repl.) 238 et seq.; 8 DIGEST (Repl.) 312 et seq.; 44 DIGEST 530 et seq.; and 11 DIGEST (Repl.) 326 et seq.

F Cases referred to:

(1) *Douglas v. Cooper* (1834), 3 My. & K. 378; 40 E.R. 144; 23 Digest (Repl.) 240, 2914.

(2) *United States v. Drummond* (1838), May 12, unreported.

(3) *Stanley v. Bernes* (1830), 3 Hag. Ecc. 373; 162 E.R. 1190; 11 Digest (Repl.) 329, 43.

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Also referred to in argument:

Allen v. M'Pherson (1847), 1 H.L.Cas. 191; 11 Jur. 785; 9 E.R. 727, H.L.; 11 Digest (Repl.) 79, 740.

Forbes v. Forbes (1854), Kay, 341; 2 Eq. Rep. 178; 23 L.J.Ch. 724; 18 Jur. 642; 2 W.R. 253; 69 E.R. 145; 11 Digest (Repl.) 327, 24.

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Munroe v. Douglas (1820), 5 Madd. 379; 56 E.R. 940; 11 Digest (Repl.) 334, 72.

Roe d. Walker v. Walker (1803), 3 Bos. & P. 375; 127 E.R. 205; 44 Digest 711, 5555.

A.-G. v. Stewart (1817), 2 Mer. 143; 35 E.R. 895; 11 Digest (Repl.) 369, 354.

Williams v. Williams, Williams v. Kershaw (1835), 5 Cl. & Fin. 111, n.; 1 Keen, 274, n.; 5 L.J.Ch. 84; 7 E.R. 346; 8 Digest (Repl.) 398, 899.

Ellis v. Selby (1836), 1 My. & Cr. 286; 5 L.J.Ch. 214; 40 E.R. 384; L.C.; 8 Digest (Repl.) 395, 871.

Morice v. Durham (Bp.) (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) A
390, 836.

Vezev v. Jamson (1822), 1 Sim. & St. 69; 57 E.R. 27; 8 Digest (Repl.) 394, 864.

Appeal from a decree of the Master of the Rolls, dated in 1851, and an order of the lords justices made in 1852, on a petition for re-hearing.

By the will of Doctor John Borthwick Gilchrist, which was made at Paris on Dec. 8, 1840, in the English form, the testator, after giving his household furniture and other things to his wife, proceeded :

"and as to and for and concerning my estate commonly called Gilchrist Place, situate at or near Sydney, in New South Wales, and my house or flat in Hunter Square, Edinburgh, with their respective appurtenances, and also all the rest and residue of my real estate and hereditaments whatsoever and wheresoever, and also as to all the rest and residue of my personal estate and effects of what nature or kind soever, I devise and bequeath the same unto and to the use of Joseph Hume, of Bryanstone Square, in the county of Middlesex, Esq., member of Parliament, Charles Holland, of Queen Street, Mayfair, in the same county, Esq., M.D., John McGregor, Esq., one of the secretaries of the Board of Trade, John Bowring, of London, Esq., Doctor of Laws, and Robert Verity, of the city of Paris, Esq., M.D., physician to the British Embassy, their heirs, executors, administrators and assigns, according to the natures and qualities thereof respectively, upon trust,"

that they should sell and convert into money all the residuary personal estate, not being ready money, and also absolutely sell and dispose of the real estate and hereditaments. The will then declared that the trustees should stand possessed of the trust-money, stocks, funds and securities upon trust out of the annual produce thereof to pay an annuity to his wife, and various legacies, and continued :

"and as to and for and concerning all the residue or surplus of the said trust-moneys, stocks, funds and securities, I direct that the trustees for the time being of this my will do and shall stand possessed thereof upon and for such trusts, intents and purposes, and with, under, and subject to such powers, provisoes and declarations as I by any codicil or codicils hereto shall direct, limit or appoint."

By a codicil which he made on the same day, he directed and appointed that the trustees or trustee for the time being of the said will

"do and shall stand possessed of and interested in the residue or surplus of the trust-moneys, stocks, funds and securities thereby to them bequeathed in trust, upon trust to apply and appropriate the same in such manner as they my said trustees or trustee shall in their absolute and uncontrolled discretion think proper and expedient for the benefit, advancement and propagation of education and learning in every part of the world, as far as circumstances will permit."

The testator died on Jan. 8, 1841. The late Walter Gilchrist Whicker was his nephew and heir-at-law, and one of the next-of-kin. The executors proved the will and codicil on July 13, 1841, in the Prerogative Court of Canterbury in solemn form, a caveat having been entered and probate being opposed by W. G. Whicker. In July, 1841, W. G. Whicker filed his bill in the Court of Chancery to administer the estate and carry into execution the trusts of the will, so far as the same were valid. The plaintiff insisted that the testator at the time of his death was domiciled either in Scotland or in France, and that his will, not being executed according to the formalities of the domicile, was void as to his personal estate, which then amounted to about £25,000, and was, therefore, distributable among his next-of-kin. Another bill was filed in 1842 by the trustees of the will. The court, by arrangement between the parties, referred it to the master to ascertain the domicile, and the master having found the domicile to be England, the plaintiff took exception to the report. On Jan. 11, 1845, LORD LANGDALE, M.R., confirmed the master's

- A report. A further report was afterwards made in 1849 setting forth the history of the testator's life, and finding from the several facts and circumstances stated that the domicile was English. Exceptions were taken to the several findings and argued, and the Master of the Rolls, by an order dated Jan. 18, 1851, held the exceptions insufficient, and overruled the same, and the report was absolutely confirmed thereafter. On May 13, 1851, the Master of the Rolls made a decree in both causes on reading affidavits to the effect that the Mortmain Act was not in force in New South Wales, by which decree the bill of W. G. Whicker was dismissed, and in the trustees' suit it was declared that the testator was domiciled in England at his death; that the real estate in Scotland did not pass by the will; and that the real estate in New South Wales did pass by the will; that the trusts of the will ought to be carried into execution; and that the disposition of the residuary real and personal estate constituted a valid and effectual charitable gift thereof. Directions as to the sale of the estate in New South Wales were given.

- W. G. Whicker presented a petition of appeal to the Lord Chancellor against so much of the decree of May 13, 1851, as dismissed the bill in *Whicker v. Hume*, and as declared that the real estate in New South Wales passed by the will and was a valid and effectual charitable gift. The appeal was heard before KNIGHT-BRUCE and LORD CRANWORTH, L.JJ., who dismissed the appeal on Mar. 6, 1852. W. G. Whicker appealed to the House of Lords. He having afterwards died, the appeal was revived by his son the present appellant. The respondents were the executors and devisees in trust.

- Rolt, Q.C., Green, Q.C., and Morris* for the appellants.
 E *Sir Hugh Cairns, Q.C., Roundell Palmer, Q.C., Anderson, Q.C., and Bagshawe, Q.C.*, for the respondents.

Their Lordships took time for consideration.

July 16, 1858. The following opinions were delivered.

- F **LORD CHELMSFORD, L.C.**—On the argument at the Bar in this case, three main questions were raised: first, upon the domicile of the testator; secondly, whether the statute of mortmain [the Charitable Uses Act, 1735, repealed by the Mortmain and Charitable Uses Act, 1888] applied to a devise of lands in New South Wales, and rendered the devise for charitable uses void; and, thirdly, whether the trust upon which the residue was given constituted a valid charitable bequest.
- G Upon the point of domicile, an objection was made on the part of the respondents that it was not competent to the appellant to enter into that question, inasmuch as it was concluded by the probate of the will which had been granted by the Prerogative Court. It is necessary, therefore, very shortly to consider what is the effect of a grant of probate upon a question of this kind. There is no doubt that it is the province and the duty of a court of probate to ascertain what was the domicile of the party whose will is offered for probate, in order to ascertain whether it is a valid will, the testator having complied with all the requisites of the law of the country in which he was domiciled. If probate is granted of a will, that conclusively establishes in all courts that the will was executed according to the law of the country where the testator was domiciled. Supposing the fact to be that the testator was domiciled in a foreign country and the will was not executed according to the law of that country, still, if it were admitted to probate by the proper ecclesiastical court here, no other court could go back upon the factum and raise any question with respect to the validity of the will. That seems to be exemplified and established by *Douglas v. Cooper* (1). There a married woman, under the power of appointment in a marriage settlement, which was to be exercised by a will to be executed with certain formalities, made an instrument which was admitted to probate by the ecclesiastical court, and the Master of the Rolls held that he was concluded by the judgment of the ecclesiastical court granting probate from considering the question whether it was a will, namely, whether it was such an instrument as

was required by the power, and that the office and duty of the court were confined to the consideration of the question whether that instrument was executed with the formalities which were required by the power. Therefore, I apprehend that, this will having been admitted to probate, it must be taken to be a valid will wherever it shall turn out that the testator was domiciled at the time of his death, but the place of domicile is still open for consideration, and also the validity of the bequest contained in the will, and the effect of it according to the law of the domicile of the testator. A B

The question, therefore, being open for consideration as to where the testator was domiciled at the time of his death, it will be necessary to enter shortly into the consideration of the evidence upon that subject, upon which I apprehend that your Lordships will feel no very great difficulty. The testator was a native of Scotland, born there in 1759. In 1782, being then of the age of twenty-three, he went to India, and shortly afterwards entered into the service of the East India Co. as a medical officer. He continued in the service of the East India Co. in India till 1804, and by his service with the East India Co. he acquired what has been called in several cases an Anglo-Indian domicile. He returned to his native country in 1804, and shortly afterwards he retired from the service of the East India Co. upon a pension, which he enjoyed down to the time of his death, which was in January, 1841. There is no doubt that his domicile of origin revived by his return to and residence in his native country. But it is unnecessary to pursue the circumstances of that residence, because your Lordships have already intimated a very strong opinion that in 1817 and subsequent years the circumstances showed that he had relinquished that domicile of origin, and that the real contest was between two alleged subsequently-acquired domiciles. C D E

In 1817 he quitted Scotland, never permanently to return, and established himself in London. He was a person well skilled in oriental languages and literature; he was the author of several oriental works, and at the time he came to London he had a large stock of those works on hand at his bookseller's, and it was alleged that the reason of his coming to London was to promote the sale of those works. He seemed to have considered that the best mode of advancing his object was to give public lectures on oriental literature, and about the year 1821 he obtained employment from the directors of the East India Co. as professor of the Hindustani language for three years, which was renewed at the expiration of that time for a further term of three years, and afterwards for one year, which brings us down to 1828. At the expiration of his employment under the East India Co. he lectured gratuitously, as it is said, for the purpose of facilitating the same object which he had in view and which brought him to London. Upon his first arrival in London with his wife, whom he had married in Scotland in 1808, he went into furnished lodgings, and he continued to reside with his wife in furnished lodgings down to the year 1822. He then took a furnished house in Clarges Street, at a rent of £400 a year, and he lived in that house for five years, at the end of which time he removed to another house, No. 38 in the same street, which he occupied for another year. That again brings us down to 1828. During the time that he was residing in Clarges Street, in the years 1825, 1826 and 1827, he made excursions to the continent, but kept on his house in London, and returned from time to time to his residence. In 1828 he went abroad and lived in various parts of the continent for three years, down to 1831. He then again returned to London. He appears to have remained a very short time in London in 1831. He went abroad in the same year, whether for pleasure or for health is wholly immaterial, but he remained abroad upon that last occasion from 1831 down to 1833, and again he returned to London. In May, 1833, he proposed to establish a newspaper, and for that purpose he took a house in the Strand, and he continued to hold that house, having employed persons to assist him in this undertaking, or speculation I may call it, of a newspaper, for a year, but the speculation failed. In 1834 he abandoned it, and in that year he quitted England for Paris, and only returned to England occasionally from 1834 down to the period of his death in 1841—namely, in the years 1839 and 1840. F G H I

A My lords, the question is whether during the long period which I have mentioned, from 1817 down to 1834, the testator having clearly abandoned his domicile of origin, he had not acquired a new domicile in England. I think your Lordships will entertain very little doubt that such a domicile was in point of fact acquired. It seems to me that the nature of his residence and his constant returns from the continent bring that residence completely within the definition of domicile which B is given in the Digest (Bk. 50, tit. 16, s. 203): "*Unde cum profectus est, peregrinari videtur; quod si rediit peregrinari jam destitit.*"

If, then, he acquired a domicile in England, the question is whether he ever lost that domicile by the acquisition of another. That will depend upon whether the former domicile had been abandoned by the acquisition of a new one intentionally and actually, *animo et facto*. It will be necessary, therefore, to consider what were C the circumstances under which it was alleged that this French domicile was acquired. I have stated that he went abroad in the year 1834. In the year 1837 he took a second floor in the Rue Martignon in Paris for a period of three, six, or nine years, determinable after the first year's occupation upon a six months' notice, at a rent of 3,500 francs, amounting to £140 a year and with a stipulation that he should place in the apartments sufficient furniture to be a security for the rent. But the D question first of all arises: Did he manifest any intention of abandoning the English domicile which he had acquired? Let us observe what happens with reference to the English domicile. At the time he went abroad in 1834 he left with his solicitor a number of private papers and his library of books. There was a large stock of books still remaining on hand at his bookseller's. I do not lay much stress upon that circumstance. There was an insurance upon it to the extent of £6,000, but E of course he could not remove those—it would not have answered his object. He also left several trunks and boxes and packages and a bookcase at Holland's ware-rooms in Great Pulteney Street, I think, where they had been warehoused occasionally from the year 1827, and they were left there down to the year 1840, he paying warehouse rent for them during the time. In 1840 nine of those packages were removed to Tilbury's, in High Street, Marylebone, where they remained till F after the death of the testator, when a year or two afterwards they were removed by the widow and warehouse rent paid for them. The circumstance of his leaving this property in England appears to me very strongly to indicate an intention to return to this country when circumstances rendered it desirable for him to do so. He was very far advanced in life at that time, and he died at the age of eighty-two, and if he had intended to make France his permanent residence he would have G removed all his property and would never have been at the expense of having to pay warehouse rent for it. One circumstance upon this subject appears to me to be almost conclusive with respect to the fact of his domicile, in the evidence of Mr. Allen, the bookseller, in which he says:

H "On the occasion of the testator's going abroad, in or about the year 1839, he deposited with me a handsome ornamental clock and some pictures, in order that I might keep the same for the said testator during his absence and until his return to London, and that the same remained in my possession at the time of the decease of the said testator."

I think it quite clear that there is no evidence whatever of an intention to abandon the domicile which he had clearly acquired in England. Then was there any inten- I tion to reside permanently in France so as to acquire a domicile there? I leave out of consideration the expressions which may be scattered here and there through letters which are to be found in the voluminous correspondence, because I believe your Lordships will find expressions with respect to each country of an intention to reside permanently there. I think it is rather more important to consider what is the actual evidence upon this subject, upon which it appears to me to be extremely difficult for the appellant now to contend that it was a French domicile. [His LORDSHIP referred to the hearing in the courts below.] What is the result of that? The domicile of origin was abandoned, and a new domicile was acquired

by his residence in England; that new domicile was never relinquished; no fresh domicile was obtained in France, consequently the English domicile remained undisturbed; and that was the domicile of the testator at the time of his death. A

[HIS LORDSHIP then dealt with the question whether the Mortmain Acts applied to New South Wales, a question which depended on the law of that State and repealed statutes of the Imperial Parliament, and so does not call for report; in any event, the law of mortmain was repealed by the Charities Act, 1960, s. 38. He held that neither by common law nor by Act of Parliament were the Mortmain Acts applicable to a devise of lands in New South Wales.] B

The only remaining question that arises upon the words of the bequest in the codicil is whether this is a good charitable bequest of the testator by which these stocks, funds and securities are given to trustees

"upon trust to apply and appropriate the same in such manner as they, my said trustees or trustee shall in their absolute and uncontrolled discretion think proper and expedient for the benefit, advancement and propagation of education and learning in every part of the world." C

It appeared to be conceded in the course of the argument that if the bequest had stopped short at the word "education" the gift would have been good. But it is said that the word "learning" is a word of very extensive signification, and that you may benefit learning in various ways which would not be charitable. In the course of the argument an illustration was borrowed from the argument of counsel before the Master of the Rolls in this case. It was suggested in the course of the argument then that if you could suppose any one instance in which learning might be benefited by applying the funds in a way that would not come within the description of a charitable object, that would make the bequest invalid and void. It appeared to me, when that argument was put forward, that that was rather begging the question, because it was first of all putting a construction, and a very extensive construction, upon the word "learning," which possibly it may be found not necessarily to bear, and it was only by putting that wide construction upon it that you could suppose that there were purposes to which the fund might be applied, which would not come within the description of a charitable object. D E F

The word "learning" is susceptible of various meanings. It is rather extraordinary that in ARCHBISHOP WHATELEY'S work upon LOGIC, it is placed among the equivocal words, that is, words which have two significations. He says:

" 'Learning' signifies either the act of acquiring knowledge, or the knowledge itself: *exempli gratia*, he neglects his learning; Johnson was a man of learning." G

The question is in what sense did the testator use this expression? I apprehend that if there are two meanings of a word, one of which will effectuate and the other will defeat a testator's object, the court is bound to select that meaning of the word which will carry out the intentions and objects of the testator, and I think that your Lordships are not without aid in giving the particular limited interpretation (if I may use the expression) to the word "learning," which is required for the purpose of establishing the validity of this bequest, because when you find that the testator associates with that word "learning" the word "education," I think that from the society itself in which you find the word, your Lordships may gather the meaning which it is necessary to put upon it, and that he means the word "learning" in the sense of imparting knowledge by instruction or teaching. I If this construction be correct, I apprehend there is no difficulty whatever, because it will range itself pretty much within the meaning of the word "education," although not precisely synonymous with it, and it is admitted in the argument that if the word "education" had stood alone the bequest would have been valid.

Then it is stated that the bequest is of such an extensive nature that it is impossible that it can be carried into effect, that it extends over the whole habitable world. But I apprehend, my Lords, that there is no difficulty whatever with regard to the extensive character of this gift, because the object of the trust, and the

A subject upon which the discretion of the trustees is to be exercised is specific and limited. It is for "education" and for "learning" in the sense of teaching and instruction. In that sense it appears to me that the case which was cited by the respondents, of *United States of America v. Drummond* (2), may be applicable, where LORD LANGDALE decided that a gift to the United States of America to found at Washington under the name of the "Smithsonian Institution, an establishment
B for the increase of knowledge among men," was a valid charity. There the area was as spacious and extensive as in the present case. The particular mode in which the object of the testator was to be carried out was described, namely, by founding an institution for the increase of knowledge among men. Here it is to instruct, to teach, and to educate throughout the world. The mere circumstance of this spacious area being open to the discretion of the trustees would not prevent
C the gift from being available as a good charitable bequest, the discretion being sufficiently pointed and specific to make it definite and certain.

Under these circumstances, my Lords, without going into the different authorities that have been cited, because I do not think it is at all necessary, it appears to me that giving that interpretation to the word "learning" which I think we are entitled to give to it, and which its association with the word "education" seems
D to me necessarily to point to, this according to all the authorities is a valid charitable bequest. Therefore, upon the whole of the case, I submit to your Lordships that the decrees of the court below ought to be affirmed.

LORD CRANWORTH.—My noble and learned friend has gone through this case so very fully that it seems to me I shall be best discharging my duty by adding
E very little to what he has already said. I will just allude very briefly to all the different points.

The first question made is one that is extremely important, namely, whether probate was or was not conclusive evidence of the domicile. I have no hesitation in saying that the affirmative of that proposition cannot be a correct exposition of the law. A probate is conclusive evidence that the instrument proved was testamentary
F according to the law of this country, but it proves nothing else. That may be illustrated in this way. Suppose there were a country in which the form of a will was exactly similar to that in this country, but in which no person could give away more than half his property. Such an instrument made in that country by a person there domiciled, when brought to probate here, would be admitted to probate as a matter of course. Probate would be conclusive that it was testamentary, but it
G would be conclusive of nothing more, for after that there would then arise the question how was the court that was to administer the property to ascertain who was entitled to it? For that purpose you must look beyond the probate to know in what country the testator was domiciled, for by the law of that country the property must be administered. Therefore, if the testator in the case I have supposed had given away all his property, consisting of £10,000, it would be the duty of the
H court that had to construe the will, to say that £5,000 only could go according to the direction of the will; the other £5,000 must go in some other channel. Therefore, I think it is clear that that proposition is one that cannot be maintained. In truth, however, in the present case, in my opinion, it is utterly unimportant with reference to the result, because from the first moment when I understood this case, and saw my way into the great mass of letters and papers and evidence in the
I case, I could not entertain a moment's doubt that there is nothing here to lead to the notion of anything but an English domicile. I will not go into the circumstances prior to 1817, and only very few of them afterwards; but in 1817 I think the evidence is conclusive that this gentleman quitted Scotland intending to quit it for ever. I do not mean that he did not contemplate at some time or other going back again to visit Scotland, but that he never meant to be otherwise than a non-Scotsman—an Englishman, in truth, because he settled himself in London.

[HIS LORDSHIP referred to the evidence which has already been mentioned, and continued:] That being so, I might leave that part of the case, but I think it is

not inexpedient on questions of this sort to say that I think that all courts ought to look with the greatest suspicion and jealousy at any of these questions as to change of domicile into a foreign country. You may much more easily suppose that a person having originally been living in Scotland, a Scotsman, means permanently to quit that country and come to England, or vice versa, than that he is quitting the United Kingdom in order to make his permanent home where he must for ever be a foreigner, and in a country where there must always be those difficulties which arise from the complication that exists, and the conflict between the duties that you owe to one country and the duties which you owe to the other. Circumstances may be so strong as to lead irresistibly to the inference that a person does mean *quatenus in illo exuere patriam*. But that is not a presumption at which we ought easily to arrive, more especially in modern times, when the facilities for travelling and the various inducements for pleasure, for curiosity, or for economy, so frequently lead persons to make temporary residences out of their native country. It appears to me, therefore, preposterous to suppose that this gentleman did not look to return to this country. Upon the subject of the domicile my noble and learned friend has alluded to one definition which he said came from the *DIGEST*. It is also to be found in the *Codex* (bk. 10, tit. 39, s. 7), and was a principle of Roman Law. There have been innumerable others, but I never saw any of them that appeared to me to assist us at all in arriving at a conclusion. In fact none of them is, properly speaking, a definition. They are all illustrations, in which those who have made them have sought to rival one another by endeavouring, as far as they can, by some epigrammatic neatness or elegance of expression, to gloss over the fact that, after all we are endeavouring to explain something *clarum per obscurum*. By "domicil" we mean home—the permanent home; and if you do not understand your permanent home, I am afraid that no illustration will very much help you to it. I think the best I have ever heard is one which describes the home as the place (I believe there is one definition in which the "lares" are alluded to)—the place *unde non sit discessurus si nihil avocet; unde cum profectus est peregrinari videtur*. I think that is the best—illustration rather than definition, I should say. That being so, I think it is perfectly clear that in this case it was competent to those who questioned this will to go into this question, and to ask where the testator was domiciled, with a view to see how the property was to be distributed. But, having done so, they have failed to show that he was domiciled anywhere else than in this country, where, therefore, the property would have to be administered.

[HIS LORDSHIP dealt with the point whether the English law of mortmain applied to New South Wales, and continued:] With regard to the charitable gift for education and learning, it is said that "benefit of learning" would not be charity. But what is the meaning of "education" and "learning?" If I remember rightly, KNIGHT-BRUCE, L.J., said: "I think it means just the same as if he had said 'education in learning.'" It was objected that you cannot say that, because that would alter the words. You are not to alter the words of a will, if by doing so you give a different meaning to it; but where you have expressions so very vague as these used, "for the benefit, advancement and propagation of education and learning," you must see what the words mean looking at them in their context, and there I think *noscitur a sociis*—learning there is the correlative of teaching; it is the being taught. It is for the benefit of educating and teaching, only that instead of teaching the correlative verb is used, namely, the being taught; the meaning is exactly the same. My noble and learned friend has pointed out that "learning" is a word of very equivocal meaning. You talk of having had a "learned education." Strictly that is nonsense. Still less is there any sense in talking about "the learned languages." What is the meaning of that? It means the languages that are learned by people of high education. But coupling the word "learning" with "education" here, it is evident that it means education, and education for the benefit of those who are to be taught. I think that impliedly it means that they are to be taught that which commonly passes in the world under the name of learning—

A that is, they are not to be taught how to tame horses or (I was going to say) how to guide ships—but perhaps that is something which might be taught, but it is for education as connected with learning that this charity was meant to be established.

It is objected that it is extended all over the world. I can only say that I think that was a very silly provision, but I cannot say that it is a fatal objection because the testator has said, not that it shall be applied all over the world—that would be absurd—but that it shall be for the benefit of mankind in general, in every part of the world, as far as circumstances will permit. In settling the scheme for this charity, it will be the duty of the court to see that the trustees make it as extensive as the nature of the income will permit. Therefore, I cannot have any doubt whatever that it is a perfectly valid charity.

C **LORD WENSLEYDALE.**—In this case I agree entirely with my noble and learned friends who have preceded me. The main and principal question in this case is one of fact, and it has been determined by the Master of the Rolls upon the facts in evidence in this case, that the deceased at the time of his death was domiciled in England. I think he came to a very proper conclusion. As my noble and learned friends have already stated, it is perfectly clear that he had lost his Scottish domicile and acquired an English one, and, therefore, the only remaining question was, whether, after having acquired an English domicile, he lost it by acquiring a French domicile. It is not necessary for me to add anything to the copious account which has been given by my noble and learned friend on the Woolsack of the evidence in this case, or to the observations which have been made upon that evidence. It is perfectly clear to me that it is as distinctly proved as it can be that when the testator commenced to reside at Paris in 1837, he did so without the intention of making that his permanent residence. I think it is unnecessary to enter into the question of domicile, though I do not quite agree in the difficulty presented by my noble and learned friend who last spoke, as to the definition of “domicil.” There are several definitions of domicile, which appear to me pretty nearly to approach to correctness. One very good definition is this: F Habitation in a place with the intention of remaining there for ever, unless some circumstance should occur to alter the intention of the person in question. I also take the definition from the *Codex*, which is epigrammatically stated, and which, I think, will be found perfectly correct, that domicile is

G “*In eo loco singulos habere domicilium non ambigitur, ubi quis larem, rerumque ac fortunarum suarum summam constituit; unde rursus non sit discessurus si nihil avocet; unde cum profectus est, peregrinari videtur; quod si rediit peregrinari, jam destitit.*”

I think that definition, if examined in all its parts, will be found to be tolerably correct, and that, if well applied in this case, it will lead to a proper conclusion as to where the testator's domicile was at the time of his death. I perfectly agree with my noble and learned friend, that in these times of visiting abroad, transferring oneself even for years abroad, you must look very narrowly into the nature of the residence abroad before you deprive an Englishman living abroad of his English domicile. In this case I apprehend it to be perfectly clear, and the evidence alluded to leaves no doubt upon my mind that the testator went over to Paris for a temporary purpose—that he never meant to reside there permanently, but only to remain there for a time—that his domicile, his establishment, and his principal residence was meant to be in this country, and he never abandoned it. Therefore, I think that the conclusion to which the Master of the Rolls came with respect to his domicile was perfectly right.

With regard to the effect of the probate of the will in the ecclesiastical court, I take it that probate of a will in common form is conclusive evidence of the title of the executors to all personal property which the testator was capable of disposing of. It is also conclusive evidence that it was executed in due form according to the law of the country where he was domiciled at the time of the death; because

it is beyond all question that the principle of *mobilia sequuntur personam* is completely and entirely established. I take it to be a perfectly clearly established proposition at this day, confirmed by *Stanley v. Bernes* (3), that the succession must be regulated according to the law of that country where the testator was domiciled at the time of his death, and that to make a valid will it must be executed according to the forms of the country where he was domiciled at the time of his death. Therefore a probate given in England, until revoked, must be considered as proof of the will being the will of a fully capable testator, and that it was executed according to the forms of the country in which he was domiciled at the time of his death. That I apprehend to be perfectly clear. If the will is proved in solemn form, as this was, the probate is incapable of being revoked, and the law of the domicile must be taken to be the law regulating the succession. At the same time, supposing it were to turn out that in some country (which is, indeed, the case in France under certain circumstances and in Scotland) that the testator had not the power of disposing of the whole of his personal property, then I agree with my noble and learned friend that this instrument will only convey such property as by the law of the country he was entitled to dispose of by will. If it could be shown that there was a part of the estate that belonged to the widow and children by the law of the country where he was domiciled, the will would have no effect upon that part. It would be a nicer question what the effect of the probate would be if he died domiciled in a country where there was no power to make a will at all. My impression is still that until the probate was revoked in solemn form it would still pass, as far as England was concerned, all the property to which the English law applied, and that the objection that he could not make any will at all ought to have been set up in opposition to the will in the ecclesiastical court, and that it could not be set up in any way afterwards. I apprehend that my noble and learned friend will hardly dispute the qualification which I have added to the proposition which he has stated.

There remain, therefore, to be considered only two questions upon the construction of this will, and the reasons which have been given by both my noble and learned friends are so very clear and satisfactory, that it is really unnecessary for me to add anything with respect to the property in New South Wales being liable to the Mortmain Acts. It seems to me to be quite out of the question, for the reasons given by both my noble and learned friends and in the court below, which I think are perfectly satisfactory.

With respect to the construction to be given to the words in question in the will, I agree entirely in the opinion that the testator did not mean any part of his property to be devoted to the purposes of learning unconnected with education, but that he meant it for education and learning connected with education, it being part of the office of education to teach. The word "learning" is an equivocal word, not merely to the extent stated by my noble and learned friend on the Woolsack, but to a much greater extent, for it means not only to learn in the ordinary sense, but also to teach. In the translation of the Scriptures in our authorised version, there are many instances of that sort in the Psalms. "Learning," therefore, I consider in this case equivalent to teaching; learning as part of education. No portion of this charitable fund can be devoted by the trustees for the purpose of rewarding learned men unconnected with education. It seems to me, therefore, that the conclusion which has been arrived at by the Master of the Rolls is perfectly right, and I agree entirely in the opinion which has been expressed to your Lordships by my two noble and learned friends both with respect to the construction of the will, and with respect to the will not being subject to the Statute of Mortmain.

Appeal dismissed.

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HADLEY AND ANOTHER v. BAXENDALE AND OTHERS

[COURT OF EXCHEQUER (Parke, Alderson, Platt and Martin, BB.), February 1, 2, 23, 1854]

B

[Reported 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358;
2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145]

Contract—Breach—Damages—Measure—Damage arising naturally from breach—Damage reasonably supposed to have been in contemplation of parties when contract made—Special circumstances—Effect of knowledge by both parties.

C

Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances under which the contract was made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But if the special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

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Notes. Followed: *Herring v. Tomlin* (1854), 23 L.T.O.S. 92. Considered: *Mann v. General Steam Navigation Co.* (1856), 26 L.T.O.S. 247; *Simons v. Patchett* (1857), 26 L.J.Q.B. 195; *Randall v. Raper* (1858), E.B. & E. 84. Applied: *Portman v. Middleton* (1858), 4 C.B.N.S. 322; *Smeed v. Foord* (1859), 1 E. & E. 602. Considered: *Allsop v. Allsop* (1860), 5 H. & N. 534; *De Mattos v. Gibson* (1860), 1 John. & H. 79. Followed: *Le Peintur v. South Eastern Rail. Co.* (1860), 2 L.T. 170. Applied: *Richardson v. Dunn* (1860), 8 C.B.N.S. 655. Considered: *Gee v. Lancashire and Yorkshire Rail. Co.* (1860), ante page 131; *Anderson v. North Eastern Rail. Co.* (1861), 4 L.T. 216; *Wilson v. Lancashire and Yorkshire Rail. Co.* (1861), 9 C.B.N.S. 632. Distinguished: *Collard v. South Eastern Rail. Co.*, [1861-73] All E.R.Rep. 851. Applied: *Henderson v. North Eastern Rail. Co.* (1861), 9 W.R. 519. Considered: *Borries v. Hutchinson* (1865), 18 C.B.N.S. 445. Applied: *Williams v. Reynolds* (1865), 6 B. & S. 495; *Knowles v. Nunns* (1866), 14 L.T. 592; *Wilson v. Newport Dock Co.* (1866), L.R. 1 Exch. 177. Considered: *Woodger v. Great Western Rail. Co.* (1867), L.R. 2 C.P. 318. Explained: *Cory v. Thames Ironworks*, [1861-73] All E.R.Rep. 597. Considered: *Engell v. Fitch* (1869), L.R. 4 Q.B. 659; *Prehn v. Royal Bank, Liverpool* (1870), L.R. 5 Exch. 92. Distinguished: *Larios v. Bonany y Gurety* (1873), L.R. 5 P.C. 346. Considered: *Horne v. Midland Rail. Co.* (1873), L.R. 8 C.P. 131; *Baxendale v. London, Chatham and Dover Rail. Co.* (1874), L.R. 10 Exch. 35; *Elbinger Akt. v. Armstrong* (1874), L.R. 9 Q.B. 473. Distinguished: *Sawdon v. Andrew* (1874), 30 L.T. 23. Considered: *Bradshaw v. Lancashire and Yorkshire Rail. Co.* (1875), L.R. 10 C.P. 189. Applied: *Smith v. Green* (1875), 1 C.P.D. 92; *Sanders v. Stuart* (1876), 1 C.P.D. 326; *Barratt v. London, Brighton and South Coast Rail. Co.* (1877), *De Collyar's County Court Cases* 195; *Wilson v. General Iron Screw Colliery Co.* (1877), 47 L.J.Q.B. 239. Distinguished: *Phillips v. London and South Western Rail. Co.*, [1874-80] All E.R.Rep. 1176. Considered: *McMahon v. Field* (1881), 7 Q.B.D. 591; *Thol v. Henderson* (1881), 8 Q.B.D. 457. Distinguished: *Lilley v. Doubleday*,

[1881-5] All E.R.Rep. 406. Applied: *Baldwin v. London, Chatham and Dover Rail. Co.* (1882), *De Colyar's County Court Cases* 224. Considered: *Smith v. Day* (1882), 21 Ch.D. 421. Applied: *The Notting Hill* (1884), 9 P.D. 105. Followed: *De Mattos v. Great Eastern Steamship Co.* (1885), 1 T.L.R. 283; Applied: *Grébert-Borgnis v. Nugent* (1885), 15 Q.B.D. 85. Considered: *Skinner v. City of London Marine Insurance Corp'n.*, [1881-5] All E.R.Rep. 167. Applied: *Rodoconachi v. Milburn* (1886), 17 Q.B.D. 316; *Hammond v. Bussey* (1887), 20 Q.B.D. 79; *Couper v. Richards* (1887), 3 T.L.R. 739. Considered: *The Argentino* (1888), 13 P.D. 191; *Welch, Perrin & Co. v. Anderson & Co.* (1891), 61 L.J.Q.B. 167; *Lepla v. Rogers*, [1893] 1 Q.B. 31. Applied: *Ebbetts v. Conquest*, [1895] 2 Ch. 377. Considered: *Marsh v. Joseph*, [1895-9] All E.R.Rep. 977; *South African Territories v. Wallington*, [1897] 1 Q.B. 692. Applied: *Agius v. Great Western Colliery Co.*, [1899] 1 Q.B. 413. Considered: *Bostock v. Nicholson*, [1904] 1 K.B. 725; *The Cairnbahn* (1913), 29 T.L.R. 559. Applied: *Cointat v. Myham & Son*, [1911-13] All E.R.Rep. 724; *Mitsui v. Watts, Watts & Co.*, [1916] 2 K.B. 826. Considered: *Turpin v. Victoria Palace*, [1918] 2 K.B. 539. Applied: *Pinnock v. Lewis and Peat*, [1923] 1 K.B. 690. Considered: *Patrick v. Russo-British Grain Export Co.*, [1927] All E.R.Rep. 692; *Re Hall and Pim* (1928), 139 L.T. 50. Distinguished: *Riley v. Brown* (1929), 98 L.J.K.B. 739. Considered: *Banco de Portugal v. Waterlow & Sons, Ltd.*, [1932] All E.R.Rep. 181. Applied: *The Edison*, [1933] All E.R.Rep. 144. Considered: *Simon v. Pawson and Leafs, Ltd.*, [1932] All E.R.Rep. 72. Applied: *Vaile Bros. v. Hobson, Ltd.*, [1933] All E.R.Rep. 447. Considered: *The Arpad*, [1934] All E.R.Rep. 326; *Flint v. Lovell*, [1934] All E.R.Rep. 200. Applied: *Foaminol Laboratories, Ltd. v. British Artid Plastics, Ltd.*, [1941] 2 All E.R. 393. Considered: *Brading v. McNeill & Co.*, [1946] Ch. 145; *Monarch Steamship Co. v. A./B. Karlshamns Oljefabriker*, [1949] 1 All E.R. 1. Distinguished: *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997; *Collins v. Howard*, [1949] 2 All E.R. 324. Applied: *Pilkington v. Wood*, [1953] 2 All E.R. 810. Considered: *Cullinane v. British "Rema" Manufacturing Co.*, [1953] 2 All E.R. 1257; *Compania Naviera Maropan S.A. v. Bowaters Lloyd Pulp and Paper Mills, Ltd.*, [1955] 2 All E.R. 241; *Diamond v. Campbell-Jones*, [1960] 1 All E.R. 583. Applied: *Liverpool and County Discount Co., Ltd. v. A.B. Motor Co. (Kilburn), Ltd.*, [1963] 2 All E.R. 396. Referred to: *Fletcher v. Tayleur* (1855), 17 C.B. 21; *Broom v. Hall* (1859), 7 C.B.N.S. 503; *Caledonian Rail. Co. v. Colt* (1860), 3 L.T. 252; *Prior v. Wilson* (1860), 1 L.T. 549; *Boyd v. Fitt* (1864), 11 L.T. 280. *O'Hanlan v. Great Western Rail. Co.* (1865), 6 B. & S. 484; *Phelps v. London and North Western Rail. Co.* (1865), 13 W.R. 782; *Mullett v. Mason* (1866), Har. & Ruth. 779; *British Columbia Saw-Mill Co. v. Nettleship* (1868), L.R. 3 C.P. 499; *Godwin v. Francis* (1870), 39 L.J.C.P. 121; *Bain v. Fothergill*, [1874-80] All E.R.Rep. 83; *Hobbs v. London and South Western Rail. Co.*, [1874-80] All E.R.Rep. 458; *The Parana* (1877), 2 P.D. 118; *Williams v. Peel River Land and Mineral Co.* (1886), 55 L.T. 689; *White v. Peto* (1888), 58 L.T. 710; *Finlay v. Chirney* (1888), 20 Q.B.D. 494; *Armstrong v. Allan* (1892), 67 L.T. 738; *Marcus v. Myers and Davis* (1895), 11 T.L.R. 327; *Prince of Wales Dry Dock Co., Swansea v. Fownes Forge and Engineering Co.* (1904), 90 L.T. 527; *Furness, Withy v. Hall* (1909), 25 T.L.R. 233; *Jackson v. Watson*, [1909] 2 K.B. 193; *Sapwell v. Bass*, [1908-10] All E.R.Rep. 528; *Clare v. Dobson*, [1911] 1 K.B. 35; *Hoole U.D.C. v. Fidelity and Deposit Co. of Maryland* (1916), 115 L.T. 24; *Quirk v. Thomas*, [1916] 1 K.B. 516; *Watts, Watts & Co., Ltd. v. Mitsui*, [1916-17] All E.R.Rep. 501; *British Stamp and Ticket Automatic Delivery Co. v. Haynes*, [1921] 1 K.B. 377; *Monte Video Gas and Dry Dock Co. v. Clan Line Steamers* (1921), 37 T.L.R. 866; *Dobell & Co., Ltd. v. Barber and Garratt* (1930), 47 T.L.R. 66; *Herbert Clayton and Jack Waller, Ltd. v. Oliver*, [1930] All E.R.Rep. 414; *British Russian Gazette and Trade Outlook, Ltd. v. Associated Newspapers, Ltd.*, *Talbot v. Associated Newspapers, Ltd.*, [1933] All E.R.Rep. 320; *Haynes v. Harwood*, [1934] All E.R.Rep. 103; *Millar's Machinery Co. v. Way & Son*

- A** (1935), 40 Com. Cas. 204; *Archie Parnell and Alfred Zeitlin, Ltd. v. Theatre Royal (Drury Lane), Ltd.* (1936), 80 Sol. Jo. 284; *Domine v. Grimsdall*, [1937] 2 All E.R. 119; *Sunley & Co. v. Cunard White Star, Ltd.*, [1940] 2 All E.R. 97; *Henderson & Co. v. Montague L. Meyer, Ltd.* (1941), 85 Sol. Jo. 166; *Comber, Ltd. v. Cork N. Seals, Ltd.* (1942), 86 Sol. Jo. 376; *Kimber v. William Willett, Ltd.*, [1947] 1 All E.R. 361; *Hyett v. Great Western Rail. Co.*, [1947] 2 All E.R. 264; *Wright v. Dean*, [1948] 2 All E.R. 415; *Biggin & Co. v. Permanite, Ltd.*, [1951] 2 All E.R. 191; *Mehmet Dogan Bey v. Abdeni & Co.*, [1951] 2 All E.R. 162; *Trans Trust S.P.R.L. v. Danubian Trading Co.*, [1952] 1 All E.R. 970; *D'Almeida Araujo Limitada v. Becker & Co.*, [1953] 2 All E.R. 288; *Otter v. Church, Adams, Tatham & Co.*, [1953] 1 All E.R. 168; *Interoffice Telephones, Ltd. v. Robert Freeman Co., Ltd.*, [1957] 3 All E.R. 479; *Sayers v. Harlow U.D.C.*, [1958] 2 All E.R. 342; *Lloyds Bank v. Lake*, [1961] 2 All E.R. 30; *Overseas Tankship, etc. v. Morts Dock, etc.*, [1961] 1 All E.R. 404.

As to the measure of damages in contract, see 11 HALSBURY'S LAWS (3rd Edn.) 241-251; and for cases see 17 DIGEST (Repl.) 91 et seq.

Cases referred to:

- D** (1) *Blake v. Midland Rail. Co.* (1852), 18 Q.B. 93; 21 L.J.Q.B. 233; 18 L.T.O.S. 330; 16 Jur. 562; 118 E.R. 35; 17 Digest (Repl.) 184, 806.
 (2) *Alder v. Keighley* (1846), 15 M. & W. 117; 15 L.J.Ex. 100; 153 E.R. 785; 5 Digest (Repl.) 1052, 8500.

Also referred to in argument:

- Nurse v. Barns* (1663), 1 T.Raym. 77.
E *Borradaile v. Brunton* (1818), 8 Taunt. 535; 2 Moore, C.P. 582; 129 E.R. 491; 39 Digest (Repl.) 589, 1095.
Everard v. Hopkins (1615), 2 Bulst. 332; 1 Roll. Rep. 124; 80 E.R. 1164; 12 Digest (Repl.) 51, 280.
Ingram v. Lawson (1840), 6 Bing.N.C. 212; 8 Scott. 471; 9 L.J.C.P. 145; 7 L.T. 134; 4 Jur. 151; 133 E.R. 84; 32 Digest (Repl.) 28, 176.
F *Bodley v. Reynolds* (1846), 8 Q.B. 779; 15 L.J.Q.B. 219; 7 L.T.O.S. 61; 10 Jur. 310; 115 E.R. 1066; 17 Digest (Repl.) 78, 19.
Black v. Baxendale (1847), 1 Exch. 410; 17 L.J.Ex. 50; 154 E.R. 174; 8 Digest (Repl.) 154, 978.
Brandt v. Bowlby (1831), 2 B. & Ad. 932; 1 L.J.K.B. 14; 109 E.R. 1389; 39 Digest (Repl.) 638, 1474.
G *Waters v. Towers* (1853), 8 Exch. 401; 22 L.J.Ex. 186; 155 E.R. 1404; 7 Digest (Repl.) 403, 255.
Ward v. Smith (1822), 11 Price, 19; 147 E.R. 388; 17 Digest (Repl.) 169, 641.
Levy v. Langridge (1838), 4 M. & W. 337; 1 Horn & H. 325; 150 E.R. 1458, Ex. Ch.; sub nom. *Levi v. Langridge*, 7 L.J.Ex. 387; 39 Digest (Repl.) 564, 927.
H *Flureau v. Thornhill* (1776), 2 Wm. Bl. 1078; 96 E.R. 635; 17 Digest (Repl.) 104, 187.
Jones v. Gooday (1841), 8 M. & W. 146.
Walton v. Fothergill (1835), 7 C. & P. 392, N.P.; 17 Digest (Repl.) 140, 428.
Boyce v. Bayliffe (1807), 1 Camp. 58; 170 E.R. 875, N.P.; 43 Digest 459, 849.
Archer v. Williams (1846), 2 Car. & Kir. 26, N.P.; 43 Digest 525, 622.
I *Lumley v. Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 17 Digest (Repl.) 116, 285.
Kelly v. Partington (1834), 5 B. & Ad. 645; 2 Nev. & M.K.B. 460; 3 Nev. & M.K.B. 116; 3 L.J.K.B. 104; 110 E.R. 929; 32 Digest (Repl.) 35, 221.
Foxall v. Barnett (1853), 2 E. & B. 928; 22 L.T.O.S. 100; 2 W.R. 61; 2 C.L.R. 273; 118 E.R. 1014; sub nom. *Foxhall v. Barnett*, 23 L.J.Q.B. 7; 18 J.P. 41; 18 Jur. 41; 17 Digest (Repl.) 134, 402.
Tindall v. Bell (1843), 11 M. & W. 228; 12 L.J.Ex. 160; 152 E.R. 786; 17 Digest (Repl.) 136, 407.

Siordet v. Hall (1828), 4 Bing. 607; 1 Moo. & P. 561; 6 L.J.O.S.C.P. 137; 130 A E.R. 902; 8 Digest (Repl.) 21, 120.

De Vaux v. Salvador (1836), 4 Ad. & El. 420; 1 Har. & W. 751; 6 Nev. & M.K.B. 713; 5 L.J.K.B. 134; 111 E.R. 845; 29 Digest (Repl.) 246; 1844.

Rule Nisi for a new trial obtained by the defendants on the ground that the jury had been misdirected at the trial.

The first count of the declaration stated that, before and at the time of the making by the defendants of the promises hereinafter mentioned, the plaintiffs carried on the business of millers and mealmen in partnership, and were proprietors and occupiers of the City Steam Mills, Gloucester. They were possessed of a steam-engine by means of which they worked the mills, and therein cleaned corn, ground the same into meal, and dressed the same into flour, sharps, and bran. The crank shaft of the steam-engine was broken, with the result that the engine was prevented from working, and the plaintiffs were desirous of having a new crank shaft made. They had ordered the shaft of W. Joyce & Co., of Greenwich, Kent, who had contracted to make it, but before Messrs. Joyce & Co. could complete the new shaft it was necessary that the broken shaft should be forwarded to their works at Greenwich in order that the new shaft might be made so as to fit the other parts of the engine which were not injured and so that it might be substituted for the broken shaft. The defendants were common carriers of goods and chattels for hire from Gloucester to Greenwich, carrying on business under the name of "Pickford & Co.," and the plaintiffs, at the request of the defendants, delivered to them as such carriers the broken shaft to be conveyed by the defendants from Gloucester to Messrs. Joyce & Co., at Greenwich for reward to the defendants. The plaintiffs alleged that in consideration thereof the defendants promised to convey the shaft from Gloucester to Greenwich and on the second day after the delivery of the shaft by the plaintiffs to the defendants to deliver it to Messrs. Joyce & Co., but that the defendants did not deliver the shaft to Messrs. Joyce & Co. on the second day, but neglected so to do for the space of seven days after the shaft had been delivered to them. In the second count the plaintiffs alleged that the defendants undertook to deliver the shaft to Messrs. Joyce & Co. within a reasonable time, but had failed to do so. The plaintiffs further said that by reason of the premises, the completing of the new shaft was delayed for five days, with the result that the plaintiffs were prevented from working their steam-mills, and from cleaning corn, and grinding the same into meal, and were unable to supply many of their customers with flour, sharps, and bran during that period, were obliged to buy flour to supply some of their other customers, were deprived of gains and profits which otherwise would have accrued to them, and were unable to employ their workmen to whom they were compelled to pay wages during that period. They claimed £300 damages. The defendants denied liability on the first count, and with regard to the second they paid £25 into court in satisfaction of the plaintiffs' claim under that count.

At the trial before CROMPTON, J., at Gloucester Assizes, it appeared that on May 13 a servant of the plaintiffs, whom they had sent to defendants' office, told the defendants' clerk, who was there, that the mill was stopped and the shaft must be sent immediately, and that, in answer to the inquiry when the shaft would be taken, the defendants' clerk said that if it was sent up by twelve o'clock any day it would be delivered at Greenwich on the following day. On May 14 the shaft was taken to the defendants' office, before noon, for the purpose of being conveyed to Greenwich, and the sum of £2 4s. was paid for its carriage for the whole distance. At the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was delayed and they lost the profits they would otherwise have received. The defendants objected that the damage alleged was too remote, and that the defendants were not liable with respect to it. The

A learned judge left the case generally to the jury, who found a verdict with £25 damages beyond the amount paid into court.

The defendants obtained a rule nisi for a new trial on the ground of misdirection.

Keating and *Dowdeswell* showed cause against the rule.

Whateley, *Willes* and *Phipson* supported the rule.

B

Cur. adv. vult.

Feb. 23, 1854. **ALDERSON, B.**, delivered the following judgment of the court. — We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

C It is, indeed, of the last importance that we should do this, for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The courts have done this on several occasions, and, in *Blake v. Midland Rail. Co.* (1), the court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at nisi prius. In *Alder v. Keighley* (2) **POLLOCK, C.B.**, said (15 M. & W. at p. 120):

“There are certain established rules according to which the jury ought to find, and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken.”

E We think the proper rule in such a case as the present is this. Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated.

G But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.

H The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognisant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. In the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made were that the article to be carried was the broken shaft of a mill and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be

stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profit really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred, and these special circumstances were here never communicated by the plaintiffs to the defendants.

It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must, therefore, be a new trial in this case.

Rule absolute.

JACKSON v. SMITHSON

[COURT OF EXCHEQUER (Pollock, C.B., Alderson and Platt, BB.), June 5, 1846]
[Reported 15 M. & W. 563; 4 Dow. & L. 45; 15 L.J.Ex. 311;
7 L.T.O.S. 231; 153 E.R. 973]

Animal—Ram—Butting men—Averment and proof of scienter.

Animal—Ferae naturæ—Tame animal becoming fierce.

The plaintiff's declaration stated that the defendant wrongfully and injuriously kept a ram, well knowing that it was prone and accustomed to attack, butt, and injure mankind, and that the ram, while so kept by the defendant, attacked, butted, and threw down the plaintiff, whereby the plaintiff was hurt and injured.

Held: the declaration was sufficient without averring that the defendant negligently kept the ram.

Per ALDERSON, B.: There is no distinction between the case of an animal which breaks through the tameness of its nature and is fierce and known by the owner to be so and one which is *feræ naturæ*.

Notes. Followed: *Card v. Case* (1848), 5 C.B. 622. Considered: *Smith v. Cook* (1875), 1 Q.B.D. 79. Applied: *Baker v. Snell* [1908-10] All E.R.Rep. 398. Referred to: *Cox v. Burbridge* (1863), 13 C.B.N.S. 430; *Knott v. L.C.C.*, [1933] All E.R.Rep. 172; *Gould v. McAuliffe*, [1941] 1 All E.R. 515; *Read v. J. Lyons & Co.*, [1944] 2 All E.R. 98; *Fitzgerald v. F. D. & A. D. Cooke Bourne (Farms), Ltd.*, [1963] 3 All E.R. 36.

A As to liability of owners for injuries caused by animals and the necessity for scienter, see 1 HALSBURY'S LAWS (3rd Edn.) 663 et seq.; and for cases see 2 DIGEST (Repl.) 333 et seq.

Case referred to:

(1) *May v. Burdett* (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 10 Jur. 692; 115 E.R. 1213; 2 Digest (Repl.) 329, 216.

B Also referred to in argument:

Cropper v. Matthews (1659), 2 Sid. 127; 82 E.R. 1293; 2 Digest (Repl.) 382, 565.

R. v. Huggins (1730), 17 State Tr. 309; 2 Ld. Raym. 1574; 1 Barn.K.B. 396; Fitz-G. 177; 2 Stra. 883; 92 E.R. 518; 2 Digest (Repl.) 328, 214.

Jenkins v. Turner (1696), 1 Ld. Raym. 109; 2 Salk. 662; 91 E.R. 969; 2 Digest (Repl.) 334, 241.

C *Smith v. Pelah* (1747), 2 Stra. 1264; 93 E.R. 1171; 2 Digest (Repl.) 379, 546.

Jones v. Perry (1796), 2 Esp. 482; 2 Digest (Repl.) 383, 569.

Hartley v. Harriman (1818), 1 B. & Ald. 620; 106 E.R. 228; 2 Digest (Repl.) 382, 562.

Blackman v. Simmons (1827), 3 C. & P. 138; 2 Digest (Repl.) 331, 224.

D *Sarch v. Blackburn* (1830), 4 C. & P. 297; Mood. & M. 505; 2 Digest (Repl.) 380, 549.

Curtis v. Mills (1833), 5 C. & P. 489; 2 Digest (Repl.) 380, 552.

Rule Nisi obtained by the defendant to set aside judgment in an action for damages for injury caused to the plaintiff by the defendant's ram.

E The declaration stated that at the time of the injury sustained by the plaintiff, the defendant wrongfully and injuriously kept a certain ram, well knowing that the ram was prone and used and accustomed to attack, butt and injure mankind; and that the ram while so kept by the defendant attacked, butted and threw down the plaintiff five times and thereby the plaintiff was hurt and injured. The defendant denied liability.

F At the trial before LORD DENMAN, C.J., at the Kent County Assizes, the plaintiff obtained a verdict with £10 damages. Subsequently, the defendant obtained a rule nisi to set aside the judgment on the ground that the claim was bad for not averring that the defendant negligently kept the ram.

Montagu Chambers and *J. Brown* for the plaintiff, showed cause against the rule. *Serjeant Shee* and *Wordsworth* for the defendant, supported the rule.

G **POLLOCK, C.B.**—The case which has been decided in the Court of Queen's Bench, of *May v. Burdett* (1), is a binding authority upon us on this point, and we must leave the parties to go to a court of error, if they think they have any ground for reversing our judgment.

H **ALDERSON, B.**—I am of the same opinion, and think we are bound by that decision. In truth, there is no distinction between the case of an animal which breaks through the tameness of its nature, and is fierce, and known by the owner to be so, and one which is *feræ naturæ*.

I **PLATT, B.**—No doubt a man has a right to keep an animal which is *feræ naturæ*, and nobody has a right to interfere with him in doing so, until some mischief happens, but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible.

Rule discharged.

HUMBLE v. HUNTER

[COURT OF QUEEN'S BENCH (Lord Denman, C.J., Patteson and Wightman, JJ.),
May 15, 29, 1848]

[Reported 12 Q.B. 310; 17 L.J.Q.B. 350; 11 L.T.O.S. 265;
12 Jur. 1021; 116 E.R. 885]

Agent—Principal—Agent contracting as principal—Right of real principal to take benefit of contract—Admissibility of evidence to establish agency.

The doctrine that a principal may come in and take the benefit of a contract made by his agent has no application where the agent expressly uses words importing that he is the principal.

A charterparty was executed by the plaintiff's son who described himself as "owner" of the ship. In an assumpsit on the charterparty the plaintiff sought to claim as principal.

Held: the son by describing himself as "owner" had contracted as principal, and evidence was not admissible to show that he contracted merely as the plaintiff's agent.

Notes. Explained: *Schmaltz v. Avery* (1851), 16 Q.B. 655. Doubted: *Killick v. Price and Lingfield Steamship Co.* (1896), 12 T.L.R. 263. Approved: *Formby Bros. v. Formby* (1910), 102 L.T. 116. Distinguished: *Fred. Drughorn, Ltd. v. Rederiakt. Transatlantic*, [1918-19] All E.R.Rep. 1122. Doubted: *Epps v. Rothnie*, [1946] 1 All E.R. 146. Referred to: *Muttyloll Seal v. Dent* (1853), 5 Moo. Ind. App. 328; *Re Streatfield, Lawrence & Co., Ex parte City Bank* (1860), 3 L.T. 792; *Wake v. Harrop* (1862), 1 H. & C. 202; *British Waggon Co. v. Lea* (1880), 5 Q.B.D. 149; *Tolhurst v. Associated Portland Cement Manufacturers*, *Associated Portland Cement Manufacturers v. Tolhurst* (1902), 87 L.T. 465; *Dunlop Pneumatic Tyre Co. v. Selfridge*, [1914-15] All E.R.Rep. 333; *Rederiakt. Argonaut v. Hani*, [1918] 2 K.B. 247; *Collins v. Associated Greyhound Racecourses*, [1930] 1 Ch. 1; *Danziger v. Thompson*, [1944] 2 All E.R. 15.

As to contracts made by agent where the latter contracts in terms importing that he is principal, see 1 HALSBURY'S LAWS (3rd Edn.) 215 et seq.; and for cases see 1 DIGEST (Repl.) 738 et seq.

Cases referred to:

- (1) *Lucas v. De la Cour* (1813), 1 M. & S. 249; 105 E.R. 93; 36 Digest (Repl.) 510, 752.
- (2) *Robson v. Drummond* (1831), 2 B. & Ad. 303; 9 L.J.O.S.K.B. 187; 109 E.R. 1156; 36 Digest (Repl.) 498, 655.
- (3) *Skinner v. Stocks* (1821), 4 B. & Ald. 437; 106 E.R. 997; 1 Digest (Repl.) 659, 2301.

Also referred to in argument:

Wilson v. Hart (1817), 7 Taunt. 295; 1 Moore, C.P. 45; 129 E.R. 118; 1 Digest (Repl.) 737, 2794.

Appleton v. Binks (1804), 5 East, 148; 1 Smith, K.B. 361; 102 E.R. 1025; 1 Digest (Repl.) 742, 2835.

Magee v. Atkinson and Townley (1837), 2 M. & W. 440; Murph. & H. 115; 6 L.J.Ex. 115; 150 E.R. 830; 1 Digest (Repl.) 727, 2726.

Sims v. Bond (1833), 5 B. & Ad. 389; 2 Nev. & M.K.B. 608; 110 E.R. 834; 1 Digest (Repl.) 658, 2292.

Higgins v. Senior (1841), 8 M. & W. 834; 11 L.J.Ex. 199; 151 E.R. 1278; 1 Digest (Repl.) 737, 2793.

Garrett v. Handley (1825), 4 B. & C. 664; 7 Dow. & Ry.K.B. 144; 107 E.R. 1208; 26 Digest (Repl.) 102, 696.

Bateman v. Phillips (1812), 15 East, 272; 104 E.R. 847; 26 Digest (Repl.) 45, 299.

- A *Cothay v. Fennell* (1830), 10 B. & C. 671; 8 L.J.O.S.K.B. 302; 109 E.R. 599; 12 Digest (Repl.) 27, 46.
Bickerton v. Burrell (1816), 5 M. & S. 383; 105 E.R. 1091; 1 Digest (Repl.) 719, 2660.
Graves v. Boston Marine Insurance Co., 2 Cranch Rep. 419.
Vinery v. Bedford Commercial Co., 8 Meli. 348.

B **Rule Nisi** obtained by the defendant for a new trial in an action of assumpsit in which it was claimed that the instrument was a charterparty of affreightment made between the plaintiff, then and still being the owner of the good ship or vessel called *Ann*, and the defendant. Plea: Non assumpsit.

C At the trial, before WIGHTMAN, J., at the Durham Assizes, 1847, the charterparty was put in, signed, not by the plaintiff, but by her son: and the words of agreement were:

"It is . . . mutually agreed between C. J. Humble, Esq. [the son] owner of the good ship or vessel called *The Ann*, . . . and Jameson Hunter [the defendant]."

D Humble the son was called as a witness for the plaintiff, to prove that she was the real owner of the vessel, and that he had signed the charterparty as her agent, and not as principal. This line of examination was objected to on the ground that a person who has signed a contract expressly as principal cannot be admitted to prove, in contradiction to the written instrument, that he was merely an agent. The evidence was received, and a verdict found for the plaintiff for £141. Subsequently the defendant obtained a rule nisi for a new trial on account of the reception of this evidence.

E Knowles and F. Robinson, for the plaintiff, showed cause against the rule.

Watson and Pashley, for the defendant, supported the rule.

F **LORD DENMAN, C.J.**—We were rather inclined at first to think that this case came within the doctrine that a principal may come in and take the benefit of a contract made by his agent. But that doctrine cannot be applied where the agent contracts as principal; and he has done so here by describing himself as "owner" of the ship. The language of LORD ELLENBOROUGH, C.J., in *Lucas v. De la Cour* (1) (1 M. & S. at p. 250),

G "if one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made,"

is very apposite to the present case.

I **PATTESON, J.**—The question in this case turns on the form of the contract. If the contract had been made in the son's name merely, without more, it might have been shown that he was agent only, and that the plaintiff was the principal. But, as the document itself represents that the son contracted as "owner," *Lucas v. De La Cour* (1), applies. In that case the partner who made the contract represented that the property which was the subject of it belonged to him alone. The plaintiff in the present case must be taken to have allowed her son to contract in this form, and must be bound by his act. In *Robson v. Drummond* (2), where Sharpe, a coachmaker, with whom Robson was a dormant partner, had agreed to furnish the defendant with a carriage for five years, at a certain yearly sum, and had retired from the business, and assigned all his interest in it to C. before the end of the first three years, it was held that an action could not be maintained by the two partners against the defendant, who returned the carriage, and refused to make the last two yearly payments. In this case I was at first in the plaintiff's favour on account of the general principle referred to by LORD DENMAN, C.J.; but the form of the contract takes the case out of that principle.

WIGHTMAN, J.—I thought at the trial that this case was governed by *Skinner v. Stocks* (3). But neither in that nor in any case of the kind did the contracting party give himself any special description, or make any assertion of title to the subject-matter of the contract. Here the plaintiff describes himself expressly as "owner" of the subject-matter. This brings the case within the principle of *Lucas v. De La Cour* (1) and the American authorities cited. A

LORD DENMAN, C.J.—*Robson v. Drummond* (2), which **PATTESON, J.**, has cited, seems the same, in principle, with the present case. You have a right to the benefit you contemplate from the character, credit and substance of the party with whom you contract. B

Rule absolute.

HUGHES v. CHATHAM OVERSEERS. BURTON'S CASE C

[COURT OF COMMON PLEAS (Tindal, C.J., Erskine and Maule, JJ.), November 13, 16, December 6, 1843]

[Reported 5 Man. & G. 54, 77; Bar. & Arn. 61; Cox & Atk. 14;
1 Lut. Reg. Cas. 51; Pig. & R. 35; 7 Scott, N.R. 581;
13 L.J.C.P. 44; 2 L.T.O.S. 149, 189; 8 J.P. 89; 7 Jur. 1136;
134 E.R. 479, 488]

Landlord and Tenant—Master and servant—Tenant—Servant—Occupying house free of rent or rates as part remuneration for services.

There is no inconsistency between the relation of master and servant and that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest, and, if he do so, the servant becomes entitled to the legal incidents of the estate as much as if he had acquired it for any consideration other than his services. D

B., a master ropemaker in a royal dockyard had, as such, the exclusive use and occupation of a house in the dockyard for himself and his family. He paid no rent, but had the house as part remuneration for his services. No part of it was used for public purposes. He was rated and assessed in respect of the house in his own name as occupier, but all rates and taxes were paid by the paymaster-general at the dockyard also as part remuneration. If B. had not been allowed the house he would have been given an allowance for a house in addition to his salary. E

Held: he occupied the house as tenant. F

Notes. The Representation of the People Act, 1832, was repealed by s. 80, Sched. 13, of the Representation of the People Act, 1948, as amended by the Representation of the People Act, 1949, s. 1 and s. 2 of which deal with Parliamentary and local government franchise (8 HALSBURY'S STATUTES (2nd Edn.) 578, 579). Although the qualification is now one of residence this case has been reported because it deals with the relation of landlord and tenant where the tenant is servant to the landlord. G

Distinguished: *Dobson v. Jones* (1844), Bar. & Arn. 243. Considered: *Clark v. St. Mary, Bury St. Edmunds Overseers* (1856), 1 C.B.N.S. 23; *Fox v. Dalby* (1874), L.R. 10 C.P. 285. Applied: *Smith v. Seghill Overseers*, [1874-80] All E.R. Rep. 373; *Dover v. Prosser*, [1904] 1 K.B. 84. Considered: *Ford v. Langford*, [1949] 1 All E.R. 483. Referred to: *Heath v. Haynes* (1857), K. & G. 99; *Heartley v.* H

A *Banks* (1859), K. & G. 219; *Bridgwater v. Durant* (1861), 26 J.P. 6; *Marsh v. Estcourt* (1889), 24 Q.B.D. 147; *Reed v. Cattermole*, [1936] 2 All E.R. 526; *I.R.Comrs. v. Leckie* (1940), 23 Tax Cas. 471; *Gray v. Holmes* (1949), 30 Tax Cas. 467.

As to the relation of landlord and tenant where a servant is in occupation of premises of the master, see 23 HALSBURY'S LAWS (3rd Edn.) 410 et seq.; and for cases see 30 DIGEST (Repl.) 547 et seq.

B Cases referred to in argument:

R. v. Minster (Inhabitants) (1814), 3 M. & S. 276.

R. v. Bardwell (Inhabitants) (1823), 2 B. & C. 161; 3 Dow. & Ry. K.B. 369; 2 Dow. & Ry. M.C. 53; 107 E.R. 343.

R. v. Kelstern (1816), 5 M. & S. 136.

C *R. v. Cheshunt (Inhabitants)* (1818), 1 B. & Ald. 473; 106 E.R. 174; 30 Digest (Repl.) 548, 1816.

R. v. South Kilvington (Inhabitants) (1843), 5 Q.B. 216; 3 Gal. & Dav. 157; 13 L.J.M.C. 3; 2 L.T.O.S. 119; 8 J.P. 38; 7 Jur. 1108; 114 E.R. 1231.

R. v. Snape (Inhabitants) (1837), 6 Ad. & El. 278; 1 Nev. & P.K.B. 429; Nev. & P.M.C. 142; Will. Woll. & Dav. 42; 6 L.J.M.C. 33; 1 J.P. 71; 1 Jur. 39; 112 E.R. 106; 30 Digest (Repl.) 548, 1818.

D *Bertie v. Beaumont* (1812), 16 East, 33; 104 E.R. 1001; 30 Digest (Repl.) 547, 1811.

R. v. Ponsonby (1842), 3 Q.B. 14; 4 State Tr.N.S. App. 1369; 1 Gal. & Dav. 713; 11 L.J.M.C. 65; 6 J.P. 266; 6 Jur. 642; 114 E.R. 412; 38 Digest (Repl.) 506, 197.

E *R. v. Williams* (1639), 1 Hale, P.C. 522; 15 Digest (Repl.) 1129, 11,284.

R. v. Burgess (1662), Kel. 27; 1 Leach, 324, n.; 84 E.R. 1066; 15 Digest (Repl.) 1134, 11,377.

R. v. Hawkins (1704), Fost. 38; 2 East, P.C. 485; 15 Digest (Repl.) 1130, 11,303.

R. v. Margetts (1801), 2 Leach, 930; 15 Digest (Repl.) 1134, 11,381.

R. v. Witt (1829), 1 Mood.C.C. 248, C.C.R.; 15 Digest (Repl.) 1134, 11,388.

F *R. v. Brown* (1787), 2 Leach, 1018, n.; 2 East, P.C. 501; 15 Digest (Repl.) 1132, 11,343.

R. v. Stock (1810), Russ. & Ry. 185; 2 Leach, 1015; 2 Taunt. 339; 127 E.R. 1109, C.C.R.; 15 Digest (Repl.) 1134, 11,383.

R. v. Rees (1836), 7 C. & P. 568; 15 Digest (Repl.) 1134, 11,389.

R. v. Jobling (1823), 1 Lew.C.C. 27; Russ. & Ry. 525, C.C.R.; 15 Digest (Repl.) 1134, 11,385.

G *R. v. Bridgwater (Inhabitants)* (1790), 3 Term Rep. 550; 100 E.R. 727; 38 Digest (Repl.) 749, 1684.

R. v. Openshaw (1764), 1 Wm. Bl. 462; Burr.S.C. 552; 96 E.R. 268.

R. v. Axmouth (Inhabitants) (1807), 8 East, 383; 103 E.R. 390.

R. v. Melkridge (Inhabitants) (1787), 1 Term Rep. 598.

H *R. v. Langrville* (1830), 10 B. & C. 899; 5 Man. & Ry. K.B. 726.

R. v. Benneworth (1824), 2 B. & C. 775; 4 Dow. & Ry. K.B. 355.

R. v. Cozens (1780), 2 Doug.K.B. 426.

R. v. Terrott (1803), 3 East, 506; 1 Bott. 197; 102 E.R. 691; 38 Digest (Repl.) 486, 82.

R. v. Hurd (1789), 3 Term Rep. 497; 1 Bott. 166; 100 E.R. 697; 38 Digest (Repl.) 486, 81.

I **Appeal** by the objector against the decision of the revising barrister disallowing an objection to the name of the claimant being retained on the list of voters for the parish of Chatham, within the said borough, and deciding that the claimant "occupied as tenant" within s. 27 of the Representation of the People Act, 1832. Seven other cases were consolidated with the present case.

The claimant, James Burton, the party objected to, occupied a house in the dockyard at Chatham, of the value of £40 per annum from July, 1836, to September, 1842, when he moved to a house in Milton Terrace, Chatham, about a mile from

the dockyard, where he now resides. The house in Milton Terrace he hired from the landlord in the usual manner, and paid a rent of £50 per annum. He was rated for it, and paid such rates in the ordinary way; and no question arose in respect of that house. With regard to the house in the dockyard, it belonged to the lords commissioners of the admiralty. The person objected to was master ropemaker in the dockyard, and as such he had the house as his residence. He paid no rent in money for it, but had it as part remuneration for his services. He had the exclusive use and occupation of the house for himself and family, and no part of it was used for public purposes; the office in which he performed his public services was away from it. He had the keys of all the doors, and no person but himself had any control over the house. He was rated to all the poor rates and assessed taxes in respect of the house, in his own name as the occupier. Such rates and taxes were paid by the paymaster-general's clerk, at the pay-office at Chatham. They were so paid as part remuneration for his services. If he had not been allowed the house, he would have had an allowance for a house in addition to his salary; and now that he had not a house in the dockyard, he was allowed one guinea per week by the admiralty in lieu of rent and rates, under the name of "lodging-money." If he had paid the poor rates himself in respect of the house in the dockyard, instead of their being paid for him as above, the admiralty would have repaid him.

William Hughes, the objector, appealed.

Kinglake for the objector.

Cockburn for the claimant.

Cur. adv. vult.

Dec. 6, 1843. **TINDAL, C.J.**, delivered the following judgment of the court.—In this case two questions were raised before the revising barrister, and were argued on the appeal to this court; first, whether the occupation by the claimant, James Burton, was an occupation as tenant, within s. 27 of the Representation of the People Act, 1832; secondly, whether upon the facts stated, he had paid the poor-rates, as required by the proviso in that section.

As to the first question, the facts are, that the house occupied by the claimant is situated in the dockyard at Chatham; that the claimant is master rope-maker, and, as such, had the house as his residence; that he paid no rent in money for it, but had it in part remuneration for his services, and that no part of it was used for public purposes, the office in which he performed his public services being away from it. If he had not been allowed the house, he would have had an allowance for a house in addition to his salary. Upon this state of facts the revising barrister has found that the claimant occupied as tenant; and the question in effect is whether the statement of facts shows that the decision is wrong; that is, whether it shows the occupation not to have been in the character of tenant.

On the argument, several cases were cited bearing on the question whether the house could be called the dwelling-house of the claimant in an indictment for burglary. But that question is so different from the one now in dispute, viz., whether there was a tenancy [i.e., whether he "occupy as tenant"] or not that we think it unnecessary to notice those decisions. But the cases chiefly relied on were those settlement cases in which the question has arisen whether a servant came to settle on a tenement belonging to his master within the meaning of the Poor Relief Act, 1661. The language and object of that Act are very different from those of the statute now under consideration; and, therefore, no similarity of facts in a case arising on the one Act can make it in point upon a question raised on the other. But as the court, in deciding those cases, has considered that the settlement turned on the question, whether the pauper occupied as tenant to his master, the decisions are very important on the present inquiry.

In those cases, as in this, there was no doubt of the right to exact, and the liability to render, service; but in those, as in the present case, the doubt was whether the relation of landlord and tenant subsisted between the same parties.

A There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; and if he do so, the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration.

It may be, that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them; it may be that he is not permitted to occupy, as a reward, in the performance of his master's contract to pay him, but required to occupy in the performance of his contract to serve his master. The settlement cases, cited in argument, established, and proceeded on, this distinction. We think it applicable to the present question; and as there is nothing in the facts stated, to show that the claimant was required to occupy the house for the performance of his services, or did occupy it in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services; and, as the Case expressly finds that he had the house as part remuneration for his services, we cannot say that the conclusion at which the revising barrister has arrived is wrong.

The Case, indeed, stated that the claimant was master ropemaker, and as such had the house as his residence; but that expression is equally applicable, whether he was made tenant of the house in payment of his services as master ropemaker, or occupied it for the purpose of performing them. The fact also of having a lower salary in consequence of being allowed a house, though not immaterial, is by no means decisive; for such a fact might exist in a case in which the house was occupied for the purpose of the service, and not in the character of tenant. It may well happen that something in the service which renders it less onerous or more pleasant may cause a reduction of the salary, without being a part of the salary itself. A master may give lower wages in consequence of lodging his servants in his house, instead of requiring them to find lodgings out of it, without making them his tenants. But in the present case, upon the grounds above stated, we think the juster inference is, that there is an occupation as tenant.

F On the second question, it appears that the claimant was rated to the poor rate and assessed taxes, and that they were paid for him in part remuneration of his services. Upon this question it appears to us that the payment, being one to which the claimant was liable, and having been made on his own account by those whom he procured to make it, by giving value for it, is sufficient within s. 27 of the Representation of the People Act, 1832. The present question arising upon an Act of Parliament conferring a franchise in respect of property or ability, we think the payment, having been made in a manner equally indicative of these qualifications, is as effectual, within the spirit of the enactment, as if made by the hand of the claimant. The words of the act which require that "such person shall have paid the rate," do certainly, in their largest ordinary sense, comprehend payments made in discharge of, and procured by, such persons, as well as those made by his own hand: and the largest ordinary sense is that in which words ought to be construed, where there is nothing in the occasion on which they are used, or in the context, to restrict them.

We think, therefore, the decision of the revising barrister is right on both points.

Appeal dismissed.

VAUGHAN *v.* TAFF VALE RAIL. CO.

[COURT OF EXCHEQUER CHAMBER (Sir Alexander Cockburn, C.J., Williams, Crompton, Willes, Byles and Blackburn, JJ.), May 12, 1860]

[Reported 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453;
6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351]

Railway—Fire arising from sparks from engine—Damage to woodland—Every precaution taken by railway company to avoid such accidents.

A wood adjoining the defendants' railway was set on fire by sparks from the locomotive. On several previous occasions it had been set on fire, and the company had paid for the damage. The jury found the defendants were guilty of negligence, but it was admitted that they had taken every possible precaution to prevent accidents.

Held: the defendants, being authorised by their Act of Parliament to use locomotive engines, in the absence of negligence on their part were not responsible for any unavoidable injury thence arising.

Notes. Considered: *Freemantle v. London and North Western Rail. Co.* (1861), 10 C.B.N.S. 89. Applied *Longman v. Grand Junction Canal Co.* (1863), 3 F. & F. 736. Distinguished: *Jones v. Festiniog Rail. Co.* (1868), L.R. 3 Q.B. 733. Applied: *Dungey v. London Corpn.* (1869), 38 L.J.C.P. 298. Approved: *Hammer-smith and City Rail. Co. v. Brand*, [1861-73] All E.R.Rep. 60. Considered: *Buccleuch v. Metropolitan Board of Works* (1870), L.R. 5 Exch. 221. Applied: *Smith v. London and South Western Rail. Co.*, [1861-73] All E.R.Rep. 167; *Dunn v. Birmingham Canal Co.* (1872), L.R. 8 Q.B. 42. Approved: *H.M.S. Bellerophon* (1875), 33 L.T. 412. Considered: *Dixon v. Metropolitan Board of Works* (1881), 7 Q.B.D. 418. Applied: *Lea Conservancy Board v. Hertford Corpn.* (1884), Cab. & El. 299. Considered: *London, Brighton and South Coast Rail. Co. v. Truman*, [1881-5] All E.R.Rep. 134; *Evans v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1887), 36 Ch.D., 626; *Cowper Essex v. Acton Local Board*, [1886-90] All E.R.Rep. 901. Applied: *A.-G. v. Metropolitan Rail. Co.*, [1894] 1 Q.B. 384. Distinguished: *Long Eaton Recreation Grounds Co. v. Midland Rail. Co.* (1901), 71 L.J.K.B. 74. Considered: *West v. Bristol Tramways Co.*, [1908-10] All E.R.Rep. 215. Distinguished: *Great Central Rail. Co. v. Hewlett*, [1916-17] All E.R.Rep. 1027. Considered: *Quebec Railway, Light, Heat and Power Co. v. Vandry*, [1920] A.C. 662; *Manchester Corpn. v. Farnworth*, [1929] All E.R.Rep. 90; *J. Langlands (Swanley), Ltd. v. British Transport Commission*, [1956] 2 All E.R. 702. Referred to: *Kearnes v. Cardwainers' Co.* (1859), 6 C.B.N.S. 388; *Caledonian Rail. Co. v. Lockhart* (1860), 3 L.T. 65; *Scott v. London Docks Co.* (1864), 11 L.T. 383; *Madras Rail. Co. v. Zemindar of Carvetinagarum* (1874), 30 L.T. 770; *Cattle v. Stockton Waterworks Co.* (1875), 44 L.J.Q.B. 139; *Hill v. Metropolitan Asylum District Managers* (1879), 4 Q.B.D. 433; *R. v. Sheward* (1882), 9 Q.B.D. 741; *Gas Light and Coke Co. v. St. Mary Abbots, Kensington Vestry* (1884), Cab. & El. 368; *National Telephone Co. v. Baker* (1893), 62 L.J.Ch. 699; *Elmsley v. North Eastern Rail. Co.*, [1896] 1 Ch. 418; *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1898] 2 Ch. 614; *Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works*, [1895-9] All E.R.Rep. 422; *Canadian Pacific Rail. v. Roy*, [1902] A.C. 220; *Fox v. Newcastle-upon-Tyne City Council*, [1941] 2 All E.R. 563; *Hay or Bourhill v. Young*, [1942] 2 All E.R. 396.

As to damage from railway engine sparks generally, see 31 HALSBURY'S LAWS (3rd Edn.) 474 et seq.; and for cases see 38 DIGEST (Repl.) 399.

Case referred to:

- (1) *R. v. Pease* (1832), 4 B. & Ad. 30; 1 Nev. & M.K.B. 690; 1 Nev. & M.M.C. 535; 2 L.J.M.C. 26; 110 E.R. 366; 38 Digest (Repl.) 398, 594.

A Also referred to in argument :

Aldridge v. Great Western Rail. Co. (1841), 3 Man. & G. 515; 1 Dowl.N.S. 247; 2 Ry. & Can. Cas. 852; 4 Scott, N.R. 156; 133 E.R. 1246; 38 Digest (Repl.) 400, 606.

Piggot v. Eastern Counties Rail. Co. (1846), 3 C.B. 229; 15 L.J.C.P. 235; 7 L.T.O.S. 209; 10 Jur. 571; 136 E.R. 92; 38 Digest (Repl.) 401, 621.

B *Manley v. St. Helens Canal and Rail. Co.* (1858), 2 H. & N. 840; 27 L.J.Ex. 159; 6 W.R. 297; 157 E.R. 346; 38 Digest (Repl.) 34, 174.

Bird v. Great Northern Rail. Co. (1858), 28 L.J.Ex. 3; 8 Digest (Repl.) 99, 654.

Blyth v. Birmingham Waterworks Co. (1856), post p. 478; 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 2 Jur.N.S. 333; 4 W.R. 294; 156 E.R. 1047; 38 Digest (Repl.) 13, 50.

C *Leame v. Bray* (1803), 3 East, 593; 102 E.R. 724; 43 Digest 420, 429.

Whitehouse v. Birmingham Canal Co. (1857), 27 L.J.Ex. 25; 38 Digest (Repl.) 13, 53.

Turberville v. Stamp (1697), 1 Com. 32; Carth. 425; Comb. 459; Holt, K.B. 9; 1 Ld. Raym. 264; 12 Mod. Rep. 152; 1 Salk. 13; 1 Skin. 681; 92 E.R. 944; 36 Digest (Repl.) 164, 870.

D *Beaulieu v. Finglam* (1401), Y.B. 2 Hen. 4, fo. 18, pl. 6; 36 Digest (Repl.) 78, 422.

Viscount Canterbury v. A.-G. (1843), 1 Ph. 306; 4 State, Tr.N.S. 767; 12 L.J.Ch. 281; 7 Jur. 224; 41 E.R. 648, L.C.; 36 Digest (Repl.) 76, 408.

May v. Burdett (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 10 Jur. 692; 115 E.R. 1213; 36 Digest (Repl.) 189, 1002.

E

Appeal by the defendants, under the provisions of the Common Law Procedure Act, 1854, against the decision of the Court of Exchequer, reported 3 H. & N. 743, in discharging a rule of that court obtained by the defendants, to show cause why the verdict found for the plaintiff on the trial of the cause should not be set aside, and a new trial had, on the ground that the verdict was against the weight of evidence, and on the ground of misdirection, the judge having told the jury that no care or skill used in preventing the escape of fire from the engine would be an answer to the charge of negligence, provided they did not succeed, and also in telling the jury that the conduct of the plaintiff, in allowing his wood to be in such a combustible state, was not material.

F

The defendants were a company, who, under their special Acts and the General Railway Act incorporated therewith, were proprietors of, and used and worked the Taff Vale Railway with locomotive engines as a passenger and goods line. The plaintiff was the owner of a wood or plantation adjoining the embankment of the railway. On Mar. 14, 1856, the plaintiff's wood was discovered to be on fire, and eight acres of it were burnt. The fire originated from a spark of coal from one of the defendants' locomotive engines in the ordinary course of its working. An action brought

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by the plaintiff against the defendants for damage he had sustained by the fire was tried before BRAMWELL, B., and a common jury at Swansea Spring Assizes, 1858. From the evidence given by the plaintiff and his witnesses it appeared that the fire in the plaintiff's wood was first seen at a place fifty yards from the railway, that there were traces of fire extending continuously all the way between the railway and the wood, and that the railway bank was burning; that the grass on the bank

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had been cut three or four months before, and that there was grass of a very combustible nature growing on the bank just previous to the fire, that it was all burned, that there was a great deal of long dry feathering grass growing in the wood which was extremely combustible, that the wood was also full of small dry branches, the remains of a former cutting, and was described by the plaintiff to be in just about as safe a state as an open barrel of gunpowder would be in the Cypartha Rolling Mill. The wood, however, was in an ordinary and natural condition, and as it had been before and since the railway was made. Whether the injury was caused by the grass on the embankment being first set fire to, or whether by lighted matter

thrown from the locomotive on to the plaintiff's land, was not left to or determined by the jury. The defendant's counsel did not at the trial make any objection on this ground. On the part of the defendants it was sworn that everything which was practicable had been done to the locomotive to make it safe; that a cap had been put to its chimney, that its ashpan had been secured, that it travelled at the slowest pace consistent with practical utility, and that if its funnel had been more guarded or its ashpan less free, or if its pace was slower, it could not be advantageously used; and it must be taken to be the fact that the defendants had taken every precaution and adopted every means in their power, and which science could suggest, to prevent their engines from emitting sparks, but the witness added, "we do occasionally burn our own banks now."

The learned judge left the question of negligence and improper conduct by the defendants to the jury, saying, there was evidence thereof, even though the jury believed the evidence, that everything which was practicable had been done to the locomotive to make it safe, and that it travelled at the slowest pace consistent with practical utility. He refused to leave to the jury any question arising out of the combustible character of the plaintiff's wood. The jury returned a general verdict for the plaintiffs, the damages being agreed upon at £27 10s. The above-mentioned rule the Court of Exchequer afterwards on Nov. 20 last discharged. The judge did not direct the jury, as therein stated, that no care or skill used in preventing the escape of fire from the engines would be an answer to the charge of negligence, provided the defendants did not succeed in preventing it, but left the question of negligence and improper conduct as before stated. The question of whether there was evidence as to both or either counts, was entertained and dealt with by the Court of Exchequer as though open to the defendants on the rule, and without requiring any amendment thereof.

Notice of appeal against the decision of that court in discharging the rule was by leave of the court duly given by the defendants according to the Common Law Procedure Act, 1854. The question for the decision of the Court of Exchequer Chamber was whether or not the defendants were entitled to have a new trial, on the ground that there was no evidence of negligence to go to the jury under the first count of the declaration, assuming it was true, as sworn, that everything had been done, etc. The plaintiffs contending that there was such evidence, and also that if not, the question was not open to the defendants, and also that the judge was wrong in not leaving to the jury any question arising out of the combustible character of the plaintiff's wood. If the court should be of opinion in the affirmative, then the verdict for the plaintiff was to be set aside, and a new trial had. If the court should be of opinion in the negative, then the verdict for the plaintiff was to stand, and judgment was to be entered for £27 10s. damages, with costs of suit.

F. W. Lloyd for the defendants.

Grove, Q.C., for the plaintiff.

SIR ALEXANDER COCKBURN, C.J. We are all of opinion that the decision of the Court of Exchequer cannot be upheld, and that the case must, therefore, go down again for a new trial. I collect from the reasons given by **BRAMWELL, B.**, in delivering the judgment of the Court of Exchequer that the view taken by him at the trial, and which was afterwards upheld by the Court of Exchequer, was that when an accident of any kind arises from the use of fire as the means of propelling an engine on a railway, it must be taken to be an invariable and necessary incident to the use of fire for the purpose of propelling a locomotive. Consequently a railway company using fire for that purpose, are liable in respect of any accident which may arise, although they may have taken every known precaution for the purpose of preventing such accidents. That was the view taken by the court below so far as regards the first count of the declaration. We cannot adopt that view, it is at variance with the doctrine laid down in *R. v. Pease* (1), a case the authority of which we are prepared to uphold, and the reason of which I entirely approve.

- A If a private person uses any means for effecting any purpose of his own, from which more or less danger may arise, he will be responsible to those injured if any accident occur from the use of those means; but if the legislature have thought fit to interfere and have sanctioned the use of particular means for a given purpose, so long as those means are used for the purpose for which their use was sanctioned, provided always every precaution is taken which the nature of the case requires,
- B then if, notwithstanding all reasonable care and diligence, an accident does occur, the parties are not liable for any injury which is a consequence of the use of the means so sanctioned, unless they have contributed to it by some negligence. That is the doctrine of *R. v. Pease* (1). As far, therefore, as regards the first count, it appears from the finding of the jury that the defendants were guilty merely of using fire as a means of locomotion, and on that count the defendants are not liable.
- C As to the second, which charges the defendants with negligence in keeping the banks, that does not appear to have been specifically left to the jury. The defendants may be able to show that they were not guilty of negligence, but as to this we think there ought to be a new trial.

- D **WILLIAMS, J.**—I am of the same opinion. To support the judgment of the court below we should hold that the defendants are liable for the mere use of the engine, without any negligence, which would be at variance with *R. v. Pease* (1).

- CROMPTON, J.**—I am of the same opinion. We must look, as in this case, as if it was a distinct finding that there was no negligence on the part of the company, except keeping the engine. When I first heard the case I was inclined to think there was sufficient evidence to support the declaration as to the first count; but
- E I quite agree that *R. v. Pease* (1) decides the matter. The Act of Parliament having sanctioned the use of locomotives, the necessary consequence is that parties using them are not liable for any injury which is a necessary result of their doing so irrespective of any negligence. It is not like the case of a man keeping a dangerous animal, because keeping an animal naturally dangerous is in itself a wrongful act.

- F If a man keeps an animal which is naturally of a mild and gentle nature, it is a lawful act, and he is not responsible for any injury done by it, unless he knew it was dangerous.

- WILLES, J.**—I am entirely of the same opinion, although it is not without some reluctance I have come to this conclusion, as I feel compelled to reverse the decision, although I believe I agree with the reasons which influenced the majority of the
- G Court of Exchequer in the judgment as to the evidence of negligence; but as the case now stands it is stated as a fact, which must be taken as such, that the defendants used all possible precautions consistent with the practical working of the line; therefore, the question of negligence or no negligence does not now arise, and as the defendants appear to have done nothing but that which their Act enabled them to do, they are not liable.

- H **BYLES, J.**—I am of the same opinion. *R. v. Pease* (1) is a direct authority.

- BLACKBURN, J.**—I am of the same opinion. The mere fact of sparks being emitted from the engine is *prima facie* evidence of negligence, but not only is that presumption rebutted by other evidence, but it is found as a fact that every possible precaution was taken by the defendants to prevent accidents. The question reduces
- I itself, therefore, to this: Are a railway company, using an engine with fire, responsible for any injury which may arise from the use of it, although they have taken every possible precaution to guard against it. *R. v. Pease* (1) decides they are not.

Appeal allowed.

BLYTH v. BIRMINGHAM WATERWORKS CO.

[COURT OF EXCHEQUER (Alderson, Martin and Bramwell, BB.), February 6, 1856]

[Reported 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261;
20 J.P. 247; 2 Jur.N.S. 333; 4 W.R. 294; 156 E.R. 1047]*Negligence—Water—Escape—Frost of exceptional severity.**Water Supply—Duties and liabilities of undertakers—Duty to fix fire plugs—
Bursting of pipe in frost of unforeseeable severity—Need to prove negligence
by undertaker.*

A water company in laying down their pipes inserted properly constructed fire-plugs as safety-valves in these pipes in pursuance of their Act of Parliament. In a winter of extreme severity such as could not have been foreseen an accumulation of ice round a plug prevented it from acting properly, and as a result a large quantity of water escaped into the plaintiff's house causing damage.

Held: the fact that the precautions taken proved insufficient against the effects of such unforeseeable coldness was not sufficient to render the water company liable in negligence, and in the absence of negligence it could not be held responsible for the escape.

Per ALDERSON, B.: Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

Semble per BRAMWELL, B.: The plaintiff was under quite as much obligation to remove the accumulated ice and snow as the defendants.

Notes. Distinguished: *Steggles v. New River Co.* (1863), 1 New Rep. 236. Considered: *Madras Rail. Co. v. Zemindar of Carvetinagarum* (1874), 30 L.T. 770; *Baker v. James Bros. & Sons, Ltd.*, [1921] All E.R.Rep. 590; *Markland v. Manchester Corpn.*, [1934] 1 K.B. 566; *Bolton v. Stone*, [1951] 1 All E.R. 1078; *Cork v. Kirby Maclean, Ltd.*, [1952] 2 All E.R. 402; *Prosser & Son, Ltd. v. Levy*, [1955] 3 All E.R. 577. Referred to: *Smith v. London and South Western Rail. Co.* (1870), L.R. 6 C.P. 14; *Stretton's Derby Brewery v. Derby Corpn.*, [1891-4] All E.R.Rep. 731; *Bull v. Shoreditch Borough* (1902), 1 L.G.R. 81; *Weld-Blundell v. Stephens*, [1920] All E.R.Rep. 32; *Re Polemis and Furness, Withy & Co., Ltd.*, [1921] All E.R.Rep. 40; *Montreal City v. Watt and Scott*, [1922] 2 A.C. 555; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539; *Cunard v. Antifyre, Ltd.*, [1932] All E.R.Rep. 558; *Overseas Tankship (U.K.), Ltd. v. Morts Dock and Engineering Co.*, [1961] 1 All E.R. 404.

As to definitions of negligence, see 28 HALSBURY'S LAWS (3rd Edn.) 3 et seq.; and for cases see 36 DIGEST (Repl.) 5-11. As to water suppliers' liability for defective work in streets, see 39 HALSBURY'S LAWS (3rd Edn.) 357; and for cases see 43 DIGEST 1096 et seq.

Cases referred to in argument:

Piggot v. Eastern Counties Rail. Co. (1846), 3 C.B. 229; 15 L.J.C.P. 235; 7 L.T.O.S. 209; 10 Jur. 571; 136 E.R. 92; 36 Digest (Repl.) 145, 765.

Aldridge v. Great Western Rail. Co. (1841), 3 Man. & G. 515; 1 Dowl.N.S. 247; 2 Ry. & Can. Cas. 852; 4 Scott, N.R. 156; 133 E.R. 1246; 36 Digest (Repl.) 134, 692.

Vaughan v. Menlove (1837), 3 Bing.N.C. 468; 3 Hodg. 51; 4 Scott, 244; 6 L.J.C.P. 92; 1 Jur. 215; 132 E.R. 490; 36 Digest (Repl.) 29, 126.

Wells v. Ody (1836), 1 M. & W. 452; 7 C. & P. 410; 5 Dowl. 95; 2 Gale, 12; Tyr. & Gr. 715; 5 L.J.Ex. 199; 150 E.R. 512; 19 Digest (Repl.) 148, 962.

Sjordet v. Hall (1828), 4 Bing. 607; 1 Moo. & P. 561; 6 L.J.O.S.C.P. 137; 130 E.R. 902; 36 Digest (Repl.) 164, 874.

A **Appeal** by the defendants, the Birmingham Waterworks Co., from a decision of the judge of the Birmingham County Court in an action tried before a jury, and brought by the plaintiff to recover for damage sustained by him by reason of the negligence of the defendants in not keeping their water-pipes and the apparatus connected therewith in proper order.

The defendants were incorporated by the statute 7 Geo. 4, c. cix, for the purpose of supplying Birmingham with water. By s. 84 of the Act it was enacted, that the company should, upon the laying down of any main-pipe or other pipe in any street, fix, at the time of laying down such pipe, a proper and sufficient fire-plug in each such street, and should deliver the key or keys of such fire-plug to the persons having the care of the engine-house in or near to the said street, and cause another key to be hung up in the watch-house in or near to the said street. By s. 87, pipes were to be eighteen inches beneath the surface of the soil. By s. 89, the mains were at all times to be kept charged with water. The defendants derived no profit from the maintenance of the plugs distinct from the general profits of the whole business, but such maintenance was one of the conditions under which they were permitted to exercise the privileges given by the Act. The main-pipe opposite the house of the plaintiff was more than eighteen inches below the surface. The fire-plug was constructed according to the best known system, and the materials of it were at the time of the accident sound and in good order.

The apparatus connected with the fire-plug was as follows: The lower part of a wooden plug was inserted in a neck, which projected above and formed part of the main. About the neck there was a bed of brickwork puddled in with clay. The plug was also enclosed in a cast iron tube, which was placed upon and fixed to the brickwork. The tube was closed at the top by a moveable iron stopper having a hole in it for the insertion of the key, by which the plug was loosened when occasion required it. The plug did not fit tight to the tube, but room was left for it to move freely. This space was necessarily left for the purpose of easily and quickly removing the wooden plug to allow the water to flow. On the removal of the wooden plug the pressure upon the main forced the water up through the neck and cap to the surface of the street.

On Feb. 24, a large quantity of water, escaping from the neck of the main, forced its way through the ground into the plaintiff's house. The apparatus had been laid down 25 years, and had worked well during that time. The defendants' engineer stated that the water might have forced its way through the brickwork round the neck of the main, and that the accident might have been caused by the frost, inasmuch as the expansion of the water would force up the plug out of the neck, and the stopper being encrusted with ice would not suffer the plug to ascend. One of the severest frosts on record set in on Jan. 15, 1855, and continued until after the accident in question. An encrustation of ice and snow had gathered about the stopper, and in the street all round, and also for some inches between the stopper and the plug. The ice had been observed on the surface of the ground for a considerable time before the accident. A short time after the accident, the company's turncock removed the ice from the stopper, took out the plug, and replaced it. The judge left it to the jury to consider whether the company had used proper care to prevent the accident. He thought, that, if the defendants had taken out the ice adhering to the plug, the accident would not have happened, and left it to the jury to say whether they ought to have removed the ice. The jury found a verdict for the plaintiff.

Field for the defendants.

Kennedy for the plaintiff.

ALDERSON, B.—I am of opinion that there was no evidence to be left to the jury. The case turns upon the question whether the facts proved show that the defendants were guilty of negligence. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and

reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A reasonable man would act with reference to the average circumstances of the temperature in ordinary years. The defendants had provided against such frosts as experience would have led men, acting prudently, to provide against; and they are not guilty of negligence, because their precautions proved insufficient against the effects of the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the polar regions. Such a state of circumstances constitutes a contingency against which no reasonable man can provide. The result was an accident, for which the defendants cannot be held liable.

MARTIN, B. I think that the direction was not correct, and that there was no evidence for the jury. The defendants are not responsible, unless there was negligence on their part. To hold otherwise would be to make the company responsible as insurers.

BRAMWELL, B.—The Act of Parliament directed the defendants to lay down pipes, with plugs in them, as safety-valves, to prevent the bursting of the pipes. The plugs were properly made, and of proper material; but there was an accumulation of ice about this plug, which prevented it from acting properly. The defendants were not bound to keep the plugs clear. It appears to me that the plaintiff was under quite as much obligation to remove the ice and snow which had accumulated, as the defendants. However that may be, it appears to me that it would be monstrous to hold the defendants responsible because they did not foresee and prevent an accident, the cause of which was so obscure, that it was not discovered until many months after the accident had happened.

Appeal allowed.

A

HORLEY v. ROGERS

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Crompton, Hill and Blackburn, JJ.), April 21, 1860]

B

[Reported 2 E. & E. 674; 29 L.J.M.C. 140; 2 L.T. 171; 24 J.P. 582;
6 Jur.N.S. 605; 8 W.R. 392; 121 E.R. 253]

Arrest—Arrest without warrant—Vagrant—Refusal by constable to arrest—No offence committed in his presence—Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 6.

C

A constable is not bound to arrest without a warrant a man as "found offending" against the Vagrancy Act, 1824, where no offence against that Act has been committed in his presence.

D

The wife of W. had become chargeable to the parish, and it was alleged that W. had failed to maintain her within the meaning of s. 3 of the Vagrancy Act, 1824. The relieving officer met W. and gave him in charge to a constable who refused to arrest him without a warrant. On a summons against the constable for neglect of duty by refusing to arrest under s. 6 of the Act of 1824,

Held: the constable was not bound to arrest as no offence had been committed in his presence and W. was not "found offending" within s. 6 of the Act of 1824.

E

Notes. Section 68 of the Criminal Justice Act, 1948 (28 HALSBURY'S STATUTES (2nd Edn.) 387) restricts the power to arrest without a warrant under s. 6 of the Vagrancy Act, 1824, for certain offences.

Considered: *Stevenson v. Audbrook*, [1941] 2 All E.R. 476. Referred to: *Ledwith v. Roberts*, [1936] 3 All E.R. 570.

F

As to arrest of vagrants, see 10 HALSBURY'S LAWS (3rd Edn.) 702; and for cases, see 14 DIGEST (Repl.) 206 et seq. For s. 3 and s. 6 of the Vagrancy Act, 1824, see 18 HALSBURY'S STATUTES (2nd Edn.) 202, 207.

Case Stated under s. 2 of the Summary Jurisdiction Act, 1857.

G

A summons had been taken out by the appellant, Horley, before a metropolitan police magistrate at Southwark, charging the respondent, Rogers, a metropolitan police constable, with "unlawfully refusing to take into his custody James Whistler who was found offending against s. 4 of the Vagrancy Act, 1824, by failing to maintain his wife," and was apprehended by Horley under s. 6 of that Act, the constable having failed to make an arrest under that section.

H

Horley stated in evidence that he was relieving officer of Christchurch district in St. Saviour's Union and that Charlotte Whistler was in the workhouse receiving relief. He went to No. 121, Waterloo Road, and found the husband of the woman who was chargeable and charged him with neglecting to support his wife. The husband said that she was quite able to support herself as she could earn 8s. a week and that she was not faithful, and Horley said that that was a question which must be settled by the magistrate. Horley then sent for a constable, told him that he was a relieving officer, that Whistler's wife was chargeable and that he wished to convey Whistler to the police court. The constable said, "I suppose you have a warrant" and on Horley saying that he had not, the constable said "his orders were not to take such a charge" and he refused to take Whistler, who refused to give his address and made off.

I

The magistrate found that the constable was not bound to take Whistler into custody as Whistler was not found "offending" against the Vagrancy Act, 1824, within s. 6 of that Act, and the summons was dismissed.

Collier, Q.C., and C. Smith for the appellant.

Ellis for the respondent.

SIR ALEXANDER COCKBURN, C.J.—It is perfectly clear that the constable was not justified in apprehending Whistler without a warrant, since he had committed no offence in his presence, or in the presence of the party wishing to give him in charge. It was not the province of the constable to take upon himself to say whether or not any offence had been committed. It is not as where some offence under the Vagrancy Act, 1824, had been committed under his own eye—in such a case he may apprehend summarily; but where, as in this case, the supposed offence is dependent upon a variety of particulars, upon which he could only be informed by others, and which, as in this case, might be justified upon the ground of the wife's infidelity, which is a question to be ascertained elsewhere, he is not justified in interfering in this summary way.

CROMPTON, HILL and **BLACKBURN, JJ.**, concurred.

Appeal dismissed.

RICKETTS v. CARPENTER

[HOUSE OF LORDS (Lord Chelmsford, L.C., Lord Cranworth, Lord St. Leonards, Lord Wensleydale, and other Lords), June 3, 4, 7, July 9, 12, 15, 1858]

[Reported 7 H.L.Cas. 68; 28 L.J.Ch. 110; 33 L.T.O.S. 66;

5 Jur.N.S. 717; 11 E.R. 28]

Will—Construction—Ordinary and grammatical sense of words used—Avoidance of absurdity, or repugnance or inconsistency with intention of testator as extracted from will—Caprice—Will to be regarded as a whole—Evidence to enable understanding of words of will—Admissibility.

Per LORD WENSLEYDALE: A will must be expressed in writing, and [in construing it] that writing only is to be considered. It is now, I believe, universally admitted that in construing that writing the rule is to read it in the ordinary and grammatical sense of the words unless some obvious absurdity or some repugnance or inconsistency with the declared intentions of the writer to be extracted from the whole instrument should follow from it, and then the sense may be modified, extended, or abridged so as to avoid those consequences, but no further . . . Quite consistently with this rule words of limitation may be supplied or rejected when warranted by the immediate context or the general scheme of the will, but not merely in a conjectural hypothesis of the testator's intentions, however reasonable, in opposition to the plain and obvious sense of the instrument.

Per LORD CRANWORTH: You are never unnecessarily to introduce and interpolate words in a will, nor even to give a construction to any clause of a will, contrary to what the plain words import, without an absolute necessity by intention declared or evinced in some other part of the will. . . . Every will must by law be in writing, and it is a necessary consequence of that law that the meaning must be discovered from the writing itself, aided only by such extrinsic evidence as is necessary to enable us to understand the words which the testator has used. . . . The only reason, therefore, for proposing to put a different interpretation on the language used is the persuasion that the intention expressed by the words does not truly convey the meaning of the testator using them; that he meant to say something different from that which he has said. But this is not a legitimate ground for adopting a forced construction, or for interpolating words, unless the instrument itself enables us to do so. Where, by acting on one interpretation of the words used, we are driven to the conclusion that the person using

A them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which are considered to be capricious, or even harsh and unreasonable. . . . The duty of a court of justice is not to search for the testator's meaning otherwise than by fairly interpreting the words he has used.

B Per LORD ST. LEONARDS: [In construing a will] you are not at liberty to transpose, to add, to subtract, to substitute one word for another, or to take a confined expression and enlarge it without absolute necessity; you must find an intention on the face of the will to authorise you to do so. You are at liberty to place yourself in the same situation as that in which the testator stood. You are entitled to inquire about his family, and the position in which he was placed with regard to his property. I doubt whether we should be justified in looking at the amount of property. . . . You can never dispose of property given by will except on what you can hold or construe to be words of gift of that property, but I deny that you are not at liberty to look at the whole frame of the will in order to collect the general intention. . . . For that purpose I read the whole of the will.

Will—Gift—Alteration or retraction in later part of will—Need of plain, unambiguous words.

E Per LORD CHELMSFORD, L.C.: Where there is a clear gift [in a will] it can only be altered and retracted by the most plain, unambiguous, and unequivocal words, and the court will, in dubio, justly prefer that construction of any subsequent clause which will make it consistent with the intention plainly expressed in the previous part [of the will].

F *Will—Construction—Value of decision on language of one will in construing another.*

Per LORD CRANWORTH: The language of one will affords very little help in enabling us to say what is the meaning of another.

G **Notes.** Distinguished: *Hope v. Potter* (1857), 3 K. & J. 206; *Neighbour v. Thurlow* (1860), 28 Beav. 33; *Stevens v. Pyle* (1860), 28 Beav. 388. Considered: *Stanley v. Stanley* (1862), 2 John. & H. 491. Applied: *Nunn v. Hancock* (1868), 16 W.R. 818; *Gordon v. Gordon* (1871), L.R. 5 H.L. 254; *Bathurst v. Errington* (1877), 2 App. 698. Considered: *Taylor v. St. Helen's Corpn.* (1877), 6 Ch.D. 264; *Re Hudson, Hudson v. Hudson* (1882), 20 Ch.D. 406. Applied: *Rogers v. Maddocks* (1892), 62 L.J.Ch. 219; *Re Whitmore, Walters v. Harrison*, [1902] 2 Ch. 66; *Re Rayner, Rayner v. Rayner*, [1904] 1 Ch. 176; *Phillips v. Rail* (1906), 54 W.R. 517; *Re Layard, Layard v. Bessborough* (1916), 85 L.J.Ch. 505. Considered: *Re Rowland, Smith v. Russell*, [1962] 2 All E.R. 837. Referred to: *Hope v. Potter* (1857), 3 K. & J. 206; *Slingsby v. Grainger* (1858), 7 H.L.Cas. 273; *Wing v. Angrave* (1860), 8 H.L.Cas. 183; *Coates v. Hart* (1863), 32 Beav. 349; *Eastwood v. Lockwood* (1867), L.R. 3 Eq. 487; *Keogh v. Keogh* (1874), 22 W.R. 508; *Leach v. Jay* (1878), 39 L.T. 242; *Evans v. Ball* (1882), 47 L.T. 165; *Rhodes v. Rhodes* (1882), 7 App. Cas. 192; *Re Northen, Salt v. Pym* (1884), 54 L.J.Ch. 273; *Locke v. Dunlop* (1888), 39 Ch.D. 387; *Re Bowman, Re Lay, Whytthead v. Boulton* (1889), 41 Ch.D. 525; *Mills v. Dunham*, [1891] 1 Ch. 576; *Foxwell v. Van Grutten* (1900), 82 L.T. 272; *Cave v. Horsell*, [1912] 3 K.B. 533; *Re Mitchell, Mitchell v. Mitchell* (1913), 108 L.T. 180; *Lowther v. Clifford*, [1926] All E.R.Rep. 290; *Perrin v. Morgan*, [1943] 1 All E.R. 187; *Re Rothermere, Mellor Basden & Co. v. Coutts & Co.*, [1943] 1 All E.R. 307.

As to the principles of the construction of wills, see 39 HALSBURY'S LAWS (3rd Edn.) 978 et seq.; and for cases see 44 DIGEST 580 et seq.

Cases referred to :

- (1) *Grey v. Pearson* (1857), 6 H.L.Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67; 3 Jur.N.S. 823; 5 W.R. 454; 10 E.R. 1216, H.L.; 44 Digest 533, 3502.
- (2) *Eden v. Wilson* (1852), 4 H.L.Cas. 257; 10 E.R. 461, H.L.; 44 Digest 541, 3589.
- (3) *Home v. Pillans* (1833), 2 My. & K. 15; Coop. temp. Brough. 198; 4 L.J.Ch. 2; 39 E.R. 850, L.C.; 44 Digest 912, 7711.
- (4) *Holmes v. Cradock* (1797), 3 Ves. 317; 30 E.R. 1031; 44 Digest 481, 2989.
- (5) *Spalding v. Spalding* (1630), Cro. Car. 185; 79 E.R. 762; 44 Digest 911, 7704.
- (6) *King v. Melling* (1671), 1 Vent. 225; 86 E.R. 151; on appeal, 1 Vent. 232, Ex. Ch.; 44 Digest 537, 3535.
- (7) *Kentish v. Newman* (1713), 1 P.Wms. 234; 24 E.R. 368; 17 Digest (Repl.) 362, 1687.
- (8) *Hewet v. Ireland* (1718), 2 Coll. 344, n.; 1 P.Wms. 426; Gilb. Ch. 145; 24 E.R. 456; sub nom. *Hewitt v. Ireland*, Prec. Ch. 489; 2 Eq. Cas. Abr. 139, L.C.; 44 Digest 571, 3886.
- (9) *Doe d. Leach v. Micklem* (1805), 6 East, 486; 102 E.R. 1374; sub nom. *Doe d. Leech v. Micklem*, 2 Smith, K.B. 499; 44 Digest 597, 4221.
- (10) *Targus v. Puget* (1751), 2 Ves. Sen. 194; 28 E.R. 126; 17 Digest (Repl.) 362, 1688.
- (11) *Hillersdon v. Lowe* (1843), 2 Hare, 355; 12 L.J.Ch. 321; 7 Jur. 482; 67 E.R. 146; 44 Digest 559, 3749.
- (12) *Malcolm v. Taylor* (1832), 2 Russ. & M. 416; 39 E.R. 452, L.C.; 44 Digest 420, 2513.
- (13) *Ellicombe v. Gompertz* (1837), 3 My. & Cr. 127; 40 E.R. 873, L.C.; 44 Digest 1139, 9850.
- (14) *Edwards v. Edwards* (1852), 15 Beav. 357; 21 L.J.Ch. 324; 19 L.T.O.S. 433; 16 Jur. 259; 51 E.R. 576; 44 Digest 1121, 9699.
- (15) *Anon.* (1545), 1 And. 33; 123 E.R. 339; 44 Digest 172, 1.
- (16) *Atkins v. Atkins* (1593), Cro. Eliz. 248; 78 E.R. 504; sub nom. *Atkins Case*, Moore, K.B. 593; 44 Digest 927, 7836.
- (17) *Wallop v. Darby* (1612), Yelv. 209.
- (18) *Brown v. Cutter* (1683), T.Raym. 427; 2 Show. 152; 83 E.R. 223; sub nom. *Luxford v. Cheeke*, 3 Lev. 125; 44 Digest 537, 3537.
- (19) *Newburgh v. Newburgh* (1825), Sugden's Law of Property, 367, H.L.; 44 Digest 625, 4555.
- (20) *Langston v. Langston* (1834), 2 Cl. & Fin. 194; 8 Bli.N.S. 167; 6 E.R. 1128, H.L.; 44 Digest 547, 3650.
- (21) *Perrin v. Lyon, Lyon v. Geddes* (1807), 9 East, 170; 103 E.R. 538, L.C.; 44 Digest 456, 2778.
- (22) *Pearsall v. Simpson* (1808), 15 Ves. 29; 33 E.R. 666; 44 Digest 1174, 10,157.
- (23) *Warburton v. Loveland d. Ivie* (1828), 1 Hud. & B. 623; 17 Digest (Repl.) 277, *371.
- (24) *Doe d. Usher v. Jessep* (1810), 12 East, 288; 104 E.R. 113; 44 Digest 1152, 9970.
- (25) *Gundry v. Pinniger* (1852), 1 De G.M. & G. 502; 21 L.J.Ch. 405; 18 L.T.O.S. 325; 16 Jur. 488; 42 E.R. 647, L.J.J.; 44 Digest 879, 7364.
- (26) *Mattison v. Hart* (1854), 14 C.B. 357; 23 L.J.C.P. 108; 18 Jur. 380; 2 W.R. 237; 139 E.R. 147; sub nom. *Matheson v. Hart*, 2 C.L.R. 314; 42 Digest 626, 276.
- (27) *Gether v. Capper* (1855), 15 C.B. 696; 24 L.J.C.P. 69; 1 Jur.N.S. 332; affirmed (1856), 18 C.B. 866; 25 L.J.C.P. 260; 27 L.T.O.S. 298; 2 Jur.N.S. 789; 4 W.R. 644; 139 E.R. 1613, Ex. Ch.; 41 Digest 312, 1724.

Appeal from a decree of SIR JOHN ROMILLY, M.R., reported 21 Beav. 143, whereby he declared that, upon the construction of the will of General Carpenter, his grandson Captain Carpenter, the respondent, was entitled to a vested interest in a sum

A of money set apart to answer an annuity to the testator's widow, in preference to a surviving daughter and other grandchildren, the children of deceased daughters of the testator.

The testator, after giving an annuity of £2,000 to his widow, ordered that a sum of the public securities of the East India Co. should be set apart to provide for the payment of that annuity. Then he provided that on the decease of his widow :

B "The sums provided and set apart for such payment to become the property of my son George Carpenter, now a captain in His Majesty's 41st Regiment of Foot, so far as he the said George Carpenter my son shall receive the interest on such sum during his life, and on his demise the principal sum to become the property of any child or children he may leave, born in lawful wedlock, and in such sums as my said son shall will and direct; but in case of my son dying

C before his mother, then and in that case the principal sum to be divided between the children of my daughters, the deceased Jane Ricketts and Mary Eliza Middleton (should she leave any issue) in equal portions to each."

The son George was unmarried at the time the will was made. He afterwards married and had one son, George William Wallace Carpenter, the respondent, and died in the lifetime of the testator, having been killed in the battle of Inkerman on Nov. 5, 1854, his mother being then living. The testator died on Jan. 16, 1855. His widow died on Sept. 20, 1855.

D The grandson George William Wallace Carpenter claimed to be entitled to a vested interest at the testator's death in the capital sum set apart to provide for the payment of the annuity to his grandmother, which claim was resisted by the surviving daughter of the testator and his other grandchildren on the ground that the event contemplated by the testator, upon which the fund was to go over, had taken place when George Carpenter, the son, died in his mother's lifetime. The Master of the Rolls was of opinion that the grandson was entitled in preference to the other claimants; that the testator's intention was clear that the fund should go over, not merely in the event of George Carpenter dying before his mother, but upon his dying before her and leaving no children; and that the two clauses of the sentence, as they stood, were inconsistent and repugnant, the first branch giving an estate to the children of George Carpenter, the second taking it away. His Honour was of opinion that the introduction of the words "without leaving a child" after the word "dying" in the second branch of the sentence would make it uniform and consistent. The persons adverse in their interests to the son appealed.

G *Sir Fitzroy Kelly, Q.C., and Roundell Palmer, Q.C. (with him Goldsmid, Q.C., and J. L. Bird), for the appellants.*

Sir Hugh Cairns, Q.C., Sir Richard Westbury, Q.C., and C. Hall for the respondent.

Their Lordships took time for consideration.

July 15, 1858. The following opinions were read.

H **LORD CHELMSFORD, L.C.**—In this case it is impossible to entertain any moral doubt of the testator's intention, and there is, therefore, great danger of the mind being insensibly and improperly influenced by this consideration. But, disclaiming all right to act upon any conjectural interpretation, I have arrived at a satisfactory conclusion that in the will itself there can be found an ample justification for the decree which has been pronounced.

I I entirely agree in the rules for the construction of wills laid down by my two noble and learned friends, LORD CRANWORTH and LORD WENSLEYDALE, in *Grey v. Pearson* (1). Where there is an uncertainty as to the meaning of any part of a will, the right of a court of construction to introduce words in case of necessity is clearly stated by LORD ST. LEONARDS in the passage quoted from *Eden v. Wilson* (2) (4 H.L.Cas. at p. 284). A power of this kind must, of course, be very cautiously exercised, to use the language of MR. JARMAN in his work on WILLS (2nd Edn.), p. 680 :

"not merely on a conjectural hypothesis of a testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument." A

Applying the general rules to the will in the question, I have not the smallest doubt that it can be fairly and legitimately collected from the whole will to have been the intention of the testator not to permit the capital fund provided for the payment of his widow's annuity to go over to his daughter, and to the children of his deceased daughters, if his son should leave a child. The general scheme of his will seems to have been to benefit all his children and grandchildren by distributing his property among them in different proportions, the whole amount having been stated by him in a paper accompanying his will. In this distribution it was evidently his intention that the son and his children should receive the largest share, as he not only gives them the fund provided for the annuity, but also makes his son his residuary legatee. According, however, to his statement of the amount of his property, it would be nearly exhausted by the specific legacies and the annuity fund, so that a very small residue would have been enjoyed by the son, and he would have been in a less favourable position than his sister and his sister's children until the death of his mother. It is stated that at the time of the testator's death his property had very largely increased; but although a will is said to speak from the death of a testator, yet in construing his intention you must necessarily refer to the period of making the will. If the appellants are right in their construction of the will, the son of the testator's son, the principal object of his regard, would derive scarcely any benefit from the dispositions of the will, but would be superseded by all the other members of the family, themselves already the objects of distinct and independent provisions. This appears to me to be utterly inconsistent with the obvious meaning of the testator. The dispositions of his will are perfectly clear down to and inclusive of the bequest to the children of his son. A fund is set apart for the annuity to the widow. The interest of that fund, on her decease, is to be received by the son during his life, and on his demise the principal sum to become the property of any child or children he may leave, born in lawful wedlock, and in such sums as he shall will and direct. D C E F

The son of the testator, therefore, had a life-estate given to him in the fund, with a contingent interest to his children in the principal. But the son was then unmarried, and it was uncertain whether he would ever marry or have children, and so the bequests, both of the interest of the fund and of the fund itself, might have failed altogether. The testator, having the possibility of the death of his son while a bachelor in his view, provides upon its occurrence for the distribution of the fund among all the rest of the family, even to the issue of his daughter, Mrs. Middleton, who had no children at the time and is now childless, and without any reference to the possible children of his son, for whom he had provided so immediately before. The words which he used to express his intention were, "but in case of my son dying before his mother." This peculiar mode of describing the gift over does not necessarily imply that in that event the son's children, to whom before the principal sum had been given, were to be supplanted by the daughter and the other grandchildren of the testator. It may, and, consistently with the previous gift to the children of the son, would more probably mean, that they were to take the capital fund in no other event than the death of George in the lifetime of his mother—not necessarily that the fund was to be theirs absolutely on that event happening. This appears to me to leave it open to attribute a meaning to the language of the will, which will render it consistent throughout, instead of confining the construction to the narrow limits of the few words introductory of the gift over. This is not like the case put at the Bar of a gift to A., and if B. should go to Rome, or if some insignificant act should be done, then over. There the event described is wholly collateral to and unconnected with the previous limitations, and, however capricious and whimsical such a bequest may be, the testator has expressed it in clear and unambiguous terms, and it must prevail. But here the event on which the gift G H I

A over depends is implicated and involved in the prior limitations—it is not, as in the case supposed, self-interpreting, but itself creates an ambiguity which, without it, would not have existed.

There are few of the cases cited in the argument which are of much assistance in determining the construction which ought to be adopted in this case. All those on which an estate was to commence or to take effect upon certain specified events
B which never occurred, and in which the gift, therefore, altogether failed are inapplicable. This is a case in which a gift either absolute or contingent is clearly and distinctly made, and the question is whether the words on which the doubt arises took it away again on the happening of an event not consistent with it, but upon which the determination of a prior gift depended. That appears to me to be a safe and reasonable principle of construction, which was stated by LORD
C BROUGHAM in *Home v. Pillans* (3) (2 My. & K. at pp. 25, 26), that where there is a clear gift it

“can only be altered and retracted by the most plain and unambiguous, and unequivocal words, and the court will, in dubio, justly prefer that construction of any subsequent clause which will make it consistent with the intention plainly expressed in the preceding part.”

D It was strongly insisted by the appellants' counsel that it was impossible for your Lordships to decide in favour of the respondents in this case without overruling *Holmes v. Cradock* (4), which, as I understand, was alleged to be a case in which there was a bequest in derogation of a previous absolute gift which was allowed to prevail. But *Holmes v. Cradock* (4) was a case which ranges under the head of
E those to which I have already alluded, where an interest was to take effect upon an event which never happened. There the bequest was:

“if my son shall die leaving my wife, without leaving a widow or any child, after his death and my wife's I give and bequeath to Mr. Holmes £500.”

F The son survived the wife and died without leaving a widow or child, and it was held that Mr. Holmes was not entitled to the legacy as all the events had not occurred upon which it was to take effect, one of them being that the son should die leaving the wife. This was not the case then of a previous gift taken away by subsequent words, but a gift upon certain conditions which were not fulfilled. In the present case there is first a plain and unequivocal gift, and then there are words immediately following which at once produce an inconsistency, and, therefore,
G an ambiguity, in the disposition of the will. By reading the will as if it had said: “but in case of my son dying before his mother without leaving a child,” the whole is rendered plain and consistent. Are your Lordships then at liberty to supply these words as the expression of a necessary implication?

Various authorities have been cited in favour of such a course, one of the earliest of which was *Spalding v. Spalding* (5). That was a case very similar to the present,
H because, if the clause had been read as it stood in the will, it was expressed in clear and unambiguous words, and reasons might readily have been suggested as in this case—why, if John died, living Alice, the estate should go over to William, although John had left children, but there the very words which are wanting here for equivalent ones, were supplied, and the clause read: “if John die ‘without issue,’ living Alice.” I do not think that the application of that case can be
I weakened by the observation that the court proceeded upon the whole context of the will in aid of the construction. This only shows that you are at liberty to resort to the rest of the will to discover a different meaning from that which the words taken by themselves would convey. The importance of this case is very much increased, in my mind, by the view of it which was taken by LORD HALE, in *King v. Melling* (6); by LORD HARCOURT, in *Kentish v. Newman* (7); by LORD MACCLESFIELD, in *Hewet v. Ireland* (8); and by LORD ELLENBOROUGH, in *Doe d. Leach v. Micklem* (9). *Targus v. Puget* (10) is also a strong authority for supplying words similar to those which are required to be understood in this case; nor can those

who consider that you are bound to adhere to the words used as conclusively expressive of a testator's meaning, object that this case and *Kentish v. Newman* (7) are cases of marriage articles, in which a provision may be expected to be made for the children of the marriage, because the same presumption may be raised in favour of the children of the testator's son under the present will. It is to be observed that in this case the property is vested in the children of the son independently of their father, who merely takes the interest of it for his life, and the event upon which the gift over depends is one which affects the father's life-interest only, and does not touch the estate of his children. I do not see why the construction suggested by the respondents should not be adopted—that there are two contingent independent dispositions, which are attached to the bequest to the son, so that if one takes effect the other fails. This renders the whole will sensible and consistent, while, on the contrary, the opposite construction (to use the words of WIGRAM, V.-C., in *Hillersdon v. Lowe* (11) is capricious and irrational, and subverts the scheme of the will, which is expressed in clear and unambiguous language in all other parts of it. It appears to me, my Lords, that, without going out of the will in search of any conjectural intention, but gathering the testator's meaning from a consideration of the whole of his dispositions, and more especially from the contexts of the particular passage upon which the question arises, your Lordships will not be frustrating, but fulfilling, the testator's intention by determining that Captain Carpenter took a vested interest in the capital of the fund set apart to answer the annuity to the testator's widow, and that the decree of the Master of the Rolls should, therefore, be affirmed.

I think it right to add, that my noble and learned friend, LORD BROUGHAM, who heard the first argument upon this case, at the first conclusion of it agreed with me in the view which I then took, and which I have now expressed. Of course my noble and learned friend is not to be bound at all by that opinion as a final opinion, inasmuch as he has not heard the second argument, which was ordered by your Lordships; much less, of course, can he be bound by the reasons which I have expressed for the opinion which I have formed, and in which, as I have stated, he concurred.

LORD CRANWORTH.—The question in this case is one of which there have of late been many instances in all the courts, it being how far there are or are not circumstances apparent on the face of a written instrument enabling those who have to interpret it to give to the words used a meaning not consistent with their ordinary import.

The rule has been repeated in various forms of language by almost every court and judge in very numerous cases. I refer to a case which was decided in this House, *Eden v. Wilson* (2), in which it was very clearly laid down that you are never unnecessarily to introduce and interpolate words in a will, nor even to give a construction to any clause of a will, contrary to what the plain words import, without an absolute necessity by intention declared or evinced in some other part of the will. The question is whether we can discover, from intention evinced in this will, an absolute necessity for interpolating the words "without leaving issue," or for construing the words, "in case of my son dying before his mother," as meaning in case of his dying without leaving issue. I confess that I cannot. Every will must by law be in writing, and it is a necessary consequence of that law that the meaning must be discovered from the writing itself, aided only by such extrinsic evidence as is necessary in order to enable us to understand the words which the testator has used. No extrinsic evidence can be necessary here for such a purpose, except the fact that the son was a bachelor, if, indeed, that is necessary. If the testator's intention really was that, unless his son survived his mother, the son's children living at his death should take no part of the money set apart to secure the annuity, he could not have more aptly expressed what he intended. The words have exactly met his wishes. The only reason, therefore, for proposing to put a different interpretation on the language used is the persuasion that the intention ex-

- A** pressed by the words does not truly convey the meaning of the testator using them; that he meant to say something different from that which he has said. But this is not a legitimate ground for adopting a forced construction, or for interpolating words, unless the instrument itself enables us to do so. Where, by acting on one interpretation of the words used, we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the
- B** ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which are considered to be capricious, or even harsh and unreasonable.
- C** In this case there is no ambiguity in the words used, and the only question is whether we can discover on the face of the will enough to enable us to say that the words "without leaving issue" must be supplied. It was fairly put in argument that cases might be supposed in which the intention not to give anything to the son's children in the event of the son dying in his mother's lifetime would have been reasonable and not capricious. Suppose for instance a real estate was settled
- D** on the wife for her life, and at her death was to go to the son's children if the son was then dead, otherwise to other persons, the provision now in question would then have been quite reasonable; we should then have seen the motive of the testator. Still the words to be construed would have been the same then as now, and I know of no principle which enables us to construe plain unambiguous words differently when we can and when we cannot discover the motive influencing the
- E** person by whom they are used. It was argued that the words must be read as a gift over, subject to the preceding gifts, but to take effect only in the case of the son dying before his mother. On any other hypothesis, it was said, the construction will deprive not only the son's children, but also the testator's widow, of the benefit of the fund set apart for her benefit, the language being that if the son dies in his mother's lifetime, then and in that case (which, as was argued, must mean
- F** at that time and on that event) the principal sum was to be divided. I do not agree with this argument. "Then," as there used, is not an adverb of time but of relation. The widow was at all events to have her annuity for her life, and the fund set apart to secure it must have been meant to endure till the annuity should terminate. There is nothing in the language preventing a construction which secures this object, and, indeed, the testator expressly provides for the fund going
- G** over on her decease, that is, not before her decease. It is not disputed that, if there had been no settlement directed of the fund—that is, if it had been given absolutely to the son without more—then the gift over on the events which happened must have taken effect.

- It has occurred to me, as one mode of looking at this case, to read it as if all the words: "so far as the said George Carpenter, my son, shall receive the interest
- H** on such sum during his life, and on his demise the principal sum to become the property of any child or children he may leave born in lawful wedlock, and in such sums as my said son shall will and direct"—the words, in short, which direct the settlement—were read as if in a parenthesis—that is, as if the son were restricted to a life-estate, with remainder to his children in something already given to him absolutely, but not giving to the children anything which is not taken out of what
- I** had been previously given to the son himself, so that when his interest is defeated that of his children fails also. This might explain what was passing in the testator's mind, as if he had said: "I give the fund to my son, but if he dies before my wife, then I give it over, and I direct that my son shall not take what I have given him absolutely, but that it shall be considered as settled on him for life, and afterwards on any children he may leave." I do not mean to represent myself as having any confident opinion that I can thus trace the workings of the testator's mind. Indeed that is, as I conceive, scarcely within the province of a court of justice, whose duty it is not to search for the testator's meaning otherwise than by fairly interpreting

the words he has used. Confining myself to this duty, I have come to the conclusion that there is nothing to show that the words now in question are to be construed otherwise than according to their obvious meaning; that the testator has given the fund over to the children of his daughters, in the event of his son dying in the lifetime of his mother; that there is nothing on the face of the will enabling me to say that the gift over was only to take effect if the son should leave no issue; that the son did die in his mother's lifetime, and therefore, that the daughters' children are entitled. A B

I have, in justice to the parties who have so much at stake in this cause, to the very able argument at your Lordships' Bar, to the high authority of the Master of the Rolls, and to the opinion of three of your Lordships who concur with him, looked attentively to all the authorities to which we were referred, but I have not found—nor, indeed, did I expect to find—anything which helps me in coming to a conclusion. The language of one will affords very little help in enabling us to say what is the meaning of another. Many of the cases relied on were cases where a gift over being made on a failure of issue after a gift to some particular classes of issue, that issue on whose failure the gift over is to take effect has been considered to be confined to that class only in whose favour the prior gift was made. This was *Malcolm v. Taylor* (12), and *Ellicombe v. Gompertz* (13); and there are many other similar decisions, the subject being discussed by SIR JAMES WIGRAM, in *Hillersden v. Lowe* (11). Such a construction has been called the referential construction, and cannot, I think, apply to a case like this where the event on which the gift over is to take effect is a collateral independent event. Again, in *Spalding v. Spalding* (5), a gift of a real estate to the wife for life, with remainder to the eldest son in tail, but if the eldest son should die, living the wife, then to the second son, was held necessarily to mean, on the whole context of the will, if he should die without issue, leaving the wife, for on no other construction could all the provisions of the will in the opinion of the court take effect. So in *Home v. Pillans* (3), where there were legacies to the testator's two nieces, when they should attain twenty-one, but in the event of either dying leaving a child, then to that child, the nieces were held to take absolute interests on attaining twenty-one, the Lord Chancellor holding, contrary to what had been held by SIR JOHN LEACH, that the gift over was only intended to provide against the event of the nieces dying during minority. All the cases coming within this class are very ably discussed by the present Master of the Rolls in *Edwards v. Edwards* (14). We were referred to several cases where the question was as to the construction of marriage articles. They clearly can afford no guide to us in construing a will. It has always been held that in a will we have nothing to guide us but the language of the testator. In marriage articles courts have always felt warranted in saying that such a construction must be put on them as will accomplish their object, namely, the securing a provision for the children. They must in general be read as if there was a recital in them—"whereas the object of the parties is to secure a provision for the children of the now intended marriage." None of the cases cited has appeared to me to render us any material assistance in deciding this case, and, therefore, on the short ground that there is no doubt as to the meaning of the words used considered by themselves, and nothing so far as I can discover on the face of the will enabling me to say that the words are to have any other than their plain primary meaning, I am compelled to come to the opinion that the decree below was wrong, and ought to be reversed. C D E F G H I

LORD ST. LEONARDS.—This is a case of great anxiety, because, although we may collect the intention of the testator from the whole of the will, yet there is considerable difficulty in giving effect to that intention according to the rules of law. It has been well remarked that hard cases make bad law, and I, therefore, made a covenant with myself to guard myself as much as I could, and to keep within what I consider to be the strict rules of law applicable to a case of this kind.

We are all agreed about the general rules of law upon this subject. My noble

A and learned friend on the Woolsack has referred to what fell from me in *Eden v. Wilson* (2). I stated very strongly in that case the rule, and I still adhere to it, and I do not mean to run counter to it. You are not at liberty to transpose, to add, to subtract, to substitute one word for another, or to take a confined expression and enlarge it without absolute necessity; you must find an intention upon the face of the will to authorise you to do so. When I say upon the face of the will, you are

B by settled rules of law at liberty to place yourself in the same situation as that in which the testator himself stood. You are entitled to inquire about his family, and the position in which he was placed with regard to his property. I doubt whether we should be justified in looking to the amount of the property, although it is referred to. I disclaim at present any intention whatever of referring to the amount of the property which he then possessed: it is personal property. He

C enumerates his property. He does not profess to dispose of it as constituting all his property; on the contrary, he makes his son residuary legatee. It would be dangerous, therefore, in my apprehension, to found the decision of this case judicially upon the amount of the property.

As I admit that you may, and must, look at the intention, that intention is to be gathered, in my apprehension, from the whole of the instrument. It was very

D elaborately argued that you can only look to what is called the proximate declaration of intention—that is, dealing with the exact property which is in dispute. No doubt you never can dispose of property given by will except upon what you can hold or construe to be words of gift of that property, but I deny that you are not at liberty to look at the whole frame of the will in order to collect the general intention.

I first of all ask what is the general intention of this testator? For that purpose

E I read the whole of his will. I am at liberty to do so, but I am not at liberty to take the disposition of another property and contrast it with the one in question, because he may have intended to give one property in one way and another property in another way. But if, upon the whole frame of the will, I am satisfied of what was his general intention, I start with that general intention; it will not enable me to alter words, but, having ascertained the intention, I then have to ask whether I can or cannot so construe the words actually used as to carry out the

F intention. I agree with my noble and learned friend, that you are not to collect intention by conjecture. I wholly disclaim anything approaching to conjecture. I must have conviction in order to bring my mind to a judicial determination in favour of an operation beyond the actual word used. Then disclaiming conjecture and founding upon words used, yet I may read those words according to the intention of the testator which I find upon the face of the instrument. Therefore, I

G conceive that I may first of all look at the instrument throughout in order to collect the intention. If I were asked, morally speaking, what the intention of this testator was, I cannot have the slightest doubt about it. He had an only son who was rather of mature age, I think about thirty-four. He was at a time of life at which

he was likely to marry, and likely to have a family, and not provided for. He had

H two daughters who had died, and had left children, and he had a living daughter without children, and he intended to provide for them all, and he did so. To the children of those who were dead he gave at once a large provision actually to vest in them. When you are talking of ambiguity there is ambiguity even there, for he talks of a class that are to survive, without telling you whom they are to survive, or when. So this is not a will without ambiguity elsewhere, for in the gifts with

I regard to the children and grandchildren there are ambiguous words that require construction. He provides for the daughter who was unmarried, and for her children, if she should have any, and if she should not, he gives it over. When we come to what was the first and principal object of his bounty, his son, he gives the property in question to his wife for life, then to his son for life, and then to his son's children. I will assume it to be who should be living at his death. If we stop there, of course there is no question; and we must stop there with this observation, that the property is actually given without any doubt or ambiguity to the son's children. So that, if it is to be taken away from the children, we must find

clear words to effect that object. It is to be observed that there is no contingency expressed or implied, upon which the property is given to the children. When we come to the real point on which the case depends, upon any construction of that clause, all the interest of the children is not taken away, because it is only upon the contingency of the mother surviving the son that you take it away at all. As regards construction, we must bear in mind that there is a great difference between gifts cutting down a previous interest, which, of course always may be, and generally are, introduced with some word stronger than "but," but I am not inclined to dwell on a word. In the gift to the children of the son there is no contingency expressed, and in the gift over of that property upon the contingency of the wife surviving the son, there is no exclusion whatever referred to of the children. I find, therefore, the property remaining in the children, and in my apprehension clearly unaffected (speaking still of intention) by the gift over. A B C

[His LORDSHIP referred to *Anon.* (15); *Atkins v. Atkins* (16); *Wallop v. Darby* (17); *Luxford v. Cheeke* (18); *Spalding v. Spalding* (5); *King v. Melling* (6); *Newburgh v. Newburgh* (19); *Langston v. Langston* (20); *Doe d. Leach v. Micklem* (9); *Perrin v. Lyon* (21); *Pearsall v. Simpson* (22) and *Malcolm v. Taylor* (12), and continued:] In *Malcolm v. Taylor* (12) there is a rule laid down to which I entirely accede, that it is natural to suppose that gifts over, when they are not expressed so as clearly to defeat a previous gift, are intended to succeed that gift and in succession. The court in that case acted on that rule, and I am ready to support that as a rule, and to advise your Lordships to act upon it. But in applying that rule to this case, remember you start with a clear, unambiguous, unconditional, unrestricted gift to the children of the son, and you have to displace that. If I find anything subsequently directly opposed to it, I sacrifice the whole intention, which I collect with respect to the children of the son, and I agree that the words of the will must operate. But if I find an imperfect intention expressed in the gift over, I must come to one of two conclusions, either an intent to cut down that gift over which is imperfectly expressed, or I must supply words. Remember, there is not here a word saying: "If he shall die, leaving his mother, though he shall leave children, for whom I have before provided." There is not a word of exclusion. F Therefore, I must either give a construction which will cut down the previous gift, or I must supply words. One or other must be done. Nobody can read the words and say they are to be taken plainly without consideration and without construction. I must construe them; and, construing them as I do, I clearly gather, to my apprehension, without the slightest doubt, what was the intention of the testator, viz., a gift over, if the son died without children, leaving his mother living at his death. G Therefore, I consider the construction at which I have arrived in favour of this gift to the children of the son is clearly warranted by the intention of the testator. I have, as already said, carefully guarded myself not to advise your Lordships to give effect to the intention, unless I can do so without disturbing any rule of law or any authority. I have satisfied myself that I can give this advice to your Lordships without disturbing any rule of law. In advising your Lordships to adopt H that construction, I do so, I think, consistently with every rule that has been stated. I break in upon no rule; I disturb no settled axiom of law; I endeavour, and always have endeavoured, to keep within those rules; but, while I have endeavoured to keep within those rules I have also endeavoured, where I could, to make them bend, so as properly to meet the justice of the case; therefore, I agree with my noble and learned friend the Lord Chancellor, that the decree of the Master of the Rolls I should be affirmed.

LORD WENSLEYDALE.—The case now before your Lordships is one of many of a similar nature, in which the mind is imperceptibly tempted to swerve from the established rules of construction by the apparent hardship of the case, and the highly probable conjecture that the testator never could have intended that which he has expressed. Nothing can be more reasonable than to suppose that he meant in this case to have provided that his son's children should take the property be-

A queathed to the father for life after his death, whether he died in his mother's lifetime or afterwards. But the rules which are to govern the construction of wills as well as all other written instruments, are now very clearly established, and it is impossible to overrate the importance, notwithstanding all the temptations from supposed hardship or probable intention, of steadily, strictly, and faithfully adhering to those rules for the sake of the great interests of society in avoiding litigation and

B affording the only chance of obtaining as much certainty in the construction of wills as such a subject is capable of. As Mr. FEARNE says (CONTINGENT REMAINDERS, p. 173):

"It is better that the intentions of twenty testators every week should fail of effect than that the rules should be departed from upon which the security of titles and the general enjoyment of property so essentially depend."

C The question in expounding a will, as SIR JAMES WIGRAM most correctly states in his excellent work, *ADMISSION OF EXTRINSIC EVIDENCE IN AID OF THE INTERPRETATION OF WILLS* (2nd Edn.), p. 7, is "not what the testator meant, but what is the meaning of his words." The use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation that it is to be sought in his words, and a rigorous attention to it, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is what that which he has written means. His will must be expressed in writing, and that writing only is to be considered. It is now, I believe, universally admitted that in construing that writing the rule is to read it in the ordinary and grammatical sense of the words unless some obvious

D absurdity or some repugnance or inconsistency with the declared intentions of the writer to be extracted from the whole instrument should follow from it, and then the sense may be modified, extended, or abridged, so as to avoid those consequences, but no further. This rule in substance is laid down by BURTON, J., in the frequently quoted case of *Warburton v. Loveland d. Ivie* (23). It had been previously described as "a rule of common sense as strong as can be," by LORD ELLENBOROUGH in *Doe d. Usher v. Jessep* (24). It is stated as "a cardinal rule, from which if we depart we launch into a sea of difficulties not easy to fathom," by LORD CRANWORTH, L.J., in *Gundry v. Pinniger* (25); and is "the golden rule," when applied to Acts of Parliament by JERVIS, C.J., in *Mattison v. Hart* (26), and by MAULE, J., as "the most general of rules, a rule of great utility," in *Gether v. Capper* (27). Many other authorities might be cited, but there is no doubt of the excellence and

E generality of the rule. Quite consistently with this rule words and limitations may be supplied or rejected when warranted by the immediate context or the general scheme of the will, but not merely in a conjectural hypothesis of the testator's intentions, however reasonable, in opposition to the plain and obvious sense of the instrument. Whether this modification of the rule is stated to be that words may be supplied where so warranted, or that words are never supplied, but that the

G instrument may be read as if the words were supplied, is matter of no consequence whatever. The meaning is precisely the same, but the latter mode of stating the proposition is skilful, and has a tendency to obtain a more ready acquiescence in the introduction of other words. [In applying this rule to the present case his Lordship arrived at the same conclusion as LORD CRANWORTH.]

H

Appeal dismissed.

WILDE AND ANOTHER v. GIBSON

[HOUSE OF LORDS (Lord Cottenham, L.C., Lord Brougham and Lord Campbell), May 22, 23, 25, June 6, 1848]

[Reported 1 H.L.Cas. 605; 12 Jur. 527; 9 E.R. 897]

Contract—Rescission—Fraud—Non-disclosure of material fact—Need to prove actual knowledge of fact—Proof of constructive notice insufficient.

Where a charge of fraud is based on the non-disclosure by the defendant, one party to a contract, of a material fact the plaintiff must prove actual knowledge of the fact by the defendant. It is not sufficient to prove that he had constructive notice of the fact.

Per LORD COTTENHAM, L.C.: The effect of constructive notice in cases where it is applicable, as in contests between equities of innocent parties, is sufficiently severe, and is only resorted to from the necessity of finding some ground for giving preference between equities otherwise equal; it cannot be applied in support of an imputation of direct personal fraud and misrepresentation.

Fraud—Need to be clearly and distinctly alleged, and equally clearly and distinctly proved.

Per LORD BROUGHAM: Where fraud is to be the ground of the proceeding and is made the principle on which the relief is sought at the hands of the court, that fraud must be clearly and distinctly alleged, and, if so alleged, must equally be clearly and distinctly proved.

Sale of Land—Contract—Rescission—Misrepresentation or concealment—Relief from completing purchase—Conveyance already executed—Need to prove actual fraud.

Per LORD CAMPBELL: If there be, in any way whatsoever, misrepresentation or concealment which is material to the purchaser, a court of equity will not compel him to complete the purchase, but where the conveyance has been executed I apprehend that a court of equity will set aside the conveyance only on the ground of actual fraud. There would be no safety for the transactions of mankind if, upon a discovery being made at any distance of time of a material fact not disclosed to the purchaser of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside.

Notes. Distinguished: *Marshall v. Sladden* (1849), 7 Hare, 428. Applied: *Price v. Berrington* (1851), 3 Mac. & G. 486. Considered and Explained: *Esprey v. Lake* (1852), 10 Hare, 260. Considered and Distinguished: *Reynell v. Sprye* (1852), 1 De G.M. & G. 660. Distinguished: *Chadwick v. Chadwick* (1854), 23 L.T.O.S. 108. Explained: *Parr v. Jewell* (1855), 1 K. & J. 671. Considered: *Barnard v. Hunter* (1856), 5 W.R. 92; *Robson v. Devon* (1857), 29 L.T.O.S. 300; *Udell v. Atherton* (1861), 7 H. & N. 172; *Brett v. Clowser* (1880), 5 C.P.D. 376; *Brownlie v. Campbell* (1880), 5 App. Cas. 925; *Joliffe v. Baker* (1883), 11 Q.B.D. 255. Applied: *Seddon v. North Eastern Salt Co.*, [1904-7] All E.R.Rep. 817. Considered: *Armstrong v. Jackson*, [1917] 2 K.B. 822. Applied: *Public Trustee v. Lancaster Duchy*, [1927] 1 K.B. 516. Referred to: *Griggs v. Staplee* (1848), 2 De G. & Sm. 572; *Blisset v. Daniel* (1853), 18 Jur. 122; *Traill v. Baring* (1864), 4 De G.J. & Sm. 318; *Boss v. Helsham* (1866), 4 H. & C. 642; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *Debenham v. Sawbridge*, [1901] 2 Ch. 98; *Solle v. Butcher*, [1949] 2 All E.R. 1107; *Leaf v. International Galleries*, [1950] 1 All E.R. 693; *Long v. Lloyd*, [1958] 2 All E.R. 402.

As to rescission of contracts on the ground of fraud, see 26 HALSBURY'S LAWS (3rd Edn.) 877 et seq.; and for cases see 35 DIGEST (Repl.) 69 et seq.

Cases referred to:

(1) *Edwards v. M'Leay* (1818), 2 Swan. 287; 36 E.R. 625, L.C.; 40 Digest (Repl.) 389, 3105.

- A (2) *Legge v. Croker* (1811), 1 Ball & B. 506; 30 Digest (Repl.) 504, *472.
 (3) *Pasley v. Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 35 Digest (Repl.) 25, 165.
 (4) *Haycraft v. Creasy* (1801), 2 East, 92; 102 E.R. 303; 35 Digest (Repl.) 8, 26.
 (5) *Foster v. Charles* (1830), 7 Bing. 105; 4 Moo. & P. 741; 9 L.J.O.S.C.P. 32; 131 E.R. 40; 35 Digest (Repl.) 37, 294.
- B (6) *Polhill v. Walter* (1832), 3 B. & Ad. 114; 1 L.J.K.B. 92; 110 E.R. 43; 35 Digest (Repl.) 41, 344.
 (7) *Corbett v. Brown* (1831), 8 Bing. 33; 1 Moo. & S. 85; 1 L.J.C.P. 13; 131 E.R. 312; 35 Digest (Repl.) 36, 286.
 (8) *Cornfoot v. Fowke* (1840), 6 M. & W. 358; 9 L.J.Ex. 297; 4 Jur. 919; 151 E.R. 450; 1 Digest (Repl.) 683, 2435.

C Also referred to in argument:

- Lowther v. Carlton* (1741), 2 Atk. 242; Barn. Ch. 358; Cas. temp. Talb. 187; 26 E.R. 589, L.C.; 20 Digest (Repl.) 280, 249.
Attwood v. Small (1838), 6 Cl. & Fin. 232; 7 E.R. 684; sub nom. *Small v. Attwood*, 2 Jur. 226, 246, H.L.; 35 Digest (Repl.) 42, 369.
Rhodes v. De Beauvoir (1832), 6 Cl. & Fin. 532; 6 Bli.N.S. 195; 7 E.R. 797, H.L.; 22 Digest (Repl.) 286, 2908.
- D *Fuller v. Wilson* (1842), 3 Q.B. 58; 2 Gal. & Dav. 460; 11 L.J.Q.B. 251; 6 Jur. 799; 114 E.R. 429; 1 Digest (Repl.) 684, 2436.
Worsley v. Earl of Scarborough (1746), 3 Atk. 392; 26 E.R. 1025; 1 Digest (Repl.) 708, 2593.
- E *Pickering v. Dowson* (1813), 4 Taunt. 779; 128 E.R. 537; 39 Digest (Repl.) 537, 736.
Levy v. Langridge (1838), 4 M. & W. 337; 1 Horn & H. 325; 150 E.R. 1458, Ex. Ch.; sub nom. *Levi v. Langridge*, 7 L.J.Ex. 387; 39 Digest (Repl.) 564, 927.
Moens v. Heyworth (1842), 10 M. & W. 147; H. & W. 138; 10 L.J.Ex. 177; 35 Digest (Repl.) 17, 97.
- F *Evans v. Collins* (1843), 5 Q.B. 804; reversed sub nom. *Collins v. Evans* (1844), 5 Q.B. 820; 1 Dav. & Mer. 669; 13 L.J.Q.B. 180; 2 L.T.O.S. 425; 8 Jur. 345; 114 E.R. 1459, Ex. Ch.; 35 Digest (Repl.) 30, 214.
Vigers v. Pike (1842), 8 Cl. & Fin. 562; 8 E.R. 220; 35 Digest (Repl.) 80, 740.
Fuller v. Bennett (1843), 2 Hare, 394; 12 L.J.Ch. 355; 7 Jur. 1056; 67 E.R. 162; 35 Digest (Repl.) 534, 2141.
- G *Medina v. Stoughton* (1700), 1 Ld. Raym. 593; Holt, K.B. 208; 1 Salk. 210; 91 E.R. 1297; 35 Digest (Repl.) 30, 207.
Hern v. Nichols (1701), Holt, K.B. 462; 1 Salk. 289; 90 E.R. 1154; 1 Digest (Repl.) 682, 2427.
Risney v. Selby (1704), 1 Salk. 211; 91 E.R. 189; sub nom. *Lysney v. Selby*, 2 Ld. Raym. 1118; 35 Digest (Repl.) 13, 67.
- H *Tapp v. Lee* (1803), 3 Bos. & P. 367; 127 E.R. 200; 35 Digest (Repl.) 21, 126.
Doc v. Martin (1790), 4 Term Rep. 39; 100 E.R. 882; 35 Digest (Repl.) 89, 313.
Schneider v. Heath (1813), 3 Camp. 506; 35 Digest (Repl.) 35, 273.
Dobell v. Stevens (1825), 3 B. & C. 623; 5 Dow. & Ry.K.B. 490; 3 L.J.O.S.K.B. 89; 107 E.R. 864; 35 Digest (Repl.) 63, 574.
- I *Early v. Garret* (1829), 9 B. & C. 928; 4 Man. & Ry.K.B. 687; 8 L.J.O.S.K.B. 76; 109 E.R. 345; 35 Digest (Repl.) 60, 541.
Freeman v. Baker (1833), 5 B. & Ad. 797; 2 Nev. & M.K.B. 446; 3 L.J.K.B. 17; 110 E.R. 985; 35 Digest (Repl.) 26, 175.
Humphrys v. Pratt (1831), 5 Bli.N.S. 154; 2 Dow. & Cl. 288; 5 E.R. 269, H.L.; 21 Digest (Repl.) 640, 1288.

Appeal from a decree and order of KNIGHT-BRUCE, V.-C., upon a bill filed by the respondent for rescinding a contract made by him in August, 1838, for the purchase of a messuage and land from the appellant, Lady Wilde, then Augusta Emma

D'Este, spinster, and completed by a conveyance and payment of the purchase money in December the same year. A

The messuage and land in question formed part of an estate at Ramsgate, formerly the property of Lady Augusta De Ameland, the appellant's mother, who conveyed it to her in fee in 1829. In August, 1838, Mademoiselle D'Este caused the estate to be set up for sale by auction in lots for building purposes. Printed particulars and conditions of sale were published. The fifth condition was that B

"no purchaser shall be entitled to require or inspect any title prior to the deeds by which the property was respectively conveyed to the vendor or Lady Augusta De Ameland respectively; or to require or inspect the title to any of the respective roads, walks, or pleasure-grounds, or to any of the premises, except the lot or lots purchased by him or her; and the vendor shall not be called upon to identify the respective lots with the former descriptions thereof; and all the recitals and statements contained in any document shall be deemed conclusive evidence thereof." C

The last of the lots, which was that purchased by the respondent, was described in the particulars as

"the capital freehold mansion-house, called Mount Albion, with the offices, etc., and pleasure grounds, containing about one acre, two roods, twenty-three perches." D

In a map annexed to the particulars and conditions, the last mentioned lot was described as bounded on the south-west by a new road, called "Victoria Road," forty feet wide; and on the east side of that road, next the lot was marked a dotted line, representing the boundary between the liberty or town of Ramsgate and the parish of St. Lawrence. E

The respondent, having been declared the purchaser of this lot at the price of £2,030, paid a deposit of £20 per cent. to the auctioneer. In the abstract of title, which was soon afterwards delivered to him by Messrs. Farrer and Parkinson [the vendor's solicitors], Mademoiselle D'Este was represented to be owner in fee of the premises which were described as adjoining the Liberty Way, and unaffected by any right or liberty of way over them. The respondent having accepted the title, the premises were conveyed to him by lease and release, dated December 28 and 29, 1838. In the release the premises were described as being situate without the liberty of Ramsgate, in the parish of St. Lawrence, and bounded as they appeared in the map before mentioned. The respondent paid the remainder of the purchase money, and, being then let into possession, proceeded to build a wall enclosing the premises. In May, 1839, the officers of the parish of St. Lawrence applied to him for payment of two shillings and sixpence as an annual acknowledgment to that parish of a right of way, called the Liberty Way, through the property on the Victoria Road side, within the wall which he had just erected there, and in January, 1840, the officers of the town of Ramsgate applied for the like payment as a similar acknowledgment to their town. They stated that the Liberty Way was situated partly within the liberty of the town, and partly in the parish of St. Lawrence, and that part of it was in fact included within the newly erected wall. It appeared, on further inquiry, that in the year 1820 Lady De Ameland had, with the permission of the officers of the town and of the parish, enclosed so much of the Liberty Way as passed through her property, and that she executed a deed poll which recited F

that the consent of the vestry of the parish was given to such enclosure on condition that, during the time the Liberty Way should be so enclosed, another road, six feet wide, without the enclosure, should be found and maintained by her, and at the expense of her and her heirs; that the part of the Liberty Way so enclosed should be marked out by proper mark-stones; that a deed should be executed by her, acknowledging for her and her heirs, that the Way was enclosed by permission and not of right, and that the same should be opened whenever the parish vestry should require it; and that by way of acknowledgment a yearly rent of five shillings G H I

A should be reserved in respect of such enclosed way, payable in moieties to the surveyors of the town and parish, by all which terms and conditions she (Lady De Ameland) declared that she, her heirs and assigns, were bound. It was also ascertained that this nominal rent to the town and parish had been regularly paid by the agents of Lady De Ameland and of Mademoiselle D'Este.

B The respondent refused to pay the sums so demanded, and, conceiving that the value of the property was materially diminished by such a claim and that his enjoyment of it was liable to be disturbed at any time, applied to the vendor's solicitors to take it back, and repay his purchase money, with his costs and other expenses. The application was refused.

C The respondent then filed his bill against Mademoiselle D'Este, stating the aforementioned facts and that, until the rent was demanded of him, he was wholly ignorant that any part of the Liberty Way was included within the purchased premises, or that the town or parish had any right of way through any part of them. The bill charged that the defendant, as well as Lady De Ameland, had acknowledged such right of way; that no notice thereof, express or constructive, was given to the respondent, and that from the abstract of title delivered to him, and from the map annexed to the particulars and conditions of sale, it appeared, and he, in fact, believed, that the Liberty Way was not included within the premises, but adjoined them, and was comprised in the Victoria Road. He charged that the defendant fraudulently concealed from him the deed poll of 1820, and the fact that Lady De Ameland and herself had regularly paid the yearly rents of two shillings and sixpence to the town and parish in acknowledgment of their right to the Way; that the premises were represented to him to be wholly situated within the parish of St. Lawrence and without the liberty of Ramsgate; and that, if he had been aware of the claim to a right of way, and that the Liberty Way was included within the premises sold to him, he would not have purchased them. The bill prayed that the sale and the deeds of lease and release might be declared fraudulent and void; that the sale might be set aside, and the deeds delivered up to be cancelled; that an account might be taken of all sums expended by the respondent in the repairs of the mansion house and the erection of the boundary wall, and of his costs and expenses incidental to the purchase and conveyance of the premises; and that the defendant might be decreed to repay to the respondent the purchase money, together with what should be found due to him upon the taking of the account for costs and expenses, with interest, he offering to account for the rents and profits during his possession of the premises, and to re-convey them.

G The appellant, Lady Wilde, in her answer to the bill, after admitting the facts already stated, denied all fraudulent concealment on the part of her and her agents, pleaded that the respondent was too late in making his claim, and said that, if he was entitled to any relief, it was by way of compensation for that one-half in breadth of the supposed way, if it ever existed in the premises purchased by the respondent, had merged in the Victoria Road, a public highway, of which the respondent was cognizant.

H The Vice-Chancellor, upon the hearing of the cause in November, 1843, came to the conclusion that there was a right of way over the lands purchased by the respondent and that it might be claimed and exercised, and, although he, and also the respondent's counsel, acquitted the appellant of all wilful fraud or intention of concealment, he decreed that the purchase and conveyance were void, and that they should be set aside. In August, 1845, Mademoiselle D'Este married Sir Thomas Wilde, and they afterwards appealed against the decree, and an order consequential thereto.

Bethell and James Wilde for the appellants.

Swanston and Sir Fitzroy Kelly for the respondent.

Their Lordships took time for consideration.

June 6, 1848. The following opinions were delivered.

LORD COTTENHAM, L.C.—The bill in this case prays that the conveyance may be set aside as fraudulent, but the decree, although it sets aside the conveyance, departs from the usual course in such cases, and, abstaining from any imputation of fraud, declares that under the circumstances the contract was void, and, as a supposed necessary consequence, that the conveyance ought to be cancelled. This is not an immaterial circumstance, as it strongly implies that the vice-chancellor was satisfied that the evidence did not establish any case of fraud. If that be so in fact, the first question will be whether, upon a bill framed as the bill in this case is, a decree can be supported upon any other ground than the case of fraud distinctly charged by the bill. A B

It is in all cases important to consider how far the case proved is in conformity with the case alleged, but it is peculiarly so in cases founded upon alleged fraud imputing dishonest practices to the defendants. It is in all such cases essential to prevent the proceedings from becoming instruments of unfounded slander. Plaintiffs should bear in mind that imputations which cannot be supported will not only not profit them, but may debar them from that relief to which they might be entitled upon other grounds, if properly brought forward. The bill in this case imputes direct fraud, consisting in this, that the defendant, at the time of the sale, knew the contents of the deed of 1820—that the Liberty Road passed over the portion of land purchased by the plaintiff—and fraudulently concealed from the plaintiff the knowledge of that deed, and of that fact. The payment of the two and sixpence to the parish of St. Lawrence and to the liberty of Ramsgate, is not charged as amounting to a knowledge of the road, but only as evidence of knowledge of the deed. The fraud imputed is personal and direct, but the language of the decree abstains from affirming any such case, and the vice-chancellor in his judgment disclaims any intention of supporting the decree upon the affirmative of such imputation, which was indeed impossible, the truth of such imputation having been distinctly disproved by the evidence on both sides. The deed of 1820 never was in the possession of the defendant, and there is not only no proof of her having had any knowledge of the deed or of its contents, before the sale and conveyance was made to the plaintiff, but the contrary is clearly proved, and no attempt is made to establish such alleged knowledge. If therefore, the case proved had been such as, upon a proper bill for that purpose, would have entitled the plaintiff to the relief prayed, the frame of this bill would probably have been a sufficient answer to the claim to such relief as this seeks. The decision upon this appeal does not, however, in my opinion, rest upon that ground. The case alleged might have been sufficient to entitle the plaintiff to relief, if it had been proved, but the case proved would not have been sufficient for that purpose, though properly alleged. D E F G

The result of the evidence is simply that there was, prior to the year 1820, a right of way passing through the land belonging to Lady Augusta De Ameland towards the sea, but the particular line of the way was not at that time ascertained. In that year the officers of St. Lawrence and of Ramsgate, assuming that the way followed the boundary between the parish and the liberty of Ramsgate, and consequently that the centre of the way was the true boundary, put up three stones, marking out that line, and, if they were correct in their supposition, the land sold to the plaintiff, abutting upon the line of those stones, would comprise within itself one-half of such way, the width of which, however, is left uncertain. But that depends entirely upon the correctness of the supposition that the centre of the way was the real boundary which the evidence proves to have been very doubtful, the precise line of way over land then unenclosed being at that time incapable of being perfectly ascertained. That the centre of the way and the boundary line had been considered as identical, depended upon what had taken place in 1820, of which the defendant had no knowledge. The deed of 1820, if the defendant had known its contents, would not have informed her of this, nor would the payment of the two sums of two shillings and sixpence each, for although from both it might have been inferred that in some point the way touched upon land in the liberty and in the parish, neither would show that it touched upon both at that H I

A point of the plaintiff's land; and, as to these payments, I must observe that there is not sufficient evidence that the defendant knew that such payments had been made, and none that she knew for what they were made. Mr. Wightwick, indeed, proves that he paid these sums as agent or manager for the defendant, and that he entered such payment in her accounts; but such accounts were not proved or produced in evidence, and there is, therefore, no proof of the manner in which such payments were entered, and unless such entries had specified that the payments to St. Lawrence were made in respect of the right of way running over the land bought by the plaintiff, they would not have given any information as to the fact of which the plaintiff complains.

It is true that the deed, if it had been in the possession of the defendant, and the payment, if known to her, might have amounted to constructive notice, being sufficient to put a party upon inquiry. The effect of constructive notice in cases where it is applicable, as in contests between equities of innocent parties, is sufficiently severe, and is only resorted to from the necessity of finding some ground for giving preference between equities otherwise equal, but this is the first time I ever knew it applied in support of an imputation of direct personal fraud and misrepresentation. The two things cannot exist together—there can be no direct personal fraud without intention, and there can be no intention without knowledge of the fact concealed or misrepresented, and if there be knowledge, the case of constructive notice cannot arise. It would be absorbed in the proof of knowledge. It must be observed that there is not in this case any misrepresentation or statement in the nature of a warranty—the utmost that has or can be alleged is that there was a dealing with the property, particularly with respect to the covenant to build a wall, inconsistent with there being any right of way—but no statement or warranty that there was not a right of way, a distinction important to be borne in mind, when this case is compared to actions for deceit; in which, under such circumstances, the scienter is the essence.

An attempt was made to affect the defendant with all the knowledge which Mr. Wightwick possessed upon this subject, but that attempt failed for many reasons. In the first place, although he was the agent of the defendant for certain purposes connected with the sale, it does not appear that the purchaser had any communication with him respecting the purchase, except in paying a stipulated percentage towards the expenses of a terrace walk. The whole transaction of the purchase was conducted in London. The documents preparatory to and connected with the purchase may have been prepared by Mr. Wightwick; but, when prepared, they became the representations of the vendor, and what knowledge the person may have had who prepared those documents is immaterial. He may have been guilty of neglect towards his employer in permitting the preparation and use of inaccurate papers on her behalf, but not having had any personal communication with the purchaser, the latter cannot complain of having been deceived by any misrepresentation made by him. It is, however, clear that Mr. Wightwick himself cannot, as between these parties, be considered as having more than constructive notice of the fact alleged by the plaintiff. What knowledge he acquired in 1820 is immaterial, as, at that time, he was not acting for the defendant or for Lady Augusta De Ameland, and although he, after he became their agent, paid the two shillings and sixpence to St. Lawrence and Ramsgate for the defendant, such payment would only show that some right of way had been supposed to pass over some part of the land in each of those districts, but could only be constructive notice of its affecting the plaintiff's land. It must also be observed that, if the plaintiff had relied upon any supposed fraud or misrepresentation on the part of Mr. Wightwick, he was bound so to have stated his case, and he cannot be permitted to support an alleged case of personal and direct fraud by a principal, by proving misconduct in an agent not named in the bill for that purpose.

If, therefore, the right of way complained of by the plaintiff had been proved—which it is not—and if the case relied upon had been properly stated in the bill—which it is not—the case would have come to this, that the defendant had no

knowledge of the fact complained of, but had within her reach means of such knowledge. That is constructive notice of a fact, not consistent indeed with the mode of dealing with the property, but as to which no representation of any kind took place. And the question would arise whether such circumstances would entitle the purchaser to have a completed purchase set aside. It has not been, and cannot be, contended that it could, but attempts were made to support the decree upon arguments resting, as it appeared to me, upon a supposition that there might be direct personal fraud consistent with perfect freedom from any personal blame or misconduct. The direct personal fraud was attempted to be supported by some expression in Mr. Wightwick's deposition, in which he says that the defendant had knowledge of the right of way claimed over the land purchased by the plaintiff, but he does not say how he proved such knowledge, and, coupled with what he said respecting the deed and the payments, he must be understood as intending to say that the defendant must, as he supposes, have known of the claim, from the fact of such deed having been executed, and such payments having been made.

Finding that there was no evidence to support the charge of direct personal fraud imputed by the bill, and that the evidence, at most, only raised a case of constructive notice of the fact complained of by the plaintiff, I waited with some curiosity to learn the ground or authority on which the decree was to be supported. The case principally relied upon was *Edwards v. M'Leay* (1); but that case cannot assist the respondent, for in that case there was knowledge in the vendor and a false representation, both of which are wanting in the present case. LORD ELDON says (2 Swan. at p. 289):

"I agree with the Master of the Rolls that if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this court will rescind the contract."

A case much more in point is that of *Legge v. Croker* (2), in which the lessor had assured the lessee that there was no right of way over the ground; that there had been formerly, but that it had been legally stopped by a grand jury presentment forty years before. It turned out that there was a footway, the presentment applying only to a carriage way, and the lessee was convicted of obstructing it, whereupon he filed his bill to be relieved from the lease; but LORD MANNERS dismissed his bill, saying (1 Ball & B. at p. 514):

"If there were a wilful misrepresentation, the plaintiff might be entitled to relief, but the lessor conceived himself entitled in point of law in asserting that there existed no right of way; it cannot be called a misrepresentation."

That was a much stronger case against the lessor than the present is against the vendor.

The result appears to me to be (i) that the plaintiff, having rested his case in the bill upon imputations of direct personal misrepresentation and fraud, cannot be permitted to support it upon any other ground; and (ii) that the evidence at the most proves only constructive notice of the fact upon the non-communication of which the plaintiff founds his claim for setting aside his completed purchase; and that nothing short of positive knowledge can be sufficient for that purpose. The case alleged is not proved, and the case proved is not alleged; and if it had been, would not have been sufficient to support the decree. The conclusion to which I have come is, that the decree ought to be reversed, and the bill dismissed, with costs.

LORD BROUGHAM.—I entirely concur with my noble and learned friend in the conclusion to which he has arrived, being clearly of opinion that the case alleged has not been proved, and that the case which has been proved is not sufficient to support the prayer of the bill to have the indentures of lease and release, the conveyance, given up and cancelled on the ground stated in the bill and assumed in the decree.

A There cannot be anything more vague than the allegation of fraud that is to be found in the pleadings, and what my noble and learned friend has most justly observed is a principle of the highest importance to be kept in view in proceedings in equity—for the security of the court against imposition upon it—for the keeping straight and clear the principle upon which its jurisdiction is to be exercised—for the safety of the characters of the parties—and for common justice. My noble
 B and learned friend has next observed that where fraud is to be the ground of the proceeding and is made the principle on which the relief is sought at the hands of the court, that fraud must be clearly and distinctly alleged, and, if so alleged, must equally be clearly and distinctly proved, if it is the ground on which parties seek the assistance of the court for equitable relief. That fraud, in this case, is clearly alleged there can be no doubt whatever, because we find in the bill this
 C allegation :

“that the said Augusta D'Este, that is to say, the defendant, at the time of the sale to the plaintiff, well knew that the said deed poll had been made and executed by her mother, the said Lady Augusta De Ameland, that is to say, well knew, that the said liberty-way so claimed in the township of Ramsgate and the parish of St. Lawrence was included within the premises so sold to
 D your orator as aforesaid.”

That is distinctly alleged, but nothing of the kind has been proved. Has anything been adduced as a substitute for that proof? Nothing of the kind. It is no question of constructive notice, for, as my noble and learned friend has well observed, constructive notice merges in actual knowledge. Constructive notice is only where
 E actual knowledge is not alleged, and here there is actual knowledge alleged, and thus no question as to constructive notice can arise.

Though it may not have been proved that the defendant actually knew of the deed poll, though, on the contrary, it may have been proved that she had not actual knowledge of it, yet by way of substitute for the first allegation, they as much as say : “If we cannot charge you with knowledge of the concealment of the
 F deed poll, we will charge you indirectly, we will charge you by inference.” In the next paragraph of the bill they go on to state :

“That the said Augusta Emma D'Este had, in fact, by her agents, regularly paid the nominal rent reserved to the said township of Ramsgate and parish of St. Lawrence by the said deed poll, as an acknowledgment of their right to re-open the said liberty way, for several years prior to the said sale to your
 G orator, that is to say, paid by her agents two shillings and sixpence in respect of the way for several years prior to the said sale to the plaintiff.”

In the first place, it is not proved that the accounts in which it is said the two shillings and sixpence paid by the agent was entered, ever did contain that entry, for the accounts were not produced. In the next place, it is not proved that she had
 H that knowledge. Therefore, in order to prove her knowledge, you must assume three things, first, that she knew of the accounts, which she did not know, but the contrary; secondly, that the accounts contained the entry; and thirdly, in order to make it the least available to the case towards proof of knowledge and suppression of that knowledge, you must go a further step, and prove that the accounts, if produced, and if seen by her, did contain, not only the entry of the pay-
 I ment of two shillings and sixpence by the agent, but also an entry that the two shillings and sixpence was paid in respect of that right of way to the parish of St. Lawrence. It is ridiculous to suppose that you can make all these assumptions in a court where the foundation of the whole claim is fraud, alleged by the concealment of a fact well known.

In *Edwards v. M'Leay* (1), both the learned judges, SIR WILLIAM GRANT, and LORD ELDON, went on the fact that there was direct knowledge brought home to the party. That case, therefore, does not help the plaintiff in this case. It does not apply here, but the case which my noble and learned friend happened to light

upon, which had not been mentioned at the Bar, does apply. I do not remember, A
 in the course of my experience, ever to have seen two cases more nearly alike than
 that case and the present, though I must observe that it did not require a case of
 this sort to enable us to arrive at the conclusion at which we now arrive. In the
 present case there is, first, a total failure in proof of the case alleged; and
 secondly, the case which is proved is totally insufficient to support the claim. B
 It is singular to observe how very different the view taken here of the proof of fraud
 and of the import of it, and its tendency towards a remedy is from that which is
 taken in the Courts of Common law in the celebrated case of *Pasley v. Freeman* (3),
 but particularly *Haycraft v. Creasy* (4). There you find that the knowledge was
 never alleged, but if you look at that case—which is celebrated by its having shown
 a rarely occurring difference of opinion between the learned Chief Justice, LORD C
 KENYON, and the three puisne judges, they having decided against LORD KENYON
 that the action would not lie—it is singular how clearly you find that the plaintiffs
 did not allege a scienter there. They allege things which might be supposed
 to amount to a scienter, but they never dared to allege a scienter. They said that
 Creasy had given intimation to Haycraft that his opinion was that Miss Robertson,
 who turned out to be a swindler, was perfectly solvent, and that he of his own
 knowledge asserted in words that she was solvent and that she might safely be D
 trusted to any reasonable amount with goods. So it was argued that there was a
 scienter; but the pleader, who drew the declaration, knew a little better than that.
 He was afraid that that would be held only to be a scienter of an opinion, and
 that it amounted only to an opinion, and so the court held. They said we must
 have knowledge alleged of a fact, and what the party was talking about was not
 a fact, but merely of an opinion, viz., the solvency of the lady. The pleader was E
 quite aware that that objection would be raised against him, and, accordingly, he
 took special care not to allege the scienter. It is expressly stated in the report
 that no knowledge was alleged in the declaration, but it was only alleged that the
 party had given a false representation. What would have been the consequence
 if he had alleged knowledge? He would have done what the pleader in equity has
 done in this case in the passage which I have read to your Lordships. He would F
 have alleged that the said Creasy well knew the same, but then he would have
 been obliged to prove that, and, as he could not prove it, he would have been
 nonsuited. He, therefore, took care not to allege it, and he left it to be a matter
 of implication.

I am, therefore, clearly of opinion that there has been as great a miscarriage of
 justice in this case in the court below as I have ever seen. The decree cannot G
 stand, but must be reversed with all the costs below.

LORD CAMPBELL.—After the very attentive and anxious consideration which
 this case has received, I have come to the clear conclusion that the decree appealed
 against ought to be reversed.

If there be, in any way whatever, misrepresentation or concealment which is H
 material to the purchaser, a court of equity will not compel him to complete the
 purchase, but where the conveyance has been executed, I apprehend, my Lords,
 that a court of equity will set aside the conveyance only on the ground of actual
 fraud. There would be no safety for the transactions of mankind if, upon a
 discovery being made at any distance of time of a material fact not disclosed to
 the purchaser of which the vendor had merely constructive notice, a conveyance I
 which had been executed could be set aside.

Counsel for the respondent acquiesced in the view that this was to be considered
 as if it were an action of deceit, but they argued that an action of deceit might
 be maintained without proof of actual fraud. From that position I entirely dis-
 sent. If you mean by fraud, an intention to injure the party to whom the
 representation is made or to benefit the party who makes the representation, there
 may be an action of deceit without fraud, but there must be falsehood, there
 must be an assertion of that which the party making it knows to be untrue.

- A The scienter must either be expressly alleged, or there must be an allegation that is tantamount to the scienter of the fraudulent representation, and this allegation must be proved at the trial. If your Lordships will examine the cases that have been referred to, *Foster v. Charles* (5), *Polhill v. Walter* (6), and *Corbett v. Brown* (7), you will find the judges uniformly lay down the rule that there must be a falsehood stated and proved. If that falsehood is stated without any view of
- B benefiting the person who states the falsehood or of injuring the person to whom the falsehood is stated, in one sense of the word you may say it is not fraudulent, but it is a breach of a moral obligation; it is telling a lie; and if a lie is told whereby a third person is prejudiced, although there may be no profit to the person who tells it, and although no injury was intended to the party to whom it is told, but a benefit to a third person, it is clearly a breach of moral obligation, and is a fraud
- C which will support an action of deceit.

- What evidence is there in the present case to support such an action? The bill is framed, I may say, *ex delicto*, not *ex contractu*; but it asserts, in the most positive manner (and that is the foundation of the relief which is prayed), that the defendant, at the time of the sale, not only knew of the deed of 1820, but knew of the direction of the "liberty way," and knew that "liberty way" came upon the
- D ground which was sold to the plaintiff. My two noble and learned friends who have preceded me, in the clearest manner have shown that there is not a particle of evidence to support that allegation, and I do not mean to trouble your Lordships by again going through the evidence. Indeed, there has been every desire to conduct a case of this sort with the courtesy and respect to the parties which were indicated in the court below and at the Bar here. I will not strictly interpret the disclaimer
- E at the Bar, but the learned judge below, judicially, more than once said that he acquitted the parties of all fraud, and, therefore, the notion of this bill being supported on the ground of personal fraud committed by the defendant must at once be dismissed. That being the case, in the shape in which the bill is presented before us, the case of personal fraud committed by her entirely fails, and we are not at all called upon to consider whether *Cornfoot v. Fowke* (8) in the Exchequer
- F was rightly decided or not, a case in which the judges were divided as to whether the fraudulent representation of an agent was equivalent to a fraudulent representation by the principal. Here the case alleged is a fraudulent representation by the principal, and not by an agent.

- In the first place, there is no evidence to which we are at liberty to pay attention to prove that the witness Wightwick, in making the representation at the time of
- G the sale, was the agent of Lady Wilde, and if he was the agent, there is no evidence whatever that he, in the course of the agency acquired any knowledge, or at any time had any knowledge of the direction of the road, and on that the whole turns, because the mere knowledge of the liberty way is nothing, and the mere knowledge of the deed of 1820 is nothing, unless he in the course of his agency acquired a knowledge of the direction of the liberty way, and knew that part of the liberty way
- H extends within the wall which was erected by the plaintiff. The knowledge then amounts to nothing; he had no knowledge which would show that he was guilty of any fraudulent misrepresentation. Therefore, my Lords, in the light in which I view this case, it seems to me that the decree cannot be supported.

- With regard to *Edwards v. M'Leay* (1), I most reverentially regard it. I think there is no case of higher authority to be found in our law books. It was decided
- I by SIR WILLIAM GRANT, on the most unexceptionable principles, and it was supported by LORD ELDON, and he in the most pithy manner states the principle on which he proceeded. This is the principle on which he acts (2 Swan. at p. 289):

"If one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this court will rescind the contract."

This is the first case that we have cited before us, or to be found, of a bill in equity to set aside such a transaction, and we have as yet no authority to go further

than *Edwards v. M'Leay* (1). That is the guide on one side; what is the guide on the other? The case decided by LORD MANNERS, a judge of very great experience and very great intelligence, whose opinion on such a question is to be regarded with high respect—that case is the guide on the other side, to show you what you ought to avoid. You may go so far as *Edwards v. M'Leay* (1), but then you are told how far you are not to go by the warning in the other case.

For these reasons, I am clearly of opinion that this bill ought to have been dismissed, with costs.

Appeal allowed.

BLAKE v. SHAW

[VICE-CHANCELLOR'S COURT (Page-Wood, V.-C.), March 21, 1860]

[Reported John. 732; 2 L.T. 84; 8 W.R. 410; 70 E.R. 615]

Will—Plant—Bequest of goodwill and plant—Plant—Exclusion of stock-in-trade and materials.

A testator by his will “gave and bequeathed unto his foreman B. the goodwill of his business in Aldersgate Street, and also the plant and £1,000 sterling for his use and benefit.” The testator had been a wholesale clothier in London, and at the time of his death was possessed of stock-in-trade, ready-made clothes, cloth and other materials, and household furniture, etc.

Held: the word “plant” did not embrace the stock-in-trade, ready-made clothes, cloth and other similar materials, and, consequently, they did not pass to the legatee.

Notes: Considered: *Re Rhagg, Easten v. Boyd*, [1938] 3 All E.R. 314. Applied: *Re Betts, Burrell v. Betts*, [1949] 1 All E.R. 568. Referred to: *Re Henton, Henton v. Henton* (1882), 30 W.R. 702.

As to gifts of plant, business or goodwill, see 39 HALSBURY'S LAWS (3rd Edn.) 1019; and for cases see 44 DIGEST 692-694.

Case referred to in argument:

Churton v. Douglas (1859), John. 174, 28 L.J.Ch. 841; 33 L.T.O.S. 57; 5 Jur.N.S. 887; 7 W.R. 365; 70 E.R. 385; 36 Digest (Repl.) 604, 1650.

Bill filed by the plaintiff Thomas Blake, who had for several years been foreman to the testator Haven Kaye, in his trade or business of a wholesale clothier in Aldersgate Street, in the City of London, against the executors of his will, to have his (the plaintiff's) interest in the testator's estate and effects, by virtue of the bequest to him of the goodwill of the testator's business in Aldersgate Street, and also the plant, ascertained and declared, and the property, if necessary, assigned to him.

Haven Kaye, the testator, of Newington Green, and of No. 129, Aldersgate Street, at the date of his will and of his decease, carried on the trade or business of a wholesale clothier at No. 129, Aldersgate Street, of which premises he was tenant at rack rent for a term still unexpired at the decease of the said Haven Kaye. The plaintiff was, and for many years previously had been, the foreman of the said Haven Kaye. Haven Kaye, by his will, dated Mar. 1, 1859, after directing payment of all his just debts and funeral and testamentary expenses, gave and bequeathed unto the plaintiff (therein called William Thomas Blake) the goodwill of his business in Aldersgate Street aforesaid, and also the plant and £1,000 sterling for his use and benefit, and after giving an annuity and certain legacies, the testator

A gave the residue of his estate as therein mentioned, and appointed the defendant William Shaw and William Robinson executors of his will.

The testator died on Mar. 6, 1859; and his will was duly proved by the defendants, who possessed themselves of the personal estate of the testator, more than sufficient to pay and satisfy his debts and funeral and testamentary expenses, and the annuity and legacies given by his said will, including the plaintiff's legacy of B £1,000, which they had not paid, although they had assented to the bequest thereof. The defendants alleged that they had not assented to the bequest to the plaintiff of the goodwill of the testator's business in Aldersgate Street, and the plant. Shortly after the death of the testator, on Mar. 7, 1859, the defendant William Robinson informed the plaintiff of the tenor of the testator's will, and added, that all the property of the testator at the time of his decease in and about No. 129, C Aldersgate Street, belonged to him (the plaintiff), and advised him to take possession. The plaintiff accordingly took possession of the leasehold premises, and the stock-in-trade, ready-made clothes, cloth and other materials, a part of the ready money, and the household furniture, plate, linen, etc., and he had since resided on the said premises, and continued the trade and business. He had also received some debts due to the testator.

D The stock-in-trade, ready-made clothes, cloth and other materials, were of very considerable value—it was said about £5,500; and the question was what part of the testator's personal estate passed to the plaintiff as legatee under the will of the testator.

Willcock, Q.C., and F. T. White for the plaintiff.

E *Daniel, Q.C., and Hitchcock* for the defendants, the executors, were not called on to argue.

PAGE-WOOD, V.-C.—I am clearly of opinion that plant cannot be held to mean stock in trade. There is no special reason in this will why I should so hold. When a testator gives the goodwill of his business and £1,000 to his foreman, it may well be imagined that the object of this bounty will be able to carry on the business and obtain the necessary capital for the purpose. In most cases the word "plant" F is used to describe something which, if not in direct contrast to stock, is at any rate of an entirely different nature. All the matters permanently used for the purposes of a trade, as distinguished from the fluctuating stock, are commonly included in the term "plant." It consists sometimes of things which are fixed, as, for example, counters, heating, gas, and other apparatus and things of that G kind, and in other cases of horses, locomotives, and the like, which are in this sense only fixed that they form a part of the permanent establishment intended to be replaced when dead or worn out, as the case may be. Therefore, I cannot treat either the stock or the household furniture as part of the plant.

My only doubt has been as to the interest in the house, which is proved to be of no intrinsic value apart from the goodwill. It is only upon the terms of this H particular will, and the circumstances of the case, that I can hold this interest to pass, on the ground that the testator, in making a gift of plant and goodwill, did not mean the plant and goodwill to be severed from the place where the business was carried on. Therefore, I think that the gift of plant and goodwill, in which each word aids the other, may properly be taken to pass the leasehold house, which the testator must have known to have no value except as an adjunct I of the business. It is only upon the grounds I have stated that I can come to this conclusion.

There will be a declaration that, according to the true construction of the will, and regard being had to the circumstances of the leasehold house in Aldersgate Street having been held at a rack-rent and only for the purposes of the business in Aldersgate Street, the same passed by the bequest of the plant and goodwill; and a declaration that the stock in trade and household furniture did not pass.

Declaration accordingly.

BEACHEY v. BROWN

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Crompton and Hill, JJ.),
February 15, 1860]

[Reported E.B. & E. 796; 29 L.J.Q.B. 105; 1 L.T. 479; 24 J.P. 518;
6 Jur.N.S. 345; 8 W.R. 292; 120 E.R. 706]

Breach of Promise—Defence to action—Failure by plaintiff to disclose to defendant prior engagement to marry another—Unchastity.

The fact that the plaintiff in a breach of promise action was, at the time of her engagement to marry the defendant, already engaged to another and failed to disclose this fact to the defendant, does not constitute a defence to the action, even though the defendant, had he known of the previous engagement, would not have agreed to marry the plaintiff.

Per SIR ALEXANDER COCKBURN, C.J.: There are a great many things a man might desire to have communicated to him, and yet the non-disclosure of such circumstances—such as debts owing, excitability of temper, and other things which a man might desire to be acquainted with—would not form a ground for the non-completion of the contract. . . . Immorality, unchastity, etc., are sufficient to excuse.

Contract—Rescission—Misrepresentation—Non-disclosure of material fact—Need to prove fraud—Distinction between circumstances showing or not showing fraud—Active or passive concealment.

Per CROMPTON, J.: To make the non-disclosure of a material fact an excuse for the non-performance of a contract, fraud must be distinctly alleged. . . . The real distinction as to circumstances showing or not showing fraud is between active and passive concealment.

Notes. Referred to: *Baker v. Cartwright* (1861), 10 C.B.N.S. 124.

As to defences to an action for breach of contract, see 19 HALSBURY'S LAWS (3rd Edn.) 771-773; and for cases see 27 DIGEST (Repl.) 29-30.

Cases referred to in argument:

Wheulton v. Hardisty (1858), 8 E. & B. 232, 285; 27 L.J.Q.B. 241; 31 L.T.O.S. 303; 5 Jur.N.S. 14; 6 W.R. 539; 120 E.R. 106, Ex. Ch.; 29 Digest (Repl.) 379, 2880.

Young v. Murphy (1836), 3 Bing.N.C. 54; 2 Hodg. 144; 3 Scott, 379; 6 L.J.C.P. 180; 132 E.R. 329; 27 Digest (Repl.) 30, 74.

Harrison v. Cage (1698), Carth. 467; Holt, K.B. 456; 1 Ld. Raym. 386; 5 Mod. Rep. 411; 12 Mod. Rep. 214; 1 Salk. 24; 90 E.R. 870; 12 Digest (Repl.) 249, 1934.

Wild v. Harris (1849), ante p. 413; 7 C.B. 999; 7 Dow. & L. 114; 18 L.J.C.P. 297; 13 L.T.O.S. 283; 13 Jur. 961; 137 E.R. 395; 12 Digest (Repl.) 213, 1528.

R. v. Millis (1844), 10 Cl. & Fin. 534; 8 Jur. 717; 8 E.R. 844, H.L.; 27 Digest (Repl.) 45, 232.

Demurrer by the plaintiff in an action by which she claimed damages for breach of promise of marriage; the defendant pleaded that the plaintiff failed to disclose that, when she agreed to marry him, she was already engaged to marry another; and the plaintiff demurred to this plea.

The declaration alleged a breach of promise to marry. The defendant pleaded that before and at time of the plaintiff and the defendant so agreeing, the plaintiff and one Charles Yeates had agreed to marry one another, which said agreement was then subsisting and in full force, and the plaintiff was then actually engaged to marry the said Charles Yeates, as she then well knew, but of which the defendant was then wholly ignorant, and that though the plaintiff ought to have fully disclosed the same to the defendant before the making of the agreement in the declaration mentioned, and though the defendant would not have made the said

A agreement had the same been disclosed to him by the plaintiff before the making thereof, yet the plaintiff at the time of making of the said agreement withheld and concealed the same from the defendant, and procured the defendant to, and the defendant did, make the said agreement on his part while he was wholly ignorant of the same. Demurrer and joinder in demurrer.

B *T. Jones* for the plaintiff in support of the demurrer.
Beresford for the defendant.

SIR ALEXANDER COCKBURN, C.J.—I am of opinion that our judgment should be for the plaintiff. This plea is no sufficient ground of defence. If the old law had continued to exist, and the fact of a pre-contract had the effect of making void a subsequent marriage, it might have been a good answer and a sufficient reason for declining to carry out the contract; but that law being abrogated, since the power of the ecclesiastical court in this respect is taken away by the statute 26 Geo. 2, c. 33, s. 13, and the Marriage Act, 1823, s. 27 [both repealed], this plea does not set forth any state of things which can have any effect upon the contract itself, or show any good reason why it should not be carried out. There are a great many things a man might desire to have communicated to him, and yet the non-disclosure of such circumstances—such as debts owing, excitability of temper, and other things, which a man might well desire to be made acquainted with—would not form a ground for the non-completion of the contract. It may be morally right that such things should be communicated to him, but he cannot excuse himself for a non-completion of the contract on such grounds. Immorality, unchastity, etc., are sufficient to excuse him, and for good reasons; but there is nothing of that sort here. Here the defence relied on is simply that the plaintiff had been engaged to another man; there is no imputation on her virtue, and nothing is disclosed in the plea to bar her right to recover.

CROMPTON, J.—I am of the same opinion. To make the non-disclosure of a material fact an excuse for the non-performance of a contract, fraud must be distinctly alleged. We cannot take this as a case of fraud, and, therefore, it is no answer. Here neither on one side nor the other was there any fraud. The real distinction as to circumstances showing or not showing fraud is between active and passive concealment. There may be other cases, such as moral turpitude, incompetency to perform the obligations of matrimony, that may be answers to such an action as this, but this plea does not show anything of the kind. The plaintiff may not have been to blame; it is not stated that she knew that the defendant was ignorant of the previous engagement, and one can suppose many cases in which it would not be incumbent on her to disclose such a fact. It is alleged by the plea that, as a matter of law, she was bound to communicate this circumstance to the defendant, but I see nothing in the case before us to prevent the plaintiff entering into this engagement with the defendant. We might come to cases like those in French law where if a man is disappointed in the amount of fortune the lady brings him, it would be a good defence, but it would be very dangerous to extend such defences; there would be no knowing where to draw the line; it might be said, if a lady apparently had a fine head of hair or good teeth, and the one or the other turned out to be false, that that would be an answer—it would be very dangerous.

H Then as to the pre-contract, the case is not brought by this plea within any such rule as has been referred to; and, as at present advised, this does not seem to me the sort of pre-contract contemplated by the statutes. I think, if looked into, they mean really a contract *de præsenti* or *de futuro* of a regular marriage; but does this pre-contract, as it has been called, prevent the defendant making good his marrying with the plaintiff? I think it clear this is not the sort of pre-contract contemplated here. The plaintiff promised to marry, and she was under no such pre-contract as created an obstacle to such marriage.

I **HILL, J.**—I am of the same opinion. The plea does not allege fraud, and fraud cannot be proved. It shows no disability on the part of the defendant or the plain-

tiff to enter into an engagement and carry it out. Without entering into the earlier statutes, I think that since the statutes 26 Geo. 2, c. 33, and the Marriage Act, 1823, on this subject, there was here no disability and no such pre-contract as could be enforced in the ecclesiastical courts. The plea sets up no such defence; it also fails in showing any concealment of such circumstances as the plaintiff was bound to disclose. It is possible that the defendant might have induced the plaintiff to break off her first engagement; and, if so, it would be rather hard that he should be allowed to set up her so doing as a defence in answer to this action. The circumstance referred to may have an influence on the damages, but I think the plea is bad in law, and the plaintiff entitled to judgment.

Judgment for the plaintiff.

WRIGHT v. CALLENDER

[COURT OF APPEAL IN CHANCERY (Lord Cranworth and Knight-Bruce, L.J.J.), July 10, 1852]

[Reported 2 De G.M. & G. 652; 21 L.J.Ch. 787; 19 L.T.O.S. 308;
16 Jur. 647; 42 E.R. 1027]

Annuity—Deficiency of income—Annuity charged on special fund—Right of annuitant to have deficiency made good out of capital.

A testator directed his executors to invest a sufficient portion of his personal estate in the public funds to produce an income of £2 a week, to be paid by them to his son J. for life. After J.'s death the sum so invested was to fall into and become part of the testator's personal estate. After dividing freehold and leasehold property among all his other children, the testator directed that, as soon as the youngest should attain twenty-one, the executors should divide the residue among all his children except J. equally. In like manner, he directed, on the decease of J. that the sum to be invested to produce and pay his annuity of £2 a week, should be divided unto and among all his other children who should be then living, or the issue of such of them as might be dead, share and share alike. The testator's residuary personal estate, when invested, was not sufficient to produce an income equal to the annuity given to J.

Held: the annuitant was entitled to have the deficiency raised from time to time, by the sale of part of the capital of the fund invested for the purpose of paying the annuity.

Notes. Applied: *Croby v. Weld* (1853), 3 De G.M. & G. 993; *Miner v. Baldwin* (1953), 1 Sm. & G. 522. Followed: *Ingleman v. Worthington* (1855), 25 L.J.Ch. 46. Distinguished: *Hindle v. Taylor* (1855), 20 Beav. 109; *Baker v. Baker* (1858), 6 H.L.Cas. 616. Applied: *Upton v. Vanner* (1861), 1 Drew. & Sm. 594; *Brayne v. Rees* (1866), 15 L.T. 349. Considered: *Michell v. Wilton* (1875), L.R. 20 Eq. 269; *Gee v. Mahood* (1878), 9 Ch.D. 151. *Carmichael v. Gee* (1880), 5 App. Cas. 588; *Re Cottrell, Buckland v. Bedingfield*, [1908-10] All E.R.Rep. 70; *Re Hill, Westminster Bank v. Wilson*, [1944] 1 All E.R. 502; *Re Thomas, Public Trustee v. Falconer*, [1945] 2 All E.R. 586. Referred to: *Hickman v. Upsall* (1860), 6 Jur.N.S. 367; *Re Dempster, Borthwick v. Lovell*, [1915] 1 Ch. 795; *Re Cox, Public Trustee v. Eve*, [1938] 1 All E.R. 661.

As to directions to set apart a fund for an annuity, see 32 HALSBURY'S LAWS (3rd Edn.) 547; and for cases see 39 DIGEST (Repl.) 157 et seq.

A Case referred to :

(1) *May v. Bennett* (1826), 1 Russ. 370; 38 E.R. 144; 23 Digest (Repl.) 429, 4996.

Also referred to in argument :

Gordon v. Bowden (1822), 6 Madd. 342; 56 E.R. 1121; 39 Digest (Repl.) 152, 412.

B *Wroughton v. Colquhoun* (1847), 1 De G. & Sm. 357; 11 Jur. 940; 63 E.R. 1103; 23 Digest (Repl.) 427, 4984.

Carr v. Ingleby (1831), 1 De G. & Sm. 362; 63 E.R. 1105; 23 Digest (Repl.) 426, 4975.

Long v. Hughes (1831), 1 De G. & Sm. 364; 7 L.J.O.S.Ch. 105; 63 E.R. 1106; 23 Digest (Repl.) 427, 4983.

C *Davies v. Wattier* (1823), 1 Sim. & St. 463; 57 E.R. 184; 24 Digest (Repl.) 861, 8561.

Re London, Brighton and South Coast Rail. Co., Ex parte Wilkinson (1849), 3 De G. & Sm. 633; 19 L.J.Ch. 257; 14 L.T.O.S. 171; 14 Jur. 301; 64 E.R. 638; 11 Digest (Repl.) 261, 1399.

Appeal from a decision of KINDERSLEY, V.-C., upon the construction of a will.

D The testator, William Wright, after giving a pecuniary legacy, and directing his debts and funeral and testamentary expenses to be paid out of his personal estate, directed his executors to get in such personal estate, and to stand possessed thereof, upon trust to invest a sufficient portion thereof in the public funds of Great Britain, or upon other government securities, to produce an income of £2 a week, to be paid by his executors to his son James Wright, during the term of his natural life, to and for his own use and benefit, for his support and maintenance; the said annuity to be in bar and satisfaction of all claim, right, or title to the testator's real and personal estate, or any part thereof; and from and after the decease of his said son James, the sum so invested to fall into and become part of the residue of the testator's said personal estate. The testator then, after a recital in his will that he was seised and possessed of certain freehold and leasehold estates particularly mentioned, gave the same, in certain specified shares, to his other children, Thomas, Isaac, Rebecca, F and Hannah, absolutely, at the age of twenty-one respectively; and he added :

G "And whereas, when and as soon as the youngest of my said children shall attain that age, upon trust that my said executors do and shall pay and divide my said residuary estate (all of such parts of which as do not already consist of public stocks, funds, and securities, I direct may in the meantime be invested in the public funds or on government securities), after deducting the several payments aforesaid, and all due allowances to my said executors, unto and amongst all and every my said children, except my said son, James Wright, share and share alike, to and for their own absolute use and benefit, and in like manner I direct, that, upon the decease of my said son James, the sum to be invested to produce and pay his annuity of £2 a week, shall be divided H unto and amongst all my other children who shall be then living, or the issue of such of them as may be dead, share and share alike."

I The testator died on July 20, 1841, and his executors proved the will, paid the debts and funeral and testamentary expenses, and the pecuniary legacy. They then invested the whole of the testator's residuary personal estate in the purchase of £2,200 17s. 6d. three per cent. consolidated bank annuities; the dividends of the stock were regularly applied in payment of the annuity of £2 a week to the testator's son James, until January, 1852, the executors from time to time making up the deficiency of such dividends by payment of the annuity out of the capital. The executors then refused to pay more in respect of the annuity than the dividends of the £2,200 17s. 6d. whereupon the testator's son James filed this claim, praying that a sufficient sum might be set apart out of the personal estate of the testator, and invested in the public funds, or upon government securities pursuant to the terms of the will; or otherwise to have the annuity valued, and the sum at which

the same should be valued paid to the annuitant out of the testator's personal estate. A

The claim came on to be heard before KINDERSLEY, V.-C., who was of opinion that there was not a specific gift of the annuity charged upon the whole personal estate of the testator, since the fund upon which it was secured was given over, on the death of the annuitant, to a different class of persons to those entitled to the residue. His Honour, therefore, held that the testator's son James was only entitled to be paid the annual dividends of the fund arising from the investment of the testator's residuary personal estate. From this decision the plaintiff appealed. B

Malins and Drewry for the plaintiff.

Stuart and Shebbeare for the executors.

LORD CRANWORTH, L.C.—I cannot but feel doubtful when expressing an opinion differing from that of KINDERSLEY, V.-C., but it is not to be wondered at that different minds should arrive at different conclusions upon the construction of a will so obscurely worded as this is. C

The view which I take is this. By the will the testator has in effect given an annuity of £104 per annum to his son James, and has directed that the annuity should be secured by means of a fund to be set apart, out of which it should be paid. The testator at his death did not leave sufficient assets to raise a fund out of the dividends of which the full annuity could be paid. The question is, What is to be done under the circumstances? It has hardly been attempted to be controverted, that if the fund had merely been directed to fall into the residue, the annuitant would be entitled to the annuity in full. The vice-chancellor, however, has proceeded upon this distinction, that according to the true construction of the will, the fund to be appropriated to secure the annuity, though directed by the will to fall into the residue of the testator's estate, is by a subsequent clause of the will given to a different class of persons from those who are to have the residue. D

Whether that is the proper construction to be put upon the will, I do not think it material to decide. I am disposed, however, to think that it is. But what then? The testator intended £104 a year to be paid to James, and gives him that annuity. How is the case varied by his saying that after the death of the annuitant the fund set apart to answer the annuity is given over? If there had been anything in the terms of that gift over, showing that the testator intended the fund to be continued in its integrity during the life of the annuitant, and in that state to go over, the argument might be well founded. But the direction to set apart the fund does not denote the object of the testator, but merely the means by which that object was to be secured. E F G

I do not see any substantial distinction between this case and *May v. Bennett* (1). There, as in the case before the Court, the question arose between the annuitant and the residuary legatee. The testator in that case having directed his executors to lay out in what government security they pleased, as much money as would produce £54 12s. per year, and having given that annual interest to his wife during her life in case she did not marry again, the executors invested in the £5 per cents. a sum which yielded dividends exactly equal to the specified income. Eighteen years afterwards those dividends were diminished by the conversion of the £5 per cents. into £4 per cents., and became therefore insufficient to meet the annuity. LORD GIFFORD held that the setting apart the fund was only a means to the end, and that if that means failed the intention was that the actual amount of the annuity should be made up out of the other assets. What LORD GIFFORD, M.R., said was this (1 Russ. at p. 373): H I

"If there is any difficulty in making good the difference out of the general estate of the testator, she must have the deficiency raised from time to time by the sale of parts of the appropriated stock."

That is, in my opinion, the equity and the only equity which the annuitant has. For I see no principle in saying that where the question is between the annuitant

A and those entitled to the residuary estate, the annuitant is entitled to have the annuity valued and to be paid the amount of the valuation in respect of his annuity. In all the cases which have been cited in support of that view, the question has arisen between the annuitant and pecuniary legatees, and not between the annuitant and the residuary legatee. But as between an annuitant and pecuniary legatees the court holds that there must be an abatement *pari passu* in case of deficiency of assets, and knows of no other way of dealing with the subject, or of making the requisite abatement than by means of a valuation.

B No such question arises here, where all that can be asked is payment of the annuity, and an investment of the fund by way of security, and in the event of the dividends of that fund being insufficient to meet the annual payments in respect of the annuity, then to have the deficiency made good from time to time, either
C by a sale of portions of the appropriated stock, or out of any other part of the residue which could be made available. It may happen certainly that by this means the whole appropriated fund would in the end be exhausted if the annuitant lived long enough. In that case the annuitant would be in the situation of any other person to whom a testator bequeaths a benefit without leaving assets to provide for it.

D **KNIGHT-BRUCE, L.J.**—It is sufficient to show this to be a case of difficulty, that LORD CRANWORTH, L.J., and KINDERSLEY, V.-C., differ in their views of it. In electing between the two constructions that have been put upon the language of the will before us, my conclusion is in conformity with the judgment which has just been pronounced. The opinion formed by me when I first read the will has continued unchanged during the argument; it is that the plaintiff is entitled to have
E the will read as if he had been named in it simply and merely as a legatee of an annuity of £2 per week for life. I am certainly not disposed at present to direct that the annuity should be valued, or to do more than allow the annuitant from time to time to break into the capital of the appropriated fund for the purpose of making good any deficiency in the dividends to pay his annuity. If the parties
F cannot agree upon the mode of raising the deficiency, the case may be again mentioned to the court.

[The order ultimately made declared that the plaintiff was entitled to be paid his annuity in full, and to have the arrears then due, as well as any deficiency in the dividends of the appropriated fund to meet the future payments, raised by sale from time to time of part of the capital of such fund.]

ACKROYD *v.* SMITH

[COURT OF COMMON PLEAS (Maule, Cresswell and Talfourd, JJ.), June 1, 24, 1850]
 [Reported 10 C.B. 164; 19 L.J.C.P. 315; 15 L.T.O.S. 395;
 14 Jur. 1047; 138 E.R. 68]

Easement—Right of way—Assignment—Need for right to be for the benefit and enjoyment of land granted.

A grant of a right of way "for all purposes" to A. and the occupiers for the time being of certain land over a road in a close occupied by B. was interpreted by the court on its true construction as extending to using the road for purposes other than those connected with the enjoyment of the land.

Held: the right purported to be granted, not being connected with the occupation of the land, could not be annexed to or incident to it, and so was incapable of assignment.

Notes. Applied: *Hill v. Tupper*, [1861-73] All E.R.Rep. 696. Considered and Explained: *Thorpe v. Brumfitt* (1873), 8 Ch. App. 650. Distinguished: *Simpson v. Godmanchester Corpn.*, [1895-9] All E.R.Rep. 630. Considered: *Todrick v. Western National Omnibus Co.*, [1934] All E.R.Rep. 25. Referred to: *Richards v. Harper* (1856), 35 L.J.Ex. 130; *London and Westminster Loan and Discount Co. v. Drake* (1859), 6 C.B.N.S. 798; *Bailey v. Stephens* (1862), 12 C.B.N.S. 91; *Ellis v. Bridgnorth Corpn.*, (1863), 15 C.B.N.S. 52; *Skull v. Glenister* (1864), 16 C.B.N.S. 81; *Shuttleworth v. Le Fleming* (1865), 19 C.B.N.S. 687; *Nuttall v. Bracewell* (1866), L.R. 2 Exch. 1; *Edgar v. English Fisheries Special Comrs.* (1870), 23 L.T. 732; *Royal v. Yaxley* (1872), 20 W.R. 903; *Chesterfield v. Harris*, [1908] 2 Ch. 397; *A.-G. v. Horne* (No. 2), [1913] 2 Ch. 140; *Thames Conservators v. Kent*, [1918] 2 K.B. 272; *Re Ellenborough Park, Re Davies, Powell & Co. v. Maddison*, [1955] 3 All E.R. 667.

As to the requirement that an easement should be appurtenant to land, see 12 HALSBURY'S LAWS (3rd Edn.) 519, 520 and 527; and for cases see 19 DIGEST (Repl.) 11 et seq.

Cases referred to:

- (1) *Keppel v. Bailey* (1834), 2 My. & K. 517; Coop. temp. Brough. 298; 39 E.R. 1042, L.C.; 19 Digest (Repl.) 22, 89.
- (2) *Weekly v. Wildman* (1698), 1 Ld. Raym. 405; 91 E.R. 1169; 19 Digest (Repl.) 159, 1048.

Also referred to in argument:

- James v. Plant* (1836), 4 Ad. & El. 749; 6 Nev. & M.K.B. 282; 6 L.J.Ex. 260; 111 E.R. 967, Ex. Ch.; 29 Digest (Repl.) 17, 50.
- Allan v. Gomme* (1840), 11 Ad. & El. 759; 3 Per. & Dav. 581; 9 L.J.Q.B. 258; 113 E.R. 602; 19 Digest (Repl.) 124, 777.
- Dand v. Kingscote* (1840), 6 M. & W. 174; 2 Ry. & Can. Cas. 27; 9 L.J.Ex. 279; 151 E.R. 370; 19 Digest (Repl.) 120, 746.
- Wood v. Leadbitter* (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 9 Jur. 187; 153 E.R. 351; 19 Digest (Repl.) 26, 115.
- Lawton v. Ward* (1696), 1 Ld. Raym. 75; 91 E.R. 946; sub nom. *Laughton v. Ward*, 1 Lut. 111; 19 Digest (Repl.) 14, 35.
- Howell v. King* (1674), 1 Mod. Rep. 190; 86 E.R. 821; 19 Digest (Repl.) 14, 34.
- Senhouse v. Christian* (1787), 1 Term Rep. 560; 99 E.R. 1251; 19 Digest (Repl.) 123, 768.
- Cowling v. Higginson* (1838), 4 M. & W. 245; 1 Horn & H. 269; 7 L.J.Ex. 265; 150 E.R. 1420; 19 Digest (Repl.) 122, 754.
- Simpson v. Lewthwaite* (1832), 3 B. & Ad. 226; 1 L.J.K.B. 126; 110 E.R. 85; 19 Digest (Repl.) 133, 868.
- Staple v. Heydon* (1703), 6 Mod. Rep. 1; 2 Ld. Raym. 922; 3 Salk. 121; 87 E.R. 768; 19 Digest (Repl.) 100, 594.

- A *Rouse v. Bardin* (1790), 1 Hy. Bl. 351; 126 E.R. 206; 26 Digest (Repl.) 326, 441.
Godley v. Frith (1609), Yelv. 159; 80 E.R. 106; 19 Digest (Repl.) 8, 6.
Dovastian v. Payne (1795), 2 Hy. Bl. 527; 126 E.R. 684; 26 Digest (Repl.) 326, 443.
Barlow v. Rhodes (1833), 1 Cr. & M. 439; 3 Tyr. 280; 2 L.J.Ex. 91; 149 E.R. 471; 19 Digest (Repl.) 32, 154.
- B *Tomlinson v. Day* (1821), 2 Brod. & Bing. 680; 5 Moore, C.P. 558; 129 E.R. 1128; 31 Digest (Repl.) 310, 4476.
Fitch v. Rawling (1795), 2 Hy. Bl. 393; 126 E.R. 614; 17 Digest (Repl.) 15, 165.

Demurrer in an action of trespass, for breaking and entering a close of the plaintiff in the parish of Bradford, in the county of York (describing it by abutments), and by feet and walking, and with horses, carts, and carriages, damaging and spoiling the grass, etc.

The defendants, in their plea, stated that long before and at the time of committing the alleged trespasses in the declaration mentioned, and at the time of making the release and grant hereafter mentioned, there was and henceforth hitherto has been and still is, and at the several times was in and upon the said close, in which, etc., a certain road, running between another road, called the Bradford turnpike road, and a lane, called Lagrane Lane; and that long before and at the time of making the indenture of release and grant hereafter mentioned, to wit, on Sept. 27, 1837, one E. C. Lister was seised in his demesne as of fee, as well of the soil of the road in this plea first mentioned as of and in the close in which, etc., and that before the time of committing the trespasses the said E. C. Lister was also seised in his demesne as of fee of and in the lands, tenements, and hereditaments and premises hereinafter next named, and being so seised in, etc., he, by lease and release, conveyed to John Smith and his heirs, to the use of him and his heirs and assigns for ever, a certain close and plots and parcels of land; and the said E. C. Lister did in and by the said last-mentioned indenture grant to the said John Smith, his heirs and assigns, that he and they respectively, being owners and occupiers for the time being of the said closes, so released as aforesaid, and all other persons having occasion to resort thereto, should have the right and privilege of passing and re-passing with or without horses, cattle, carts, and carriages, for all purposes, in, over, along, and through a certain road running between the Bradford turnpike road and Lagrane Lane, or in, over, and through some other road in the same direction, formed by and at the expense of the said plaintiff, his heirs and assigns, such other road, nevertheless, passing the said last corner of the said villas of the said plaintiff, he, the said J. Smith, his heirs, and assigns, paying to the said plaintiff, his heirs, and assigns, a proportional part of such expense of repairing the said road, according to the use thereof by him or them, not exceeding the actual damage done to the road by the wear and tear thereof by the said J. Smith, his heirs and assigns.

The plea then deduced a title in Samuel Smith, who had a life interest in one moiety of the lands and tenements, hereditaments, and appurtenances, and in Thomas Smith, to an estate in fee in the other moiety thereof, and alleged possession before and at the material time. And the said defendants, being so seised as owners as aforesaid, and being in and having such possession and occupation as aforesaid, and having occasion for their own purposes to use the road, or privilege in that behalf, granted and conveyed in and by the indenture of release and grant in such plea first mentioned, did on foot, and with their horses, etc., at the said several times, etc., pass and re-pass, for the purposes of them, the defendants, in, over, and along, and through the road in this plea first mentioned, so being, as aforesaid, in and upon the said close, in which, etc., as they lawfully might.

The plaintiff prayed over of the deed, which was a deed between the plaintiff of the first part, Richard Tolson of the second part, E. C. Lister (to whom the plaintiff had mortgaged the premises) of the third part, Samuel Smith and Thomas Smith of the fourth part, and John Smith of the fifth part. The plaintiff was the

mortgagor, and, as well as Lister, was made a conveying, granting, and covenanting party, and that is the reason why it is stated in the plea that the plaintiff granted the privilege mentioned that the plea set up as an answer to the action. Then he set out the deed on oyer, and demurred, assigning for causes, among others, that the plea did not show that the trespasses justified were committed in going to or from the premises conveyed, or that they were in any way connected with the enjoyment of such premises. Joinder in demurrer. A

Tomlinson, for the plaintiff, supported the demurrer.

T. F. Ellis for the defendants. B

June 24, 1850. **CRESSWELL, J.**, delivered the following judgment of the court, in which, after stating the pleadings as above, he proceeded.—In support of the demurrer it was contended, first, that the way granted was only for purposes connected with the occupation of the land conveyed, and, therefore, was not sufficient to support the justification pleaded; and, secondly, if the grant gave to the grantee a right of using the road for all purposes, although they might not be in any way connected with the enjoyment of the land, it would not pass to the assignee of the land, and, therefore, that the defendant could not claim as under a conveyance of the land with the appurtenances. On the other hand, it was contended that the right of way created by the deed might be assigned by deed together with the land, and was ample enough to maintain the justification pleaded. C

Upon consideration, we have come to the conclusion that the plaintiff is entitled to our judgment on the demurrer. If the right corresponding with the deed set out was only to use the road in question for purposes connected with the occupation and enjoyment of the land conveyed, it does not justify the acts confessed by the plea; but if the grant was more ample, and extended to using the road for purposes other than purposes connected with the enjoyment of the land, and this, we think, is the true construction of it, it becomes unnecessary to decide whether the assignee of the land and appurtenances would be entitled to it. In *Keppel v. Bailey* (1), the subject of covenants running with the land was fully considered by LORD BROUGHAM, L.C., and the leading cases on the subject are collected in his judgment. He there says (2 My. & K. at p. 537): D

"The covenant [that is, such as will run with the land] must be of such a nature as 'to inhere with the land,' to use the language of some cases; or 'it must concern the demised premises, and the mode of occupying them,' as is laid down in others: 'it must be quodam modo annexed and appurtenant to them,' as one authority has it; or, as another says, 'it must both concern the thing demised and tend to support it and support the reversioner's estate.'" E

The privilege or right in question does not inhere to the land; it does not concern the premises conveyed or the mode of occupying them. It is not appurtenant to them. A covenant, therefore, that such a right should be enjoyed, would not run with the land. Upon the same principle, it appears to us that such a right, unconnected with the enjoyment or occupation of the land, cannot be annexed to and incident to it; nor can it, while appendant to the house or land, be conveyed away or enjoyed in gross, for no one can have such a way but he who has the land to which it is appendant. BROOKE'S ABRIDGEMENT, "Grant," 130. If a way is granted in gross it is personal only, and cannot be assigned. So common in gross sans nombre may be granted, but cannot be granted over: per TREBY, C.J., in *Weekly v. Wildman* (2). It is not in the power of the vendor to create any rights not connected with the use or enjoyment of the land and annexed to it, nor can the owner of the land render it subject to a new species of burthen, so as to bind it in the hands of an assignee. "Incidents of a novel kind cannot be devised and attached to property at the fancy or caprice of any owner": per LORD BROUGHAM in *Keppel v. Bailey* (1). G

The principle is sufficient to dispose of the present case. It would be a novel incident annexed to the land that the owner and occupier should, for purposes H

A wholly unconnected with the land, and merely because he is owner and occupier, have a right of road over other land, and it seems to us that a grant of such a privilege or easement can no more be annexed, so as to pass with the land, than a covenant for any collateral matter.

The defendants, therefore, as assignees, cannot avail themselves of the grant to John Smith, and our judgment must be for the plaintiff.

Judgment for plaintiff.

GALSWORTHY v. STRUTT

[COURT OF EXCHEQUER (Pollock, C.B., Parke, Alderson and Platt, BB.), January 14, 1848]

[Reported 1 Exch. 659; 17 L.J.Ex. 226; 10 L.T.O.S. 329;
154 E.R. 280]

Contract—Breach—Damages—Liquidated damages or penalty—Sum fixed for breach of agreement—Damage provided against uncertain.

Where a contract contains a provision for the payment of a specified sum for the breach of a covenant or covenants therein and the damage provided against is altogether uncertain the sum specified is to be taken as liquidated damages.

Contract—Illegality—Restraint of trade—Restraint on exercise of profession—Solicitor—Covenant not to practice within specified distance, nor solicit clients of covenantee—Breach—Liquidated damages.

By a deed for the dissolution of partnership between the plaintiff and the defendant the defendant covenanted that he would not at any time thereafter within the next seven years, either by himself or in co-partnership with another, carry on the business of an attorney or solicitor within a distance of fifty miles from a named place, nor interfere with, solicit, or influence the clients of the late co-partnership, and that, if he should in any respect infringe that covenant, he should immediately thereon pay to the plaintiff the sum of £1,000, as and for liquidated damages, and not by way of penalty:

Held: on the construction of this covenant this sum of £1,000 was to be considered as liquidated damages and not as a penalty.

Notes. Considered: *Re Newman, Ex parte Capper* (1876), 4 Ch.D. 724; *Stegmann v. O'Connor* (1899), 80 L.T. 234. Referred to: *Mercer v. Irving* (1858), E.B. & E. 563; *Betts v. Burch* (1859), 4 H. & N. 506; *Wallis v. Smith* (1882), 21 Ch.D. 243.

As to liquidated damages or penalty, see 11 HALSBURY'S LAWS (3rd Edn.) 298 et seq.; and for cases see 17 DIGEST (Repl.) 164 et seq.

Cases referred to:

- (1) *Lowe v. Peers* (1770), 4 Burr. 2225; Wilm. 364; 98 E.R. 160; 12 Digest (Repl.) 278, 2131.
- (2) *Kemble v. Farren* (1829), 6 Bing. 141; 3 Moo. & P. 425; 7 L.J.O.S.C.P. 258; 130 E.R. 1234; 17 Digest (Repl.) 157; 546.
- (3) *Astley v. Weldon* (1801), 2 Bos. & P. 346; 126 E.R. 1318; 17 Digest (Repl.) 150, 495.
- (4) *Horner v. Flintoff* (1842), 9 M. & W. 678; 11 L.J.Ex. 270; 152 E.R. 287; 17 Digest (Repl.) 158, 550.
- (5) *Beckham v. Drake* (1841), 8 M. & W. 846.

- (6) *Green v. Price* (1845), 13 M. & W. 695; 17 Digest (Repl.) 153, 516. A
 (7) *Rawlinson v. Clarke* (1845), 14 M. & W. 187; 14 L.J.Ex. 364; 5 L.T.O.S. 200;
 153 E.R. 442; 17 Digest (Repl.) 161, 579.

Also referred to in argument :

- Boys v. Ansell* (1839), 5 Bing.N.C. 390; 2 Arn. 9; 7 Scott, 364; 8 L.J.C.P. 267;
 3 Jur. 316; 132 E.R. 1149; 17 Digest (Repl.) 155, 527.

Application by the defendant for a rule nisi to set aside a verdict for the plaintiff given by POLLOCK, C.B., and a jury and enter a nonsuit, in an action on a covenant.

The deed for the dissolution of a co-partnership between the plaintiff and the defendant as attorneys and solicitors, dated June 19, 1841, contained the following covenant and proviso :

"And the said John Strutt doth hereby covenant, promise, and agree to and with the said John Galsworthy, that . . . John Strutt shall not nor will, at any time or times hereafter within the next seven years, directly or indirectly, either by himself or in co-partnership with another or others, carry on the said practice, profession, or business of an attorney or solicitor within the distance of fifty miles from Ely Place aforesaid, (save as hereinafter mentioned), nor interfere with, solicit, or influence the clients of the said late co-partnership; and if . . . John Strutt shall in any respect infringe the present covenant, then and in such case he . . . shall immediately thereupon pay to the said John Galsworthy, his executors, or administrators, the sum of £1,000, as and for liquidated damages, and not by way of penalty : provided always, nevertheless, that . . . John Strutt shall not be prevented from transacting any matter of business, or being concerned for any person or persons, not being a client or clients of the said co-partnership, and upon his remaining properly qualified as an attorney and solicitor, through or by means of the said John Galsworthy as his agent, upon the usual terms, and upon the like charges and costs as are usually paid and allowed by attorneys and solicitors to their agents."

The declaration contained an averment of general performance on the part of the plaintiff, and concluded that the defendant, after the making of the indenture, and before the commencement of the suit, on various occasions within seven years following the date of the indenture, and before the commencement of the suit, carried on the practice, profession, or business of an attorney or solicitor within the distance of fifty miles from Ely Place namely, in Westminster, otherwise than through or by means of the plaintiff, as the defendant's agent; and that, although the defendant had infringed his covenant, he had not paid the sum of £1,000. To this breach the defendant pleaded payment into court of £50. The plaintiff replied damages ultra, and on this replication issue was joined.

At the trial before POLLOCK, C.B., no evidence was offered by either party, but it was contended by the plaintiff that by the terms of the deed he was entitled to the full sum of £1,000 therein specified. A verdict by consent was thereon entered for the plaintiff for £950, leave being reserved to the defendant to move to enter a nonsuit.

Jervis, Q.C., for the defendant, moved for a nonsuit.—The simple question is, whether, on the true construction of this covenant, the sum of £1,000 mentioned in it is to be taken as a penalty, or by way of liquidated damages. The defendant contends for the former construction, as being the correct one.

PARKE, B.—I entertain no doubt in the present case that the rule ought to be refused. It is an action brought on a covenant to pay one sum of £1,000, on the result of each of several events, one of which is that the defendant should set up in business or practise as an attorney within fifty miles of Ely Place, at any time or times within the space of seven years. Another event is that he should at any time interfere with or solicit the clients of the late co-partnership. Then follows the stipulation that the defendant should, in either of those cases, pay one sum of £1,000.

- A I take it to be clear that, on the true construction of this covenant, the defendant would not be bound to pay more than £1,000, that is, in case he should violate either of those two or three matters mentioned in the covenant. These matters are each of them incapable of exact estimation. It cannot be said what damage a person may sustain by another setting up in business within a limited period of time or distance, nor how much he may be injured by the loss of one of his clients.
- B The loss may be either great or small and, therefore, in order to avoid all dispute, the parties are content to fix a certain sum, namely, the sum they have mentioned in express terms in their agreement.

There is much good sense in what LORD MANSFIELD said in *Lowe v. Peers* (1) (4 Burr. at pp. 2228-9):

- C "And upon this distinction they proceed in courts of equity. They will relieve against a penalty upon a compensation. But where the covenant is to pay a particular liquidated sum, a court of equity cannot make a new covenant for a man; nor is there any room for compensation or relief. As in leases containing a covenant against plowing up meadow, if the covenant be 'not to plow,' and there be a penalty, a court of equity will relieve against the penalty, or will go even farther than that (to preserve the substance of the agreement): but if it is worded, 'to pay £5 an acre for every acre plowed up,' there is no alternative, no room for any relief against it, no compensation; it is the substance of the agreement. Here the specified sum of £1,000 is found in damages. It is the particular liquidated sum fixed and agreed upon between the parties, and is, therefore, the proper quantum of the damages. . . . It is, therefore,
- D clear, that where the precise sum is not the essence of the agreement, the quantum of the damages may be assessed by the jury; but where the precise sum is fixed and agreed upon between the parties, that very sum is the ascertained damage, and the jury are confined to it."

- E It is perfectly competent to parties to make a stipulation to pay a fixed sum for the breach of a covenant, the damage arising from which it is extremely difficult to ascertain; and I think that it is not an unreasonable stipulation which the defendant has made, that he should pay £1,000 in the event of either of the matters mentioned in this agreement.

- F It is said, however, that we are bound by the law, as laid down in *Kemble v. Farren* (2), to hold that where a sum is to be paid on the event of several different matters, to none of which the sum mentioned is precisely fixed, the sum is to be taken as a penalty, and the words "liquidated damages" are to be rejected. We have certainly always abided by the doctrine there laid down and I do not think it interferes with our opinion in the present case. TINDAL, C.J., in delivering the judgment of the court in that case says (6 Bing. at pp. 147, 148):

- G "It is undoubtedly difficult to suppose any words more precise or explicit than those used in the agreement, the same declaring not only affirmatively that the sum of £1,000 should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty, or in the nature thereof; and if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1,000. . . . In many cases such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases it saves the expense and difficulty of bringing witnesses to that point. But in the present case the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3 6s. 8d. per day; or, on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been concluded that the clause in question in either case would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and

that the former should not be considered as a penalty, appears to be a contradiction in terms." A

He then afterwards says (*ibid.* at p. 148):

"It has been argued at the Bar that the liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy by the verdict of a jury. But we can only say, if such is the intention of the parties, they have not expressed it; but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case, in principle, from that of *Astley v. Weldon* (3)." B

I take that to be the correct exposition of the rule. It would be competent for the parties to make a stipulation to pay a certain sum on the non-performance of a covenant to pay a smaller sum but they must do so in express terms; and if that be done, I do not see how the courts can avoid giving effect to such a contract. The rule is correctly laid down in *Kemble v. Farren* (2); and I said in *Horner v. Flintoff* (4) and *Beckham v. Drake* (5), that we were bound by that decision. In the more recent case, *Green v. Price* (6) I said (13 M. & W. at p. 701): C

"The principle is, that, although the parties may have used the term 'liquidated damages,' yet if the court can see, upon the whole of the instrument taken together, that there was no intention that the entire sum should be paid absolutely on non-performance of any of the stipulations of the deed, they will reject the words, and consider it as being in the nature of a penalty only." D

ALDERSON, B., there said (*ibid.* at p. 702): E

"But where the damage is altogether uncertain, and yet a definite sum of money is expressly made payable in respect of it, by way of liquidated damages, those words must be read in their ordinary sense, and cannot be construed to import a penalty." F

The law is correctly laid down in that case.

Here a sum of money is to be paid by the defendant for setting up in business within certain limits and within a certain time. The damage incurred may be very different, according to the time when the defendant sets up in business, whether it be near the beginning or end of the time. Parties are bound by their contracts, if those contracts be clearly made. It is clear that the defendant stipulated to pay £1,000 for the breach of any one of the conditions mentioned; and they are such that the damage arising from the violation of any of them cannot be exactly estimated beforehand. It is entirely a question of construction, and for the court to ascertain the intention of the parties and the meaning of the words they have used. G

ALDERSON, B.—I am of the same opinion. It seems to me that on looking at the several cases which have been decided on this subject, the rule is clear, although perhaps it may not have been so distinctly expressed as could be wished. It is entirely a question of construction. The rule seems to be that where there are many and different stipulations in an agreement, the breach of any of which gives rise to a definite amount of damage, and for which a disproportionate sum is annexed, it is not reasonable to hold that the parties intended the whole amount to be paid. In *Kemble v. Farren* (2), it was not reasonable to suppose that the parties intended that £1,000 should be paid on the non-payment of £3 6s. 8d. only. So in *Beckham v. Drake* (5), it was not reasonable to infer that the amount assigned as liquidated damage should be awarded for a breach of covenant of which the actual amount, as apparent on the face of the instrument itself, was only £3 3s.; and, therefore, the court, in that case, construed the sum to be a penalty and not liquidated damages. H

Where, however, the damage cannot be ascertained, what absurdity is there in a party saying there shall be a fixed sum? Therefore, in such case, the courts I

A may give the words their plain and ordinary meaning. The amount of damage which a person might sustain by another's practising within fifty miles for the period of seven years, would not be the same in amount as if he were to practise within forty miles or next door, nor the same if he had set up in business in the first, second, or sixth year. In one case the damages might be small, and in the other large; but the parties have agreed to a certain fixed sum in order to prevent the necessity of being at the expense of procuring the attendance of witnesses for the purpose of giving evidence on those matters.

B If, in *Kemble v. Farren* (2), it had been stipulated that for the breach by the non-payment of the agreed amount, there should be £1,000 paid as liquidated damages, I am not prepared to say that the party would not have been bound to that precise sum. *Green v. Price* (6), which was followed by *Rawlinson v. Clarke* C (7), in which the same principle was acted on, is not distinguishable from the present.

PLATT, B.—I am of the same opinion; and I concur with PARKE, B., in the limitations he has applied to this case. If all the damages are uncertain and general, there is no reason to alter the distinct words of the contract entered into D by the parties. Here it is clear that the covenant, on the breach of which this sum is to be paid, was to protect the plaintiff's business from the interference of the defendant. It is clear that such is the substance of the intention of the parties; and it was, therefore, agreed that in the event of any one of the acts stipulated against being done by the defendant, then he should be liable to pay the sum of £1,000 as liquidated damages. I am unable to distinguish this case from *Rawlinson v. Clarke* E (7). I think, therefore, that the sum recovered was right, and that there ought to be no rule.

POLLOCK, C.B.—I entirely agree with the rest of the court. I think that this matter has already been decided. *Kemble v. Farren* (2) is a direct authority that where the injury provided against is altogether uncertain, the sum specified F is to be taken as liquidated damages. The rule is correctly laid down by TINDAL, C.J., in that case; and I think that the present falls entirely within the principle there laid down. I concur with the rest of the court in thinking that there ought to be no rule.

Rule refused.

GURNEY AND OTHERS *v.* BEHREND

[COURT OF QUEEN'S BENCH (Lord Campbell, C.J., Wightman, Erle and Crompton, JJ.), May 2, 3, 1854]

[Reported 3 E. & B. 622; 23 L.J.Q.B. 265; 23 L.T.O.S. 89;
18 Jur. 856; 2 W.R. 425; 118 E.R. 1275]

Shipping—Stoppage in transitu—Bill of lading—Transfer—Bona fide transferee—Title to cargo—Right of unpaid vendor of cargo to stop in transitu.

The bona fide transferee for value of a bill of lading endorsed by the shipper or his consignee and put into circulation by the authority of the shipper or his consignee has an absolute title to the cargo free from the equitable right of the unpaid vendor to stop in transitu as against the purchaser.

Notes. Considered: *The Tigress* (1863), Brown. & Lush. 38; *Pease v. Gloahec*, *The Marie Joseph* (1866), L.R. 1 P.C. 219; *Coventry v. Gladstone* (1867), L.R. 4 Eq. 493. Applied: *The Argentina* (1867), L.R. 1 Ad. & El. 370. Referred to: *Shepherd v. Harrison* (1869), L.R. 4 Q.B. 196; *Leask v. Scott Bros.* (1877), 46 L.J.Q.B. 576; *Glyn, Mills & Co. v. East and West India Dock Co.* (1882), 47 L.T. 309.

As to bills of lading, see 35 HALSBURY'S LAWS (3rd Edn.) 328 et seq.; and for cases see 41 DIGEST 385 et seq.

Case referred to:

(1) *Lickbarrow v. Mason* (1787), 2 Term Rep. 63; 100 E.R. 35; on appeal sub nom. *Mason v. Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; sub nom. *Lickbarrow v. Mason* (1793), 4 Bro. Parl. Cas. 57; 6 East, 22 n., H.L.; subsequent proceedings (1794), 5 Term Rep. 683; 39 Digest (Repl.) 750, 2279.

Also referred to in argument:

Key v. Cotesworth (1852), 7 Exch. 595; 22 L.J.Ex. 4; 19 L.T.O.S. 145; 155 E.R. 1085; 39 Digest (Repl.) 635, 1456.

Turner v. Liverpool Docks Trustees (1851), 6 Exch. 543; 20 L.J.Ex. 393; 17 L.T.O.S. 212; 155 E.R. 659, Ex. Ch.; 39 Digest (Repl.) 631, 1426.

Newsom v. Thornton (1805), 6 East, 17; 2 Smith, K.B. 207; 102 E.R. 1189; 41 Digest 386, 2306.

Jenkyns v. Brown (1849), 14 Q.B. 496; 19 L.J.Q.B. 286; 14 L.T.O.S. 395; 14 Jur. 505; 117 E.R. 193; 39 Digest (Repl.) 630, 1420.

Howes v. Ball (1827), 7 B. & C. 481; 1 Man. & Ry.K.B. 288; 6 L.J.O.S.K.B. 106; 108 E.R. 802; 39 Digest (Repl.) 779, 2549.

Brandt v. Bowlby (1831), 2 B. & Ad. 932; 1 L.J.K.B. 14; 109 E.R. 1389; 39 Digest (Repl.) 638, 1474.

Barrow v. Coles (1811), 3 Camp. 92; 170 E.R. 1316, N.P.; 39 Digest (Repl.) 633, 1439.

Case Stated in an action of trover for a cargo of wheat. Pleas, not guilty and not possessed. At the trial before LORD CAMPBELL, C.J., a verdict was found for the plaintiffs, with damages £3,725, subject to the opinion of the court on a Case.

The plaintiffs, during the transactions hereinafter mentioned, carried on business in London, under the firm of Overend, Gurney & Co., as money-dealers; and it was part of their usual business to make advances to merchants and others on the security of bills of lading and other documents representing value. The defendants were at the same time merchants at Dantzic, carrying on business under the firm of T. Behrend & Co. Coventry & Sheppard were at the same time corn-factors in the city of London. The plaintiffs had, for a considerable time previously to Jan. 8, 1853, been in the habit of making advances to Coventry & Sheppard, on the security of bills of lading of cargoes of corn; and the course of business generally

A adopted with reference to those advances, was for Coventry & Sheppard to submit to the plaintiffs, for approval, a note of the securities together with the securities themselves on which the advance was required; and, if approved by the plaintiffs, the advance was made, the plaintiffs calculating from the value of the cargo, as appearing from the bill of lading, the sum they could prudently advance on the proposed security. The defendants were the shippers of the wheat. (A copy of the bill of lading was inserted in the Case, but there was nothing special in the terms of it.) On the approval by the plaintiffs of the bill of lading so handed to them as aforesaid, they advanced to Coventry and Sheppard the sum of £3,400, and obtained from them an acknowledgment or borrowed note, as they were in the habit of doing on like occasions. The money was paid by the plaintiffs' cheque on Jan. 8 in favour of Coventry & Sheppard. The advance was made by the plaintiffs on the bill of lading in the ordinary course of their business, and was such as they had been in the habit of making to Coventry & Sheppard. The plaintiffs had ever since held the bill of lading as a security for their advance. The *Ernte* arrived in the Thames on Feb. 2, 1853, when the wheat was taken possession of in the ship by the defendants before any other person had taken possession of it; they paid the freight, obtained delivery from the captain, and kept the wheat and refused to deliver it up to the plaintiffs—which was the conversion complained of.

Mr. Robert Ferdinand Pries was, for some years previously to and during the transactions hereinafter mentioned, a corn-merchant in a very large way of business in London, in the habit of receiving large shipments of wheat from abroad, and was in good credit down to the evening of Jan. 8, 1853, when he was arrested on a criminal charge not connected with the bill of lading in question. He never resumed business, and was shortly afterwards made bankrupt. Coventry & Sheppard had been employed for many years by Pries as his factors, and as such had very large transactions with him, and were in the habit, in the usual way of their business, of making him advances from time to time on receiving bills of lading deposited at the time, or on his promise to deposit further bills of lading of expected cargoes when they arrived. The cargoes, as they came forward, were from time to time disposed of by them, and the proceeds were placed to Pries's credit less commission and expenses. Coventry & Sheppard were in the habit, on receiving the bills of lading, of getting advances from the plaintiffs on deposit.

On Nov. 26, 1852, Coventry & Sheppard were promised by Pries bills of lading of the *Johannes* and the *Diana*, and on that day they advanced £3,000. On Dec. 16 they were promised the *Kleine Marie*, and thereupon advanced £3,000. On Dec. 20 G they were promised the bill of lading of the *Martha*, and thereupon advanced £3,500. On Dec. 22, 1852, Pries deposited with Coventry & Sheppard bills of lading of cargoes by the four vessels, viz., the *Martha*, *Johannes*, *Diana*, and *Marie*, covering about 2,800 quarters of corn, which had previously been promised on advances made, and stated that he expected a cargo of wheat from Dantzic by the *Ernte*, then in the course of shipment, and also five other cargoes by other vessels, and that Coventry & Sheppard should have the bills of lading of such wheat when they were received; and he then applied for a further advance. At the same time Pries handed to Coventry & Sheppard, in the usual way, a slip, stating the particulars of the cargo of the ship *Ernte*, for the purpose of their getting it assured, which they thereupon did.

On the faith of Pries's promise to deposit the said six bills of lading on arrival, I Coventry & Sheppard on Dec. 22, 1852, made him a further advance of £7,000. Between Dec. 22, 1852, and Jan. 8, 1853, Pries handed over to Coventry & Sheppard four of the bills of lading promised to them on Dec. 22, but not the *Ernte*'s; and during that period he obtained further advances from Coventry & Sheppard to the amount of £49,300 on similar securities. On Jan. 8, 1853, Pries handed to Coventry & Sheppard the bill of lading of the *Ernte*, bearing the endorsement of the defendants as already set forth; and at the same time he applied for a further large advance, and thereupon obtained from Coventry & Sheppard a further advance of £600, they declining further to increase their advances without additional security.

Coventry & Sheppard on the same day (Jan. 8, 1853) took the bill of lading of the *Ernte* to the plaintiffs, and obtained from them the advance already mentioned. A

It appeared at the trial that Coventry & Sheppard's advances to Pries had not been paid, and that their securities had not been realised, and that it was uncertain whether they would realise enough to cover what was due to them by Pries. The cargo was bought of the defendants by E. Werthemann, a merchant of Amsterdam. Werthemann, in point of fact, bought the corn for Pries; but that fact was unknown to the defendants. They only knew Werthemann in the transaction, and payment of the price, at the rate of 40s. per quarter was to be made in the manner stated in the following letters. Collmann & Stolterfoht, mentioned in these letters, were a firm in a large way of business in London, as merchants and commission-agents, who had had very large dealings with Pries during the time he was in business. B

On Dec. 31, 1852, Werthemann wrote and sent the following letter to Collmann & Stolterfoht: C

"Messrs. Collmann & Stolterfoht, London.

Amsterdam, Dec. 31, 1852.

By order and for account of Mr. Robert F. Pries, I beg to inform you that I have opened a credit with your house in favour of Messrs. Th. Behrend & Co. for £10,000—Ten thousand pounds. I, therefore, request you to favour the drafts at 2 m—d. of said Dantzic friends for this amount against bills of lading of wheat at the rate of 40s. per quarter, and to debit Mr. Robert F. Pries for them. D

E. WERTHEMANN."

On Jan. 4, 1853, the defendants forwarded the bill of lading of the *Ernte* to Collmann & Stolterfoht, in the following letter: E

"Messrs. Collmann & Stolterfoht, London.

Dantzic, Jan. 4, 1853.

According to instructions from Mr. E. Werthemann, Amsterdam, we have the pleasure of handing you enclosed bill of lading of 9,200 scheffels of wheat, with 200 bags and 700 mats, by the ship *Ernte*, Captain Zielcke, to that port, and request you to follow the instructions of said Amsterdam friend respecting these documents by whose order and for whose account we have today taken the liberty of valuing on you £3,418 2 m—d. R. Warschaw & Co., which drafts we recommend to your kind protection for account of Mr. E. Werthemann. F

TH. BEHREND & Co."

This letter was received by Collmann & Co. (with the bill of lading) on Jan. 7, and they replied to it on Jan. 8 by the following letter: G

"Messrs. Th. Behrend & Co., Dantzic.

London, Jan. 8, 1853.

"Your favour of 4th inst. came to hand with b.l. 9,200 scheffels of wheat, shipped by order of Mr. E. Werthemann in Amsterdam, to this port, per *Ernte*, Captain Zielcke, with which document we shall follow the orders of said friend. H

Your draft on us against this shipment, amounting to £3,418 2 m—d. will be promptly protected on presentation for account of Mr. E. Werthemann.

COLLMANN & STOLTERFOHT."

On the same day, Jan. 8 (a Saturday), the defendants' drafts for £3,418, drawn conformably to the letters, were left by the defendants' agents, Hambro' & Son of London, at the counting-house of Collmann & Stolterfoht for acceptance, according to the usual and ordinary custom in cases where bills of exchange are left for acceptance. On the morning of Monday, Jan. 10, in accordance with the custom in such cases, a clerk of Hambro' & Son called at the counting-house of Collmann & Stolterfoht for the bills of exchange, when they were handed to him dishonoured, and without even having been accepted. On the bills of exchange being returned to Hambro' & Son, dishonoured, on Monday, Jan. 10, they demanded of Collmann & Stolterfoht the return of the bill of lading also; but it was not then, or at any time I

A afterwards, returned to them, or to the defendants. It appeared in evidence at the trial that the bill of lading was in Collmann & Stolterfoht's possession on the morning of Saturday, Jan. 8. On Jan. 10 Coventry & Sheppard had notice from Collmann & Stolterfoht that they, Collman & Stolterfoht, claimed the bill of lading. On the same Jan. 10 Collmann & Stolterfoht stopped payment; Werthemann also stopped payment. The defendants had never been paid any part of the price of the wheat.

B The question for the opinion of the court was whether the plaintiffs were entitled in this action to recover the value of the wheat, less the freight and charges paid by the defendants. If they are, then the verdict was to stand for the plaintiffs for £3,725; otherwise a nonsuit or verdict for the defendants was to be entered, as the court might direct.

C *Willes* for the plaintiffs.
Bramwell for the defendants.

Cur. adv. vult.

May 3, 1854. **LORD CAMPBELL, C.J.**, delivered the following judgment of the court.—We think that the only question in this case is whether the defendants had a right to stop in transitu the cargo of the *Ernte* on Feb. 2, when they took possession of it. We cannot doubt that, subject to the right of stopping in transitu, the property vested in the vendee when the cargo had been loaded at Dantzic and the endorsed bill of lading had been sent off by the defendants to Collmann & Stolterfoht; nor does there seem to us to be any ground for contending that the defendants afterwards continued in possession of the cargo. They had chartered the ship, that is, they had entered into a contract with the captain that he would carry the cargo in the ship from Dantzic to London; but the ship was not theirs, and he, the captain, was bailee of the cargo, and it was in the possession of the captain. There can be no lien without possession; and the claim of the defendants to lien, as unpaid vendors, is quite unsupportable. From such considerations the equitable right of an unpaid vendor to stop in transitu took its origin; this right would have been wholly unnecessary if the goods while in transitu could be considered in the possession of the vendor.

F Prima facie, the defendants had a right to stop the wheat on Feb. 2, for it was still in transitu, and they were unpaid vendors. The onus lies on the plaintiffs to prove that they had become the owners, and that the right to stop in transitu was gone. For this purpose it is not enough that they had become bona fide holders of the endorsed bill of lading for valuable consideration. A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a bona fide transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have endorsed in blank a bill of lading deliverable to his assigns, his right is not affected by the appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent bona fide transferee for value cannot make title under it against the shipper of the goods. The bill of lading only represents the goods; and in this instance the transfer of the symbol does not operate more than a transfer of what is represented.

H We are, therefore, to inquire whether this bill of lading is to be considered as having come into the possession of the plaintiffs before the stoppage in transitu with the authority of the defendants; and this depends entirely on whether Collmann & Stolterfoht had authority from the defendants to deliver it to Pries. We think it is as clear that Collmann & Stolterfoht delivered it to Pries, as that Pries delivered it to Coventry & Sheppard, and Coventry and Sheppard to the plaintiffs. But if this delivery to Pries was a misapplication of the bill of lading, the rights of the defendants will be the same as if it had remained in the hands of Pries or of Collmann & Stolterfoht until Feb. 2, in which case the stoppage in transitu would have been right.

I It is contended on the part of the defendants that Collmann & Stolterfoht had no

authority to part with the bill of lading, until they had accepted the bill of exchange drawn for the price of the wheat. If this be so, they certainly exceeded their authority, for their promise to accept, which was not treated by the agent of the defendants as an acceptance, would not have been a performance of the condition on which the right to part with the bill of lading depended. The defendants might easily have imposed a condition if they suspected the solvency of the parties with whom they were dealing. But, looking to the correspondence set out in the Special Case, and to all the circumstances of the transaction, we are of opinion that no such condition was imposed, and that as soon as Collmann & Stolterfoht received the bill of lading, they were at liberty to hand it over to Pries so as to make the result the same as if by the bill of lading Pries had been the consignee, and the defendants had remitted it to him, and he had endorsed it before handing it over to Coventry & Sheppard. There was nothing on the bill of lading itself to indicate that it is not to be transferred until the bill of exchange has been accepted. In the defendant's letter of Jan. 4 no such condition is to be found; and on the contrary, they desire Collmann & Stolterfoht to follow the instructions of Werthemann respecting the bill of lading, Werthemann being the agent of Pries, and having purchased the cargo for him. They go on to say they have drawn a bill of exchange for the price, but merely recommend it to protection, without saying anything that can be construed as a direction that this protection shall be given before the instructions of Werthemann are followed respecting the bill of lading. There seems no reason to doubt that the defendants would have been perfectly satisfied with the answer written to them on Jan. 8, in which Collmann & Stolterfoht first say that they will follow the directions they had received respecting the bill of lading, and afterwards, in a separate sentence, add that they would protect the bill of exchange on presentation.

The circumstances in the transaction, instead of raising the supposed condition by implication, are rather inconsistent with it. While the bill of lading is forwarded to Collmann & Stolterfoht the bill of exchange is sent to Hambro' & Son. The bill of exchange happened to be left for acceptance on Jan. 8; but, ab initio, being dissevered from the bill of lading, it might have been negotiated at Dantzic and circulating over the north of Europe; it might not have been presented to the drawees for a month afterwards. Would Collmann & Stolterfoht be bound to keep the bill of lading in their hands during the whole of this time? On the contrary, we think that Pries, having lodged the credit according to his undertaking was immediately entitled to have the bill of lading delivered up to him on producing an order to that effect from Werthemann; and he could not be made to run the risk of a fall in the market in the interval elapsing before the bill was presented for acceptance.

If the language of the letter of Jan. 4 were equivocal, the construction to be put on it ought rather to be against the party who placed an endorsed bill of lading in the hands of third persons, and enabled them to deal with others as if they had complete control over it. But in this case we think the language of the defendants expressly and clearly authorises the unconditional transfer of the bill of lading to the purchaser. No decision or dictum was cited in the argument which at all conflicts with the view we have taken of this case, and we conceive that it is in entire conformity with the various decisions relied on by the plaintiffs. These we abstain from commenting on, as they appear to be in harmony with each other, and we entirely approve of them.

Ever since the great case of *Lickbarrow v. Mason* (1), the law has been considered to be that the bona fide transferee for value of a bill of lading endorsed by the shipper or his consignee, and put into circulation by the authority of the shipper or consignee, has an absolute title to the goods, free from the equitable right of the unpaid vendor to stop in transitu as against the purchaser. We believe it to be of essential importance to commerce that this law should be upheld—and for these reasons we give judgment for the plaintiffs.

Judgment for plaintiffs.

A
GREEN v. LONDON GENERAL OMNIBUS CO.

[COURT OF COMMON PLEAS (Erle, C.J., Williams, Crowder and Byles, JJ.), November 11, 14, 18, 1859]

[Reported 7 C.B.N.S. 290; 29 L.J.C.P. 13; 1 L.T. 95; 6 Jur.N.S. 228; 8 W.R. 88; 141 E.R. 828]

Company—Proceedings against—Tort—Act within company's purpose—Actionable wrong if done by private person.

An action will lie against a company for an injury wrongfully committed where the act done is within the purpose for which the company was incorporated, and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual.

Notes. Considered: *Edwards v. Midland Rail. Co.* (1880), 6 Q.B.D. 287; *Allen v. Flood*, [1895–9] All E.R.Rep. 52. Referred to: *Cowley v. Sunderland Corpn.* (1861), 30 L.J.Ex. 127.

As to liability in tort of a corporation, see 9 HALSBURY'S LAWS (3rd Edn.) 87 et seq.; and for cases see 13 DIGEST (Repl.) 317 et seq.

Cases referred to:

(1) *Yarborough v. Bank of England* (1812), 16 East, 6; 104 E.R. 991; 13 Digest (Repl.) 201, 203.

(2) *Whitfield v. South Eastern Rail. Co.* (1858), E.B. & E. 115; 27 L.J.Q.B. 229; 31 L.T.O.S. 113; 4 Jur.N.S. 688; 6 W.R. 545; 120 E.R. 451; 13 Digest (Repl.) 321, 1288.

Also referred to in argument:

Sutton's Hospital Case (1612), 10 Co. Rep. 23 a; Jenk. 270; 77 E.R. 960, Ex. Ch.; 8 Digest (Repl.), 502, 2223.

Eastern Counties Rail. Co. v. Broom (1851), 6 Exch. 314; 6 Ry. & Can. Cas. 743; 20 L.J.Ex. 196; 16 L.T.O.S. 465; 15 Jur. 297; 155 E.R. 562, Ex. Ch.; 8 Digest (Repl.) 128, 821.

Hubert v. Groves (1794), 1 Esp. 147; 26 Digest (Repl.) 523, 1988.

Wilkes v. Hungerford Market Co. (1835), 2 Bing.N.C. 281; 2 Scott, 446; 1 Hodg. 281; 5 L.J.C.P. 23; 132 E.R. 110; 26 Digest (Repl.) 520, 1976.

Gregory v. Duke of Brunswick (1843), 6 Man. & G. 205.

R. v. Birmingham and Gloucester Rail. Co. (1842), 3 Q.B. 223; 3 Ry. & Can. Cas. 148; 2 Gal. & Dav. 236; 11 L.J.M.C. 134; 6 Jur. 804; 114 E.R. 492; 14 Digest (Repl.) 139, 1018.

Maud v. Monmouthshire Canal Co. (1842), 4 Man. & G. 452; Car. & M. 606; 2 Dowl.N.S. 113; 3 Ry. & Can. Cas. 159; 5 Scott, N.R. 457; 11 L.J.C.P. 317; 6 Jur. 932; 134 E.R. 186; 13 Digest (Repl.) 323, 1302.

Lawson v. Bank of London (1856), 18 C.B. 84; 25 L.J.C.P. 188; 27 L.T.O.S. 134; 2 Jur.N.S. 716; 4 W.R. 481; 139 E.R. 1296; 3 Digest (Repl.) 176, 284.

Scott v. Manchester Corpn. (1857), 2 H. & N. 204; 26 L.J.Ex. 132, 406; 29 L.T.O.S. 233; 22 J.P. 70; 3 Jur.N.S. 590; 5 W.R. 598; 157 E.R. 85, Ex. Ch.; 38 Digest (Repl.) 45, 228.

I Demurrer in an action for damages against the defendants for wrongfully and maliciously obstructing the plaintiff in his business of an omnibus proprietor.

By his declaration the plaintiff stated that, at the material time, he carried on the trade and business of a carrier of passengers for hire in certain public streets, roads and highways, between the Queen's Elms, Chelsea, in the county of Middlesex, and the White Lion Inn, in Clerkenwell, and also between the Rising Sun, Fulham, and the London Bridge railway, Southwark, by means of certain omnibuses of the plaintiff, drawn by horses, and driven and conducted by the servants of the plaintiff, for the profit and benefit of the plaintiff, and which omnibuses had full liberty and right to

run between the points above mentioned, to stop for a reasonable time at all points and places on and along the said streets, roads and highways, for the purpose of taking up and putting down passengers, and at certain points and places where numerous passengers were accustomed to enter the omnibuses passing such points and places, the plaintiff's omnibuses and all other omnibuses passing that way were, by the police regulations then lawfully enforceable, permitted to wait for four minutes, to look for passengers, etc., unless by their so doing any actual obstruction of the thoroughfare, or nuisance to the inhabitants near the places, was caused thereby. A B

That the defendants well knowing the premises, but contriving and intending to injure, impoverish and ruin the plaintiff, and to prevent him from carrying on his business, at divers times before this suit, wrongfully, vexatiously and maliciously placed and drove, on the public streets, roads and highways aforesaid, certain other omnibuses and carriages just before and just behind the plaintiff's omnibuses, while the same were plying for passengers for hire, in the public streets, and with which the plaintiff was then carrying on his business, in such a manner as to hinder and prevent, frighten and deter great numbers of passengers from entering the plaintiff's omnibuses and becoming passengers therein for hire, as they otherwise might and would have done, and so as to hinder and prevent the plaintiff from having the free use of the said highways with his omnibuses and horses in so large and ample a manner as he otherwise might and would have done, and so as to retard, delay and stop the plaintiff's omnibuses, and so as greatly to obstruct and encumber the highway, to the nuisance of the Queen's subjects then lawfully using the same. C D

Further, that the defendants wrongfully, vexatiously and maliciously drove and placed, on the public streets, roads and highways, certain other carriages and omnibuses on and against the plaintiff's omnibuses and horses and on and against the plaintiff's servants then conducting the same, while the omnibuses, with the plaintiff's horses harnessed to the same, and the plaintiff's servants conducting the same, were plying and waiting for passengers for hire in the public streets, roads and highways aforesaid, and with which the plaintiff was then carrying on his business in such a manner as thereby to bruise, damage and injure the omnibuses and horses and to prevent the doors of the omnibuses from being opened, and to obstruct and block up the access of passengers into the plaintiff's omnibuses, and to hinder and disable the plaintiff's servants from freely and fully performing their duties to the plaintiff in the conduct and management of the omnibuses and whereby they were then so hindered and disabled as aforesaid. E F

Further, that the defendants also wrongfully, vexatiously and maliciously, in the public streets, roads and highways, thrust and pushed themselves, and caused their servants to, and they did, thrust and push and place themselves between the plaintiff's omnibuses while plying and waiting for passengers, in the way of the plaintiff's business and divers persons who were desirous to enter the same as passengers for hire, so as to obstruct the entrance and access of such passengers into the plaintiff's omnibuses, and to hinder, deter and prevent them from entering the same or becoming passengers therein or thereby. G H

Further, in continuation of this count, the plaintiff said that the defendants wrongfully, vexatiously and maliciously caused and directed their servants to, and their servants did, insult, hiss, assault, beat and ill-treat the plaintiff's servants in the public streets, roads and highways, while they were employed in driving, managing and conducting the omnibuses in the way of the plaintiff's business, and were plying and waiting for passengers in the public streets, roads and highways; and, further, that the defendants, well knowing the points and places on the respective roads at which the plaintiff's omnibuses, by the police regulation above mentioned, were permitted to remain for four minutes, wrongfully, vexatiously and maliciously, and for the express purpose of annoying the plaintiff, and causing such an obstruction of the thoroughfares at the points and places aforesaid, as would induce and oblige the police there stationed to order the plaintiff's omnibuses from the points and places for the said space of time which by the police regulations I

A they were permitted to remain, and thereby prevent passengers who, if the plaintiff's omnibuses had so remained, would have come and entered the plaintiff's omnibuses, from so doing, and caused one or more of their (defendants') omnibuses, drawn by their horses and driven and conducted by their drivers and conductors, to precede and follow each omnibus of the plaintiff, as such omnibus approached near to and arrived at each and all of the points and places as aforesaid, in such a manner as to cause such an obstruction to the thoroughfares at such points and places as would induce and oblige, and which did induce and oblige, the police there stationed to order that the plaintiff's omnibuses should move off from the said points and places as aforesaid, before they had remained there for the space of time which, but for the defendants' wrongful continuance and conduct, they otherwise might and would have done. Thereby the defendants prevented numerous passengers from entering and riding on the plaintiff's omnibuses for hire, as they otherwise might and would have done, by reason of which several grievances in this count respectively mentioned, great numbers of persons were hindered, deterred and prevented from becoming passengers for hire by the plaintiff's omnibuses, as they otherwise might and would have done; and the plaintiff's omnibuses and horses were greatly broken, injured, wasted and destroyed, and the plaintiff was greatly damaged, prejudiced, hindered and obstructed in carrying on his business in the public streets, roads and highways, and the receipts, gains and profits of the plaintiff in and by the business were much reduced and diminished, and the plaintiff was otherwise injured and damaged; and the plaintiff claimed £2,000. The defendants denied liability, and further said that the declaration was bad in substance. One of the matters of law intended to be argued was that the defendants were a corporation, and that the declaration disclosed no cause of action maintainable against a corporation; that a corporation could not be guilty of the malicious intention alleged in the declaration. As to the defendants' demurrer, the plaintiff contended that the declaration disclosed a good cause of action, for which the defendants were liable.

F *F. Edwards* for the plaintiff.
Giffard for the defendants.
Grant as amicus curiæ.

Cur. adv. vult.

Nov. 18, 1859. **ERLE, C.J.**, delivered the following judgment of the court.—
 G In this case we are of opinion that the judgment ought to be for the plaintiff.

This was an action brought against the defendants for interfering with the rights of the plaintiff, by driving their omnibuses in such a manner as to molest him in the use of the highway. The declaration sets out various grievances that fall under that general description. There is a demurrer to that declaration, and on that demurrer we are called on to give our opinion whether the action lies. The ground of the demurrer relied on by the defendants is that the charge is a charge of a wilful intentional wrong, and that a corporation cannot be guilty of a wilful, wrongful intention and, therefore, that the action does not lie. I should, however, state that the whole of the acts that are charged against the defendants are acts connected with the driving of their vehicles, and the object of this incorporation was for the purpose of driving omnibuses. It is the "London General Omnibus Co." incorporated for that purpose and, therefore, the actual things done by the defendants are acts within the purpose of their incorporation, and unless they had been wrongfully done, of course there could be no ground of complaint, but, they being wrongfully done, we think clearly the action lies, and that there is an abundance of authorities to show that under those circumstances the action would lie.

I take the whole tenor of authorities from *Yarborough v. Bank of England* (1) down to an action of defamation, viz., *Whitfield v. South Eastern Rail. Co.* (2)—in reality against the Electric Telegraph Co., for a wrong in the way of taking away character. I take the whole tenor of those authorities to show that an action

for a wrong does lie against the corporation where the act of the corporation—the thing done—is within the purpose of the incorporation, and that it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. A

The doctrine that was relied on by counsel for the defendants is rather more of a quaint than a substantial form, that, because a corporation has no soul, therefore it is incapable of intentional malice. The reason has been assigned; and we do not in the smallest degree interfere with the tenor of the decisions that have been uniformly established, but are only a little within the limits of the long tenor of authorities beginning with *Yarborough v. Bank of England* (1), that being by no means the first. It is a well-considered and elaborate judgment, going over all the authorities, and from *Yarborough v. Bank of England* (1), down to *Whitfield v. South-Eastern Rail. Co.* (2), there have been numerous authorities on the principle on which we rely. I add, in confirmation of that, that we dwell the less on the ground that counsel for the defendants so clearly pressed on us, from the inconvenience to the public that would arise if these companies incorporated for the purpose of trade, being in reality a partnership for the purpose of carrying on that trade, had a restricted limitation put on their liability by reason of incorporation; and extreme difficulty, it seems to me, would follow, if we were to hold they were exempted from being responsible because they intentionally wrong persons who were their fellow-subjects. We think it extremely important, if they do admit that they have in fact intentionally committed a wrong, that the public should have a remedy against them, and not have a remedy against their servants and others who they have employed, many of whom may be entirely incapable of giving the recompense that the law awards. We are, therefore, of opinion that the judgment of the court should be for the plaintiff. B C D E

Judgment for plaintiff.

HATCH v. HALE AND OTHERS

[COURT OF QUEEN'S BENCH (Lord Campbell, C.J., Patteson, Wightman and Erle, JJ.), April 17, 1850]

[Reported 15 Q.B. 10; 19 L.J.Q.B. 289; 15 L.T.O.S. 65;
14 Jur. 459; 117 E.R. 361]

Distress—For rent—Warrant to distrain for arrears of rent—Tender to bailiff—Authority of bailiff to receive rent.

A bailiff holding a warrant to distrain for arrears of rent has implied authority to receive rent and costs when tendered, notwithstanding that he has been expressly directed by the landlord not to receive them. H

Notes. As to how the right to distrain may be lost, see 12 HALSBURY'S LAWS (3rd Edn.) 118 et seq.; as to levying distress, see *ibid.*, pp. 126 et seq; and for cases see 18 DIGEST (Repl.) 312 et seq. I

Case referred to:

- (1) *Smith v. Goodwin* (1833), 4 B. & Ad. 413; 2 Nev. & M.K.B. 114; 2 L.J.K.B. 192; 110 E.R. 511; 18 Digest (Repl.) 347, 951.

Also referred to in argument:

- (2) *Pilkington's Case* (1601), 5 Co. Rep. 76a; 77 E.R. 169; sub nom. *Pilkington v. Hastings*, Cro. Eliz. 813; 18 Digest (Repl.) 443, 1872.

- A (3) *Browne v. Powell* (1827), 4 Bing. 230; 12 Moore, C.P. 454; 5 L.J.O.S.C.P. 159; 130 E.R. 757; 18 Digest (Repl.) 444, 1875.
- (4) *Ladd v. Thomas* (1840), 12 Ad. & El. 117; 4 Per. & Dav. 9; 9 L.J.Q.B. 345; 4 Jur. 797; 113 E.R. 755; 18 Digest (Repl.) 315, 604.
- (5) *Muffatt (Moffat) v. Parsons* (1814), 1 Marsh. 55; 5 Taunt. 307; 128 E.R. 707; 1 Digest (Repl.) 377, 439.
- B (6) *Bingham v. Allport* (1833), 1 Nev. & M.K.B. 398; 2 L.J.Q.B. 86; 1 Digest (Repl.) 377, 440.

Application by the defendant for a rule nisi for a new trial, in an action of trover for goods and chattels in which the defendant pleaded that the plaintiff was tenant of the defendant Hale; that £5, half a year's rent, was in arrear; and that Hale in his own right, and Collins and Tickler, the other defendants, as his bailiffs, took the goods as a distress for rent due. Replication.—That after the taking and before the impounding of the distress the plaintiff made a tender of £5 3s. (the rent and costs of the distress) to the defendant, Collins, who was duly authorised to receive the same. Rejoinder.—That Collins was not duly authorised to receive the money. Issue thereon.

- D At the trial before ERLE, J., at Hampshire Assizes, it appeared that in November, 1849, £5, half a year's rent, was due from the plaintiff to the defendant Hale, and that Hale, through the medium of his attorney, employed Collins to distrain. The words of the warrant were, to distrain "for the arrears of rent, and to proceed for the recovery thereof as the law directs." The warrant was placed in the hands of Collins by Hale's attorney, who desired him on no account to receive the money if tendered, but to refer the plaintiff, or whoever tendered it, to Hatch or the attorney. After the distress was taken, but before it was impounded, the plaintiff tendered to Collins £5 3s. (the arrears of rent and the cost of the distress), which Collins declined to accept, referring him to Hatch or the attorney, neither of whom were present at the distress being taken. The judge directed the jury that the warrant given by Hale to Collins was an express authority to him to receive the rent as well as to distrain. The jury found a verdict for the plaintiff, and awarded £11 18s. damages.
- E if tendered, but to refer the plaintiff, or whoever tendered it, to Hatch or the attorney. After the distress was taken, but before it was impounded, the plaintiff tendered to Collins £5 3s. (the arrears of rent and the cost of the distress), which Collins declined to accept, referring him to Hatch or the attorney, neither of whom were present at the distress being taken. The judge directed the jury that the warrant given by Hale to Collins was an express authority to him to receive the rent as well as to distrain. The jury found a verdict for the plaintiff, and awarded £11 18s. damages.
- F £11 18s. damages.

Serjeant Kinglake now moved for a new trial on the ground of misdirection. A mere warrant to distrain is not of itself an authority to receive money, although under certain circumstances it may be evidence of it. (*Pilkington's Case* (2)). [ERLE, J.—That was a distress for damage feasant, where the bailiff might not know the amount of damage done.] A landlord may limit the authority of the bailiff to whom he delegates his powers. (*Browne v. Powell* (3); *Smith v. Goodwin* (1); *Ladd v. Thomas* (4)). Here the evidence was distinct that the authority was limited. *Moffat v. Parsons* (5), which was cited at the trial, cannot be supported, because any principal may disauthorise his general agent for some particular purpose. (*Bingham v. Allport* (6)).

- H **LORD CAMPBELL, C.J.**—I think there should be no rule. My own opinion is that the law which authorises a landlord to appoint a bailiff does not allow of the exercise of that power unless where the bailiff impliedly has authority to receive the rent if tendered. Such is a very reasonable state of the law with reference to the extraordinary powers and remedies which a landlord possesses, and there has been no authority cited which calls that state of the law in question. In this case, besides the general authority of the bailiff, there is the special authority "to proceed for the recovery of the rent as the law directs," so that the bailiff was clearly bound to accept a tender on the premises.
- I

PATTESON, J.—In *Smith v. Goodwin* (1), the contention was strong that the tender of rent under such circumstances must be to the broker by reason of the tender being insufficient, unless it included the broker's charges. We thought a tender to the landlord was also good, but it was never argued or suggested that the

tender might not be to the broker. If a landlord takes the law into his own hands, and sends a bailiff to distrain, he necessarily gives him authority to receive the rent if tendered. A

WIGHTMAN, J.—The person whom the landlord employs as bailiff is virtute officii the person to receive the rent if tendered. The inconvenience of any other state of law would be so monstrous that it need hardly be pointed out. The old and wholesome rule, that a tender before distress taken makes the taking tortious, and after the taking, but before impounding, makes the detainer wrongful, might be evaded by the landlord forbidding the broker to accept the rent when tendered. B

ERLE, J., concurred.

Rule refused. C

TANCRED AND ANOTHER v. LEYLAND

[COURT OF EXCHEQUER CHAMBER (Parke, B., Maule and Cresswell, JJ., Platt, B., and Talfourd, J.), November 27, 1850, February 1, 1851]

[Reported 16 Q.B. 669; 20 L.J.Q.B. 316; 17 L.T.O.S. 53;
15 J.P. 815; 15 Jur. 394; 117 E.R. 1036]

Distress—For rent—Claim made for more rent than due—Legality of distress.

The defendant distrained the plaintiff's goods for arrears of rent which he claimed to be due. Only part of the amount alleged to be due was, in fact, due. In an action for wrongful distress,

Held: as some rent was due and an unreasonable quantity of goods had not been taken, the distress was not illegal and the action failed. F

Distress—For rent—Duty of landlord to inform tenant amount of rent for which distress made.

Per Curiam: There was no duty cast on a landlord at common law to inform the tenant what was the amount of rent for which a distress was made. G

Taylor v. Henniker (1) (1840), 12 Ad. & El. 48 overruled.

Notes. Approved: *Stevenson v. Newnham* (1853), 13 C.B. 285. Followed: *French v. Phillips* (1856), 1 H. & N. 564. Considered and Approved: *Glyn v. Thomas* (1856), 11 Exch. 870. Distinguished: *Fell v. Whittaker* (1871), L.R. 7 Q.B. 120. Followed: *Thwaites v. Wilding* (1883), 52 L.J.Q.B. 734. Referred to: *French v. Siggers* (1854), 3 E. & B. 929. H

As to what should be stated in a distress notice, see 12 HALSBURY'S LAWS (3rd Edn.) 132, 133, and as to excessive distress *ibid.*, 160; and for cases see 18 DIGEST (Repl.) 328, 381, 382.

Cases referred to:

- (1) *Taylor v. Henniker* (1840), 12 Ad. & El., 484; 4 Per. & Dav. 242; 9 L.J.Q.B. 383; 4 Jur. 719; 113 E.R. 897; 18 Digest (Repl.) 382, 1330. I
- (2) *Avenell v. Croker* (1828), Mood. & M. 172, N.P.; 18 Digest (Repl.) 360, 1106.
- (3) *Crowder v. Self* (1839), 2 Mood. & R. 190, N.P.; 18 Digest (Repl.) 382, 1329.

Also referred to in argument:

Wilkinson v. Terry (1834), 1 Mood. & R. 377, N.P.; 18 Digest (Repl.) 382, 1328.
Six Carpenters' Case (1610), 8 Co. Rep. 146 a; 77 E.R. 695; 18 Digest (Repl.) 314, 591.

- A** *Lyne v. Moody* (1729), Fitz.-G. 85; 94 E.R. 665; sub nom. *Lynne v. Moody*, 2 Stra. 851; sub nom. *Lisne v. Moody*, 1 Barn.K.B. 184; 18 Digest (Repl.) 381, 1315.
- Crowther v. Ramsbottom* (1798), 7 Term Rep. 654; 101 E.R. 1182; 18 Digest (Repl.) 327, 733.
- B** *Etherton v. Popplewell* (1800), 1 East, 139; 102 E.R. 55; 18 Digest (Repl.) 330, 758.
- Grenville v. College of Physicians* (1700), 12 Mod. Rep. 386; 88 E.R. 1398; sub nom. *Groenvelt v. Burwell*, 1 Com. 76; 1 Ld. Raym. 454; 43 Digest, 458, 837.
- Carter v. Carter* (1829), 5 Bing. 406; 2 Moo. & P. 732; 7 L.J.O.S.C.P. 141; 130 E.R. 1118; 18 Digest (Repl.) 309, 535.
- C** *Hunt v. Round* (1834), 2 Dowl. 558; 18 Digest (Repl.) 368, 1192.
- Rogers v. Birkmere* (1736), Lee temp. Hard. 245; 2 Stra. 1040; 95 E.R. 157; 18 Digest (Repl.) 305, 509.
- Bristol Poor Governors v. Wait* (1834), 1 Ad. & El. 264; 6 C. & P. 591; 3 Nev. & M.K.B. 359; 2 Nev. & M.M.C. 254; 3 L.J.M.C. 71; 110 E.R. 1207; 18 Digest (Repl.) 396, 1455.
- D** *Smith v. Goodwin* (1833), 4 B. & Ad. 413; 2 Nev. & M.K.B. 114; 2 L.J.K.B. 192; 110 E.R. 511; 18 Digest (Repl.) 347, 951.
- Tebbutt v. Selby* (1837), 6 Ad. & El. 786.

Appeal by the defendants from a decision of the Court of Queen's Bench (LORD CAMPBELL, C.J., PATTESON, WIGHTMAN and ERLE, JJ.), reported 16 Q.B. 664, in an action for wrongful distress.

- E** The declaration contained two counts. The first count of the declaration was in case, and alleged that whereas the plaintiff, before and at the time of the committing of the several grievances thereafter next mentioned, held a certain messuage and premises, with the appurtenances, as tenant thereof to the defendant, Charles Tancred, at a rent payable by the plaintiff to the defendant Charles Tancred.
- F** The defendants, Tancred and Armitage had contrived to injure the plaintiff and had wrongfully and injuriously seized and taken in and upon the said messuage and premises divers goods and chattels of the plaintiff of the value of £80 as a distress for certain arrears of rent, amounting to £45, then claimed and pretended by the defendants to be due and in arrear to the defendant, Charles Tancred, for the said messuage and premises. The defendants under that pretence wrongfully sold
- G** the goods and chattels as distress for the alleged arrears of rent, and the costs and charges of the said distress and of the appraisement and sale of the said goods and chattels. Whereas in fact at the time of the making the said distress, and during all the time aforesaid, a small part only, namely, £17 10s. of the said alleged arrears of rent so distrained was in arrear to the defendant, Charles Tancred, in respect of the said messuage and premises. The second count was in trover. To the first
- H** count the defendants pleaded payment into court of 1s. and no damages ultra.

At the trial before ROLFE, B., at the York Assizes, 1850, the jury found for the plaintiff upon that issue, with £40 damages; and the judgment was that the plaintiff should recover the sum of £40 and £71 for his costs. Upon that judgment error was brought, and the following points for argument were stated: that the first count of the declaration disclosed no cause of action, for that no legal injury or damage was shown to have been sustained by the plaintiff below. The only cause of action alleged being that at the time of the making the distress the defendants said, or, in the terms of the declaration, pretended that more rent was due than was in fact due. It would be contended, therefore, that as the declaration admitted that a tenancy existed, and that at the time of the seizure and sale of the goods therein mentioned to have been distrained some rent was due, and that as it nowhere appeared that the said seizure was excessive as a distress, or that the goods so seized were sold for more than the amount admitted to be due, such distress,

seizure, and sale were lawful acts. The declaration did not state that the act complained of, if, indeed, any act is complained of, was wilfully or maliciously done.

Peacock (Udall with him) for the defendants.

Cowling for the plaintiff.

Cur. adv. vult.

Feb. 1, 1851. **PARKE, B.**, delivered the following judgment of the court. On the argument before us, it was contended that the first count in the declaration was bad, inasmuch as it disclosed no cause of action, as no legal injury was shown to have been committed by the plaintiff. The first count alleges as the cause of action: first, that the defendant took certain goods as a distress for certain arrears of rent then claimed and pretended by the defendant to be due to him, whereas part only of the rent was due; and, secondly, that they wrongfully sold the said goods as such distress for the alleged arrears of rent and costs. As some rent is admitted to have been due at the time of the distress, the distress itself was not a wrong to the plaintiff below. There is no allegation that an unreasonable quantity of goods were taken, such as to constitute an excessive distress; and the only question is whether the fact of the making of the distress for rent, some rent being due, is rendered illegal by being accompanied by a claim or pretence by the defendant that more was due than really was due, or by being followed by a sale of the goods distrained for, for these pretended arrears, in the manner described in the latter part of the first count.

It cannot be disputed that an untrue claim or pretence may give a cause of action, as all false and untrue statements may, if all the circumstances should concur in respect to it which are necessary to make a false representation actionable, and, amongst others, if it had been followed by any special damage; as if, for instance, the tenant had been prevented thereby from obtaining sureties to join in a replevin bond, some friends being ready to join in the bond to secure the true amount, who would not join in one to secure the amount claimed; nor can it be disputed, if a larger quantity of goods be taken than was sufficient to raise the amount of the rent in arrear and the legal costs, and had been subsequently sold, such excessive sale would have been illegal and actionable. But it is contended for the defendant that, putting the construction the most favourable to the plaintiff that can be put on the allegation in the first count as to the sale, it has really no such import.

We agree that every intendment is to be made for the plaintiff, and that the declaration is to be construed to contain a sufficient cause of action, after pleading over, if it be reasonably capable of such a construction; but we think this allegation cannot be reasonably so understood. The argument is simply that the goods distrained were sold for the said arrears and costs, that is, for the purpose of satisfying the said arrears and costs, not for a sum equal to the said arrears and costs, or as and for arrears due. There is no express or implied averment that more goods were sold than were necessary to raise the amount of the arrears actually due and costs, and all that need have been proved if that allegation had been traversed, was that he sold the goods seized for the purpose of paying the arrears, and consequently by the plea nothing more is admitted.

That being so, the only question is whether the simple fact of making the distress accompanied by an untrue claim or pretence that more was due than really was due, is actionable? It is said it is so at common law, and the argument, therefore, is founded on the supposition that the common law casts the duty on a landlord distraining to inform the tenant what is the arrear of rent for which he distrains. We think that the common law casts no such obligation on the distrainer. It has been expressly laid down:

"If the lord distrains for rent or services, he has no occasion to give notice to the tenant for what he distrains, for the tenant by intendment knows what things are in arrear for his land."

A That is cited from ROLLE'S ABRIDGEMENT, title "Distress" (S), 674, and the authority for this is the YEAR BOOK, 45 Edw. 3, 9, where the Chief Justice of the Common Pleas (FYNCHEDE, C.J.), in answer to an argument that the lord, on taking a distress, ought to give notice to the tenant what the cause of taking is, says:

B "It is not so, for the tenant is always held by common intendment to know what things are in arrear for his land, as rent and service";

and this is adopted by GILBERT, C.B., in his treatise on DISTRESSES (Edn., 1757), p. 48.

The defendant, however, relied on the decision on a similar question by the Court of Queen's Bench in *Taylor v. Henniker* (1), in which it was laid down that a distress under a pretence that more was due than really was due was unlawful in its inception, the sale being only a matter of aggravation. We do not think that case was well decided. We do not see on what legal principle it can be supported. No authority was cited in favour of the decision, and those above referred to in ROLLE'S ABRIDGEMENT and the YEAR BOOK were not brought before the court. Some nisi prius authorities which were cited were in favour of the defendant; that of LORD TENTERDEN in *Avenell v. Croker* (2), in particular; but that of LORD ABINGER, in *Crowder v. Self* (3) was not cited. We are not satisfied with the decision of the Queen's Bench, and, therefore, think it should be overruled. The judgment, therefore, in the present case must be reversed.

Appeal allowed.

E

F

GROSVENOR v. SHERRATT AND ANOTHER

[ROLLS COURT (Sir John Romilly, M.R.), July 18, 19, 23, 1860]

[Reported 28 Beav. 659; 3 L.T. 76; 6 Jur.N.S. 1228; 8 W.R. 682;
54 E.R. 520]

G

Undue influence—Landlord and tenant—Lease—Lease granted by young woman on advice of father's executor—Fiduciary relationship—Lessees including son of executor—No independent legal advice.

H

A lease granted on the advice of a person standing in a fiduciary relationship to the lessees one of whom is the son of that person, the lessees having knowledge of the advice, should be set aside unless it be shown that the transaction was entirely proper. Where, therefore, a young woman who had just attained her majority, without professional advice and on the persuasion of a friend of her late father, who was the acting trustee under his will, and in whom she placed great confidence, granted a lease of mineral lands part of which were in possession and the other part in reversion, and the lessees afterwards took the adviser into partnership to work the mines, and the terms of the lease were disadvantageous to the lessor, the court set the lease aside and ordered the defendants to pay the costs of the suit.

I

Notes. As to capacity to grant and accept tenancies, see 23 HALSBURY'S LAWS (3rd Edn.) 414 et seq.; and for cases see 30 DIGEST (Repl.) 503 et seq.

Case referred to in argument:

Duke of Leeds v. Earl of Amherst (1846), 2 Ph. 117; 16 L.J.Ch. 5; 10 Jur. 956; 41 E.R. 886, L.C.; 21 Digest (Repl.) 451, 1539.

Bill praying that the lease of certain mineral lands granted by the plaintiff to the A
defendants be set aside.

Elizabeth Grosvenor, the plaintiff, on the death of her father, became entitled
in possession to a certain estate at Newchapel, in Staffordshire, and also became
entitled for an estate of fee-simple in reversion, immediately expectant on the death
of her mother, to a certain other estate in the same county. After her father's B
death, and until the plaintiff attained her age of twenty-one years, which took place
on April 30, 1856, the defendant, Henry Sherratt, as the acting trustee and executor
of her father's will, managed the whole of the property and acted as her guardian
in respect thereof. He also continued after she obtained her majority to advise
her in all matters of business, and in particular with regard to the granting of the
lease in question. Relying on his representations, and believing his statements
as to the value of the mineral land to be correct, the plaintiff reluctantly consented C
to grant a lease of the mines to the defendant, Thomas Sherratt, who was the son
of Henry Sherratt, and who married one of the plaintiff's sisters, and the defendant
John Batteley (who was an uncle of the plaintiff).

On Mar. 15, 1857, the defendant Henry Sherratt informed the plaintiff that the
draft lease was prepared, but the plaintiff alleged that she did not understand and
did not read it. The engrossment of the lease was executed by her on the follow- D
ing day. This lease, dated Mar. 18, 1857, was a demise by the plaintiff Elizabeth
Grosvenor (then Elizabeth Wilshaw) to the defendants Thomas Sherratt and John
Batteley, their executors, administrators and assigns, of the mines and minerals
lying under that part of the property to which the grantor was entitled in posses-
sion, for the term of twenty-five years, and of the mines and minerals under that
part of the property to which the grantor was entitled in reversion, for the term E
of twenty-one years from the death of her mother, the tenant for life, the lessees
paying for every ton of coal or cannel (allowing 120 lbs. to every cwt., and 22 cwt.
to every ton) the sum of 8d., and for the other minerals raised the respective rates
in the said lease mentioned; the minimum rent to be £200 per annum. The lease
also contained a clause, giving the lessees power to determine the term of twenty-
five years : F

“Provided always, and it is hereby agreed and declared between and by the
said parties to these presents, that if the said lessees, their executors, adminis-
trators, or assigns, shall be desirous of determining the said term of twenty-five
years hereby granted at the end of the second year, or of any subsequent year
thereof, and of such their desire shall give to the said lessor, her heirs, or
assigns, or her or their agent or steward, not less than twelve calendar months' G
notice in writing previous to the end of such second or subsequent year thereof,
and if the said lessees, their executors, administrators, or assigns, shall, at or
before the expiration of such second or subsequent year, as the case may be,
pay and discharge the several rents hereinbefore reserved, and which shall have
become payable, and perform and fulfil the several covenants, conditions and
agreements hereinbefore on their parts contained up to that time, then and in H
such case at the end of such second or subsequent year as the case may be,
the said term hereby granted shall cease and determine.”

A few weeks after the lease was granted the defendant, Henry Sherratt, entered
into a partnership with the defendants Thomas Sherratt and John Batteley for
working the mines, and they had continued in partnership ever since. On Oct. 21, I
1858, the plaintiff married her present husband. The bill which was filed on
Mar. 23, 1859, alleged that the plaintiff had no separate solicitor or legal adviser
on the occasion of the preparation or execution of the lease; that the lease contained
many improper and unusual clauses to the disadvantage of the lessor, which ought
not to have been inserted therein, and that many proper clauses were omitted, and
that the lease was granted at an undervalue, inasmuch as much larger royalties and
rents could have been obtained from other persons. The bill prayed that the lease
might be set aside, and delivered up to be cancelled; that the defendants might be

A decreed to deliver up possession of the mines to the plaintiff; and for an account of the rents and profits made by the defendants in working the said mines. The defendants by their answer denied liability.

It appeared from the evidence in support of the plaintiff's case, that before the granting of the lease in question, the defendant Henry Sherratt personally, and through his son the defendant Thomas Sherratt, received two offers from the owners or managers of adjacent mines to take the mines at Newchapel and work them on very liberal terms. Mr. Andrew, one of such mineowners, stated in his affidavit that in answer to his offer Henry Sherratt replied that the plaintiff was under age, and that the mines could not be let until her majority, when his (Andrew's) firm would be allowed an opportunity of treating for them with other persons, but that no communication had been made by the defendant to him when the plaintiff attained her majority, and that no opportunity had ever been given his firm of treating for such mines, which they were very desirous of taking, and for which they could have afforded to give a liberal mine rent, and would have been willing to have paid a minimum rent of £400 per year, rather than have missed them. Mr. Andrew also stated that if the mines had been advertised to be let by tender or competition, as was usual in such cases, a higher mineral and minimum rent would readily have been obtained, and the mines would have been let on much more advantageous terms in favour of the lessor than those contained in the defendants' lease; that the proviso contained in the lease authorising the defendants to abandon the mines on giving twelve months' notice, was very unusual and unfair towards the lessor, inasmuch as it enabled the lessees to get all the top mines, and such as might be dry and worked with little expense, and leave the deeper mines which could not be worked without a much greater outlay.

Other mining agents also stated that they had applied for information respecting the mines, and had been willing to give higher rents than those reserved by the lease; that it was most unusual to allow twenty-two cwts. to the ton; that the provision for cesser of the twenty-five years' lease was most unfair and unusual, and that mining leases invariably contained a proviso against assigning or underletting, except with the consent of the lessor, but that no such proviso was contained in the lease in question. In answer to one of these applications for information the defendant T. Sherratt, on Aug. 9, 1854, wrote as follows :

"As to the mines under the Bent and Mrs. Litchfield's holding, the property is so secured as to prevent any party interfering for many years to come. In fact they cannot be let."

R. Palmer, Q.C., and Jessel for the plaintiff.
Lloyd, Q.C., and Southgate for the defendants.

SIR JOHN ROMILLY, M.R.—I entertain no doubt, after reading the evidence in this case, as to the decree I ought to make. The plaintiff, a young lady of twenty-two, was entitled in fee-simple to certain property in possession, and to certain other property in fee-simple in reversion. She was persuaded by Henry Sherratt, a friend of her father's, and one of the executors of his will (in whom she placed the greatest confidence) to grant a lease to Thomas Sherratt (the son of Henry Sherratt) and John Batteley her uncle, of certain minerals for two terms of twenty-five years and twenty-one years respectively. The evidence shows that she knew nothing about the mines, that she consulted nobody, that she placed implicit reliance in Henry Sherratt, and that a month after she became dissatisfied and complained of the terms on which the lease was granted; that she, again relying on Henry Sherratt, took no steps to set aside the lease; that Henry Sherratt got Wood, a friend of his, to look at the lease and say that the clauses were fair, and that she was, consequently, persuaded to let the matter rest. It is clear that these lessees might have obtained any terms which they thought fit, but I am bound to say that they intended to act fairly by her, and that they took the leases on what they believed to be fair and reasonable terms as between herself and her executors.

This, however, was not sufficient; she was entitled to the utmost that any person A would give for the lease.

The defendants brought forward a great number of witnesses to show that the terms of the lease were fair, and that it contained only the usual covenants; but this amounts to nothing, for the plaintiff produces two persons who said that they would have given more. What makes the matter worse is, that before the lease was granted to these lessees, offers of better terms had been made to the defendants and had been repelled by them, without their informing the plaintiff that such offers had been made. That the lease was taken merely as a profitable speculation on the part of the defendants is shown by this circumstance that the lessees were not miners, and were not cognisant of the business of mining, and that in less than six months after the granting of the lease they took into partnership with them, for the purpose of working this mine, the very gentleman who, by reason of the unbounded confidence placed in him by the plaintiff, had obtained the grant of the lease for the defendants. There really appears to be no ground of defence to this bill. It is clear that the lease, so far as it applies to the property in reversion, cannot stand, if the plaintiff declines to be bound by it, any more than a sale could stand, for a lease is a sale pro tanto. B C

One defence made for the defendants was, that the plaintiff confirmed the lease by the transaction with Wood. But Wood's share in the transaction only makes the matter worse. The plaintiff was dissatisfied with the terms of the lease; and thereupon the defendants obtained Wood, a friend of theirs, to say, what no doubt he believed to be true, that in his opinion the terms of the lease were reasonable. But this was a very different matter from saying that no one would give more, and which was well known not to be the fact. If the plaintiff had stood by till the mines had turned out to be profitable, and had then come forward to endeavour to set the lease aside, the position of the defendants might have been very different. But this was not so; she was dissatisfied throughout, and within two years after the lease was granted the present bill was filed. As usually happens in such cases, the bill was filed a few months after marriage, when the plaintiff had become independent of those who had formerly controlled her. The bill was filed before the reversionary part of the property comprised in the lease had been worked at all, and before the other portion had been worked profitably. D E F

Persons who act like the defendants put themselves in a position which, in a court of equity, makes it almost impossible for them to succeed. In such cases the onus lies on them to prove that the grantor acted with full knowledge of all that could be known on the subject; that she had separate and independent advice, and that she deliberately and with full knowledge made the grant. Here the plaintiff knew nothing about it. She did not know that other offers had been made, or what terms adjoining lessees were willing to give for the mines; she was also ignorant of the effect of the lease on her reversionary interest, and of its rendering her incapable to come to any terms for working the mines during her mother's lifetime. In fact she knew nothing, except that she placed implicit confidence in Henry Sherratt, who obtained, without any intention to defraud her, this lease to be granted. The lease, therefore, must be set aside, and delivered up to be cancelled. The defendants must account for any profits made by working the mines, and the plaintiff must give credit for the rent paid by the defendants, who must be allowed for permanent improvements. They must be allowed to remove all the moveable stock on the premises, or be paid for it at a valuation. The defendants must also pay the costs of the suit. G H I

Judgment for plaintiff.

Re THOMSON

[ROLLS COURT (Sir John Romilly, M.R.), May 23, 24, 30, 1855]

[Reported 20 Beav. 545; 24 L.J.Ch. 599; 25 L.T.O.S. 138;
1 Jur.N.S. 718; 3 W.R. 474; 52 E.R. 714]

Solicitor—Termination of employment—Client's right to documents—Letters to solicitor from client—Copies of letters written by solicitor on client's behalf.

On the termination of the employment of an attorney his client claimed delivery of all original letters addressed to him as her attorney and relating exclusively to her business, and also all copies of letters written by him on her behalf.

Held: the client was entitled to an order for delivery of all the original letters, but not of the copies, which were made by the attorney for his own protection at his own expense; she was, however, at liberty to have copies delivered to her at her expense.

Notes. As to the liability of solicitors to deliver up client's papers, see 36 HALSBURY'S LAWS (3rd Edn.) 206; and for cases see 43 DIGEST (Repl.) 357.

Cases referred to in argument:

- (1) *Pope v. Curl* (1741), 2 Atk. 342; 26 E.R. 608, L.C.; 13 Digest (Repl.) 99, 410.
- (2) *Gee v. Pritchard* (1818), 2 Swan. 402; 36 E.R. 670; 13 Digest (Repl.) 100, 421.

Petition to obtain the delivery to the petitioner, by Benjamin James Thomson, her late attorney, of all original letters addressed to the said B. J. Thomson as such attorney of the petitioner, relating exclusively to the business of the petitioner, and now in the custody or power of Thomson; and also all copies of letters written by Thomson, as such solicitor, on the business of the petitioner, now in the custody or power of Thomson.

The petitioner, Mrs. Lowe, had discharged Thomson from being her attorney, and had paid him his bill of costs, but he had refused to deliver up to the petitioner, with the other papers in his possession belonging to her, the original letters received by him, and the copies of letters sent by him, relating to her business, as being contrary to the practice of the profession, but he offered to make copies of them at the expense of the petitioner, which she declined. The copies of the letters written by Thomson had been made in a general letter-book, which contained copies of letters relating to the business of other clients.

Waller for the petitioner.

G. Osborne Morgan, for Thomson, contended that the original letters received by the attorney were his private property: *Pope v. Curl* (1); *Gee v. Pritchard* (2). [SIR JOHN ROMILLY, M.R.—The letters were received by the attorney as the agent of the client.] The letters and copies of letters were retained by the attorney for his protection, as evidence that he had discharged his duty. The copies of letters were made by the attorney for his own convenience. He was not bound to make them, and the client was not charged for them; they were mixed up with the copies of letters referring to other matters. The practice of the profession was not to deliver them up.

Waller, in reply, submitted that the copies made of letters written by the attorney were included, by inference, in the charge made for writing the letters. How could the business of the client be properly conducted by the attorney without copies of the letters written by him?

SIR JOHN ROMILLY, M.R., said he would consider the question, but his present impression was, clearly, that the original letters were the property of the client, and must be delivered up; but he thought that the copies made of the letters written by the attorney were so made for his own security and benefit; that

he was not bound to make such copies; and that the copies were not charged to the client; and, therefore, that the attorney was entitled to retain them. A

Cur. adv. vult.

May 30, 1855. **SIR JOHN ROMILLY, M.R.**, said his opinion remained unchanged as to both points; and he made an order for the delivery of all original letters written by third parties to the attorney relating exclusively to the business of the petitioner; and that any copies of such letters required by Thomson were made by him at his own expense; and he refused to order the delivery of the copies made of letters written by Thomson, relating to her business, but gave her liberty to have copies delivered to her at her own expense. He made no order as to costs. B

Order accordingly. C

HOLDER v. SOULBY

[COURT OF COMMON PLEAS (Erle, C.J., Byles and Keating, JJ.), April 30, 1860]

[Reported 8 C.B.N.S. 254; 29 L.J.C.P. 246; 2 L.T. 219; 25 J.P. 311;
6 Jur.N.S. 1031; 8 W.R. 438; 141 E.R. 1163] E

Lodging House—Liability of keeper—Care of lodger's property—No gross misconduct or wilful negligence.

There is no duty on a lodging-house keeper to protect the goods of his lodger, nor is he liable for them if stolen, unless he has been guilty of gross misconduct or wilful negligence. F

Calye's Case (1) (1584), 8 Co. Rep. 32a applied.

Notes. Followed: *Hollingsworth v. Nicholson* (1904), 68 J.P.Jo. 534. Considered: *Scarborough v. Cosgrove*, [1904-7] All E.R.Rep. 48. Referred to: *Re Marlborough Mansions, Victoria Street* (1896), 60 J.P.Jo. 284.

As to position and liability of a lodging-house keeper, see 21 HALSBURY'S LAWS (3rd Edn.) 444-5, 452-3; and for cases see 29 DIGEST (Repl.) 14, 30 DIGEST (Repl.) 545 et seq. G

Cases referred to:

- (1) *Calye's Case* (1584), 8 Co. Rep. 32a; 77 E.R. 520; sub nom. *Windham and Meads Case*, 4 Leon. 96; 29 Digest (Repl.) 2, 1.
- (2) *Dansey v. Richardson* (1854), 3 E. & B. 144; 2 C.L.R. 1449; 23 L.J.Q.B. 217; 118 E.R. 1095; sub nom. *Dancey v. Richardson*, 18 Jur. 721; 29 Digest (Repl.) 3, 17. H
- (3) *Parker v. Flint* (1699), 12 Mod. Rep. 254; Holt, K.B. 366; 88 E.R. 1303; sub nom. *Parkhurst v. Foster*, 1 Ld. Raym. 479; 5 Mod. Rep. 427; 1 Salk. 387; Carth. 417; 29 Digest (Repl.) 2, 6.

Also referred to in argument: I

Thompson v. Lacy (1820), 3 B. & Ald. 283; 106 E.R. 667; 29 Digest (Repl.) 2, 3.

Newton v. Harland (1840), 1 Man. & G. 644; 1 Scott, N.R. 474; 133 E.R. 490; 31 Digest (Repl.) 44, 2034.

Hillary v. Gay (1833), 6 C. & P. 284, N.P.; 31 Digest (Repl.) 610, 7254.

Vicars v. Wilcocks (1806), 8 East, 1; 103 E.R. 244; 17 Digest (Repl.) 114, 270.

Chapman v. Rothwell (1858), E.B. & E. 168; 27 L.J.Q.B. 315; 4 Jur.N.S. 1180; 120 E.R. 471; 36 Digest (Repl.) 57, 313.

- A *Blakemore v. Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035; 31 L.T.O.S. 12; 120 E.R. 385; sub nom. *Blackmore v. Bristol and Exeter Rail. Co.*, 27 L.J.Q.B. 167; 4 Jur.N.S. 657; 6 W.R. 336; 3 Digest (Repl.) 73, 122.

Demurrer in an action against a lodging-house keeper for damages for the negligent loss of the lodger's goods.

- B The first count of the declaration stated that the plaintiff, at the request of the defendant, hired of the defendant, at and for a certain price in that behalf, certain furnished apartments in the house of the defendant, and brought into the same certain personal luggage, chattels and effects of the plaintiff; yet the defendant, neglecting his duty in that behalf did not take such due and proper care of his house as a prudent owner would take, by means whereof certain dishonest persons
- C in the house entered and obtained access to the apartments so hired, who converted, took and carried away the luggage, chattels and effects of the plaintiff, and the same were wholly lost to the plaintiff. In the second count the plaintiff alleged that he was in possession of certain furnished apartments hired by him of the defendant in the house of the defendant, and had therein certain personal luggage, chattels and effects of him the plaintiff, and was shortly about to quit
- D and yield up the apartments to the defendant, and the defendant was then desirous of procuring another lodger to hire the apartments after the same should have been yielded up by the plaintiff, and the plaintiff alleged that in such case it was the usage for the landlord to have licence, whether his tenant were present or absent, to enter and show the apartments to any person or persons proposing to become the future tenant or tenants thereof. The plaintiff alleged that the defendant had
- E such licence to enter and show, and did in the absence of the plaintiff enter and show the apartments to divers persons in that behalf for the purpose aforesaid; and, therefore, it became and was the duty of the defendant to use due and proper care to prevent any of the said persons from injuring or carrying away any of the luggage, chattels, and effects of the plaintiff. Nevertheless the defendant, neglecting his duty, did not use such due and proper care, by means whereof the goods and chattels of the plaintiff then in the apartments were taken and carried away
- F by a certain person to whom the apartments in the plaintiff's absence were shown by the defendant, and were wholly lost to the plaintiff.

The defendant demurred to each of these counts on the ground that the first clause, not alleging the defendant to be a common innkeeper, or any contract of insurance against loss or any personal bailment to defendant, did not disclose any

G duty or liability on the part of the defendant to take care of plaintiff's goods.

Archibald for the plaintiff.

J. Thompson for the defendant.

ERLE, C.J.—I am of opinion that our judgment should be for the defendant. On the first count the plaintiff claims to recover on the mere relation of a lodger in the defendant's house, and it is assumed that the law creates a duty in the landlord to take care of the goods of his lodger. Is there any such duty created by law? It is clear that no court or judge has decided in the affirmative.

H

According to the first proposition of *Calye's Case* (1) the liability for the safe keeping of the property of a guest is confined entirely to innkeepers keeping common inns for the use of wayfarers, and the judges distinctly laid it down that a lodging-house keeper is under no such liability, if the goods of his lodger are stolen in his house by a lodger, or a member of his family, much less if abstracted by a stranger. The reason of the law making an innkeeper liable is, that a wayfarer, who may be a complete stranger in the neighbourhood, has no means of knowing the character of those with whom he may be brought into contact at the inn and, therefore, the law imposes on the innkeeper the obligation of protecting the goods of his guest. But this reason for the law has no applicability to the case of a lodging-house keeper.

I

It is not contended that there is an absolute duty cast on the keeper of a lodging-house to protect the lodger's goods, but the allegation is that he did not

take such due and proper care of his house as a prudent man would take, by means whereof certain dishonest persons were admitted into the house and stole the plaintiff's goods. I am most averse to affirm the proposition that the lodging-house keeper is bound to take due and proper care of his lodger's goods, as the greatest mischief might be done by imposing on him undefined duties, the result of which no man can foresee. Looking at the character of the different persons taking up their abode at lodging-houses or frequenting them, if the landlords of such houses were to be held liable to them under such circumstances, it would to my mind be affirming a most pernicious evil. The risk at lodging-houses must vary according to circumstances. Near the seaside it would be most inconvenient and objectionable that the door should be kept locked all day; so also in a port where the lodgings are taken at short notice, and the lodgers continually moving in and out. The lodger staying in such houses must take care of his goods in like manner as of valuables on his person when he walks the streets. I regard *Calye's Case* (1) as the fons juris on the point; and it is an authority directly against counsel for the plaintiff. The whole tenor of my judgment in *Dansey v. Richardson* (2) is that the law imposes no such liability on the lodging-house keeper, and goes to the unreasonableness of making people liable for the loss of goods of which they never had the custody.

As to the second count, that alleges that the plaintiff being in the occupation of and about to quit apartments hired by him of the defendant, and having personal luggage therein and the defendant being desirous of procuring another lodger, the plaintiff averred it was the usage for the landlord to have licence to enter and show the apartments to any person in the absence of the plaintiff; that he did enter and show the apartments to certain persons, and that it was his duty to prevent any of the said persons from injuring or carrying away any of the luggage, goods and effects. Is there any such duty imposed by law upon the defendant? I am of opinion there is not. The lodger had given the lodging-house keeper licence to show the apartments, and I think it was the lodger's duty to put his valuables and goods out of the way. Greater evil would ensue were we to hold otherwise, for the lodger might conspire with an accomplice to steal the goods, and they might have joint benefit of the theft, while the landlord would be liable to the lodger for the goods so abstracted. There is no precedent whatever for such a liability. There is no guarantee by the lodging-house keeper that the persons whom he introduces to see and take the lodgings shall do nothing wrong.

This judgment does not interfere with the liability of the landlord who has by gross misconduct, or wilful negligence, conduced to the loss of the goods. In the present case the landlord has done his best, and he must not be held liable for a loss, in the happening of which he was not in fault.

BYLES, J.—I am also of opinion that the defendant is entitled to judgment on both counts of the declaration. In both there has been an attempt made to remove the ancient landmarks of the law; it being clear from the decision in *Calye's Case* (1) that an innkeeper is, and a lodging-house keeper is not, liable for the loss of goods of a guest or lodger. **LORD COKE, C.J.**, defines the original writ

"to be the ground of the common law, and that by it all such cases may be decided; for, first, it ought to be a common inn, for if a man be lodged with another (who is not an innholder), upon request, if he be robbed in his house by the servants of him who lodged him, or any other, he shall not answer for it,"

for the words are "hospitatores qui com' hospitia tenent," etc. This seems to me consistent with principle as well as authority. There is no contract here between the parties that the defendant shall take care of the plaintiff's goods, nor can it be pretended there was any bailment. There is no precedent to be found for such an action. The allegation that the defendant did not take such due and proper care of his house as a prudent man would is not sufficient to fix him with liability,

A for if that were so a lodging-house keeper might be held liable for any loss whatever in his house.

The distinction between the liability of an innkeeper as contradistinguished from that of a lodging-house keeper is well marked and proper. If you are at an innkeeper's there is a duty on the innkeeper to protect your goods, and he is liable for their abstraction; if you are at a lodging-house there is no such duty on the landlord and you must take care of your goods yourself. If I have chambers in one of the Inns of Court, or at a university, and my goods are stolen, can I sue the Benchers or the authorities at the university if they do not take the precaution of keeping a proper watch? Certainly not.

Then as to the second count, it seems to me not so strong as the first count, and all the objections urged to the one apply also to the other. For these reasons
C our judgment must be for the defendant.

KEATING, J.—I am of opinion that the defendant is entitled to judgment on both counts of the declaration. The first count has not been supported by any authorities; but on the contrary, it is opposed to what has always been laid down as law, from *Calye's Case* (1) down to the present time. In *Parker v. Flint* (3),
D **LORD HOLT, C.J.**, laid it down, that,

"If one come to an inn and make a previous contract for lodging for a set time, and do not eat and drink there, he is no guest, but a lodger, and as such is not under the innkeeper's protection; but, if he eat and drink there, it is otherwise; or if he pay for his diet there, though he do not take it there."

E So that there may be a case where a man at an inn may be unprotected, the law regarding him as a lodger. After the remarks made by **ERLE, C.J.**, in *Dansey v. Richardson* (2), it will be evident that it does not apply here.

The second count is, as it were, a modification of the first count. The licence to show the apartments is stated in a very peculiar way; it was alleged that it was the usage that the landlord should have leave to enter and show the apartments in the absence of the lodger, and that pursuant to such usage he entered but
F did not take care of the goods and they were stolen.

In truth, there was no duty on the defendant to protect the plaintiff's goods; the duty of so doing lay in the plaintiff himself, so that in reality the second count places the plaintiff in no better position than was given him by the first count.

G

Judgment for defendant.

Re CANT'S ESTATE

[COURT OF APPEAL IN CHANCERY (Knight-Bruce and Turner, L.JJ.), July 8, 1859]

[Reported 4 De G. & J. 503; 28 L.J.Ch. 641; 33 L.T.O.S. 280;

5 Jur.N.S. 829; 7 W.R. 624; 45 E.R. 196]

Will—Real estate—Right of beneficiary to purchase part of real estate—Compulsory acquisition of land before right exercisable.

A testator by his will gave his son the right to purchase for £450 certain portions of his real estate, this right to be exercisable after the death of the testator's widow who was tenant for life of the whole estate. If the son did not exercise the right the land in question was to be held on trust for sale with the remainder of the estate. Before the death of the widow the land was purchased by a railway company under an Act passed in 1847, for the sum of £700 which was paid into court. On the death of the widow, the surviving executor petitioned for payment out of this sum for the general benefit of the testator's estate.

Held: the purchase money was substituted for the land and was subject to all the rights affecting it, but it was unaffected by the railway company's Act; and, therefore, the son was entitled to payment of the sum of £700, subject to the payment by him of £450 for the general benefit of the estate.

Notes. Applied: *Re Fison's Will Trusts*, *Fison v. Fison*, [1950] 1 All E.R. 501. Referred to: *Re Kerry*, *Bocock v. Kerry*, *Arnall v. Kerry*, [1889] W.N. 3; *Oppenheimer v. Minister of Transport*, [1941] 3 All E.R. 485; *Re Armstrong's Will Trusts*, *Graham v. Armstrong*, [1943] 2 All E.R. 537.

As to the rights of a person exercising an option under a will, see 39 HALSBURY'S LAWS (3rd Edn.) 913; and for cases see 44 DIGEST 212.

Case referred to in argument:

Earl of Radnor v. Shafto (1805), 11 Ves. 448; 32 E.R. 1160, L.C.; 44 Digest 211, 383.

Appeal from a decision of STUART, V.-C.

The testator, a market-gardener, by his will made on Jan. 27, 1827, gave all his real and personal estate to his executrix and executors, namely his wife Hannah Cant, his son George Long Cant, and his son-in-law James Wright, upon trust to permit his said wife to receive the income of the real and personal estates respectively during her life; and within six months after her decease, he directed his executors, or the survivor of them, to sell his real and personal estate, and to divide the proceeds of such sale into ten equal parts; and one of such equal parts be paid to each of his ten children.

The testator further directed by his will that his executors, before proceeding to a sale of two pieces of garden land, forming part of his real estate, and which had been used by him in carrying on his business as a market-gardener, should offer both of the said pieces of land to his [the testator's] son Charles Cant, for the sum of £450; and he provided that if Charles Cant should be desirous of purchasing the two gardens at and for the price mentioned, he should give to the executors of the testator three calendar months' notice in writing of such his desire to purchase the same, and on payment by Charles Cant of the aforesaid purchase-money at the expiration of the notice, the testator directed his executors to stand possessed of the two pieces of garden land upon trust to convey the same to his son Charles Cant. In the event of their not receiving such notice from his son Charles, his executors were to stand possessed of the gardens in trust for sale as above mentioned.

The testator died on July 13, 1828, survived by Hannah Cant his wife, who died on Jan. 27, 1859.

In 1853 the Eastern Union Rail. Co., requiring the pieces of land, purchased

A them under their statutory powers of compulsory purchase, exercised under the Lands Clauses Consolidation Act, 1844, and the Eastern Union and Harwich Railway and Pier Act, 1847. The purchase-money was fixed at £700, and that sum was paid into court by the company.

B Upon the death of the widow, Charles Cant was living, and he claimed to be entitled to the right of pre-emption given him by the will, notwithstanding the conversion of the garden ground. This right was denied by some of the parties interested, and accordingly the surviving executor of the testator presented this petition, praying for the payment to him of the sum paid into court by the company. The question in issue was whether the testator's son, Charles Cant, was entitled to the difference between the sum of £450, the price at which the testator gave him the option of purchasing the two pieces of ground, and the sum of £700, C at which they had been sold to the railway company.

The petition was heard by STUART, V.-C., who stated that the right of pre-emption was to arise only on the execution of the trust for sale, and that, as that trust could not now come into operation, the right itself was gone. The right of pre-emption depended only upon the trusts for sale and conversion, and these could not be carried into effect. His Honour, therefore, ordered that the fund in D court should be paid to the petitioner, as the testator's surviving executor. From this decision Charles Cant appealed.

G. M. Giffard, Q.C., and F. C. Miller for the appellant.

Shebbeare (with him Bacon, Q.C.) for the respondent.

D Henry F. Shebbeare for other parties interested in the testator's estate adversely to the appellant.

E **KNIGHT-BRUCE, L.J.**—By a contract of purchase under the powers of a railway Act, a sum of money was substituted for land, and became subject to all the rights which affected the land. The land was devised by the testator to his wife for life together with other property, and after her death all was to be sold, and the testator in effect said this: "As to a particular portion, namely, the land now F in question, one of my sons shall have it if he chooses to be charged with £450 as between himself and my estate." This right remains unaffected by the Act, and the son was entitled to take the purchase-money, whether it is worth hundreds or hundreds of thousands, on paying the sum which the testator has specified in his will, just as he would have been entitled to the land itself, if it had not been taken by the railway company.

G **TURNER, L.J.**—The whole argument of the respondents rests on this, that the testator only intended to benefit his son Charles in the event of his continuing to be a gardener. The true test of this argument is whether, if he had ceased to be a gardener in his father's lifetime, he would still have been entitled to the land. This question admits of no doubt, and the only consideration then is, whether, if the H right remained at the death of the testator, the fact of a subsequent Act of Parliament passing can affect the rights of the parties. I am of opinion that it cannot. The order of the court below must, therefore, be reversed.

I *The order was that, on Charles Cant's paying £450 to the credit of the general estate of the testator, he should be declared entitled to the purchase-money of £700 paid into court by the railway company. The costs of all parties on the appeal petition to be borne by the general estate of the testator.*

BUSBY v. CHESTERFIELD WATERWORKS AND GAS LIGHT CO.

[COURT OF QUEEN'S BENCH (Lord Campbell, C.J., Erle and Crompton, JJ.),
April 28, 1858]

[Reported E.B. & E. 176; 27 L.J.M.C. 174; 31 L.T.O.S. 98;
22 J.P. 689; 4 Jur.N.S. 757; 6 W.R. 515; 120 E.R. 474]

Water—Domestic purposes—Use for cleaning horse and carriage.

Under a local Act the use of water for domestic purposes was charged for at a different rate from water used for other purposes. The appellant, who paid a water rate for domestic purposes, used the water for cleaning his horse and carriage. On his appeal against his conviction for using water for other than domestic purposes,

Held: the use of water for washing a horse and carriage was use for a private purpose and as such should be construed as a use for domestic purposes, and the appeal would be allowed.

Notes. Considered: *Walker v. Lambeth Waterworks Co.* (1894), 71 L.T. 75; *D Barnard Castle U.D.C. v. Wilson*, [1902] 2 Ch. 746. Applied: *Harrogate Corp'n. v. Mackay*, [1907] 2 K.B. 611. Referred to: *Bristol Waterworks Co. v. Uren* (1885), 15 Q.B.D. 637; *Grand Junction Waterworks Co. v. Davies* (1897), 13 T.L.R. 489; *Chester Waterworks Co. v. Chester Union* (1907), 96 L.T. 566; *Frederick v. Bognor Water Co.*, [1909] 1 Ch. 149.

As to the meaning of "domestic purposes" for the use of water, see 39 HALSBURY'S LAWS (3rd Edn.) 400; and for cases see 43 DIGEST 1080 et seq.

Appeal from conviction by justices.

In this case the opinion of the court was sought as to the construction of ss. 31 and 33 of the Chesterfield Waterworks and Gaslight Company's Act, 1855. By s. 31 of that Act it was provided that

"the company shall furnish to the owner or occupier of any house who shall be entitled to demand a supply of water for domestic use, including water-closets, a sufficient supply thereof at the following annual rates or prices, according to the poor-rate assessment of such houses for the time being, that is to say:—"

Then followed the scale of charges. By s. 33 it was provided that a supply of water for domestic purposes shall not include a supply of water for machinery, railways, or for any trade or business whatsoever, or for watering gardens, or for fountains, or for any ornamental purposes whatsoever. The company were empowered by s. 34 to take a different rate of payment for the supply of water for other than domestic purposes.

The appellant occupied a house, to which a stable and coach-house were attached, being rated to the poor, however, separately upon the rental of the house. He was accustomed to use the water of the company, not only for his domestic purposes in the house, for which he was charged according to the scale of the poor-rate upon the house, but also for the purpose of cleaning his horse and carriage, having entered into no agreement with the company under s. 34 of the Act. Upon an information laid against him for using the water for other than domestic purposes the justices convicted him.

Pashley, Q.C., for the appellant.

Macnamara, in support of the conviction, argued that this was not such a use of the water for domestic purposes as was contemplated by the Act, and that the stable could not be considered as a part of the premises, for which the appellant had the supply of the water. [CROMPTON, J.—Surely the stable must be considered as part of the premises.] But washing horses and carriages cannot be deemed

A domestic purposes; they come rather within the operation of s. 34. In so using it a very great waste may be the consequence.

LORD CAMPBELL, C.J.—Considering that this water when used for washing the carriage and horse of the occupier is for a private purpose, I think it must be construed as being used for domestic purposes. Whether it is used for a carriage
B for the appellant or a go-cart for his children, it is just the same. No fear need be entertained of an undue use of the water, and if two parts of premises are separately rated, I think the company are entitled to make a charge upon the aggregate rental.

ERLE and CROMPTON, JJ., concurred.

Appeal allowed.

C

D

MANDERS AND ANOTHER v. WILLIAMS

[COURT OF EXCHEQUER (Parke, Alderson and Platt, BB.), June 25, 1849]

E

[Reported 4 Exch. 339; 18 L.J.Ex. 487; 13 L.T.O.S. 325;
154 E.R. 1242]

*Execution—Property of debtor liable to seizure—Goods held by debtor as bailee.
Sale of Goods—Containers—Containers to be returned—Held by buyer as bailee—
Liability to seizure in execution.*

F

The plaintiffs, who were brewers, sent two consignments of porter in casks to a customer on the terms that the empty casks were to be returned to them at the customer's expense and risk within six months from the date of the contract or paid for at invoice price at the option of the plaintiffs. The defendant seized and sold, under a fi. fa. against the customer, 800 of the casks which were lying empty in the customer's cellar.

G

Held: as soon as the casks were empty the customer became a bailee of them during pleasure and the rights of property and possession in them reverted to the plaintiffs, who, accordingly, were entitled to maintain an action of trover against the defendant.

Notes. Explained: *Jelks v. Hayward*, [1905] 2 K.B. 460. Considered: *William Leitch & Co., Ltd. v. Leydon*, [1930] All E.R.Rep. 754. Referred to: *North Central Wagon and Finance Co. v. Graham*, [1950] 1 All E.R. 780.

H

As to seizure of goods held by debtor in fiduciary capacity, see 16 HALSBURY'S LAWS (3rd Edn.) 52; and for cases see 21 DIGEST (Repl.) 588. As to delivery of goods on sale or return, see 34 HALSBURY'S LAWS (3rd Edn.) 71; and for cases see 39 DIGEST (Repl.) 623 et seq.

I

Cases referred to:

- (1) *Gordon v. Harper* (1796), 7 Term Rep. 9; 2 Esp. 465; 101 E.R. 828; 43 Digest 496, 354.
- (2) *Bradley v. Copley* (1845), 1 C.B. 685; 14 L.J.C.P. 222; 5 L.T.O.S. 198; 9 Jur. 599; 135 E.R. 711; 43 Digest 497, 361.

Also referred to in argument:

- Legg v. Evans* (1840), 6 M. & W. 36; 8 Dowl. 177; 9 L.J.Ex. 102; 4 J.P. 123; 4 Jur. 197; 151 E.R. 311; 32 Digest (Repl.) 255, 12.
- Hobson v. Melland* (1841), 2 Mood. & R. 342, N.P.; 3 Digest (Repl.) 568, 201.

- Farrant v. Thompson* (1822), 5 B. & Ald. 826; 2 Dow. & Ry.K.B. 1; 106 E.R. 1392; 31 Digest (Repl.) 231, 3659. A
- Doe d. Parsley v. Day* (1842), 2 Q.B. 147; 2 Gal. & Dav. 757; 12 L.J.Q.B. 86; 6 Jur. 913; 114 E.R. 58; 35 Digest (Repl.) 465, 1549.
- Rogers v. Grazebrook* (1846), 8 Q.B. 895; 7 L.T.O.S. 109; 115 E.R. 1111; 35 Digest (Repl.) 454, 1464.
- Wilkinson v. Hall* (1837), 3 Bing.N.C. 508; 3 Hodg. 56; 4 Scott, 301; 6 L.J.C.P. 82; 132 E.R. 506; 35 Digest (Repl.) 370, 725. B
- Wheeler v. Montefiore* (1841), 2 Q.B. 133; 1 Gal. & Dav. 493; 11 L.J.Q.B. 34; 6 Jur. 299; 114 E.R. 53; 35 Digest (Repl.) 450, 1425.

Rule Nisi to enter a verdict for the plaintiffs in an action for trover for a quantity of porter casks, tried before ERLE, J.

The plaintiffs, who were porter merchants in Dublin, were accustomed to supply one John David, of Laugharne in Wales, with porter. The course of dealing was to consign the porter to David twice a year in half-barrel casks with an invoice, charging nothing for the casks which were returned by him to the plaintiffs when empty. In April, 1848, the plaintiffs sent to David a quantity of porter, with a bill of lading in the usual form, and the following invoice, dated April 13, 1848:

"Invoice of butts, hhds., brls., 440 half-brls. porter (Irish measure), shipped by order and for account, risk, and to address of John David, Laugharne. The empty casks to be returned to Dublin at his expense and risk within six months from date hereof, or paid for at invoice price, at the option of the shippers."

The invoice then stated the price of the porter; and there was a note at the foot: "Value of the barrels 7s. 6d. each." In June, 1848, the plaintiffs consigned sixty more half-barrels of porter to David, with a similar invoice, dated June 24. In August, 1848, the defendant, who was sheriff of Carmarthenshire, seized and sold, under a fieri facias against David, 300 of these casks which were lying empty in his cellar.

On Oct. 26, 1848, the plaintiffs commenced an action for trover of the 300 casks, more than six months after the date of the first invoice, but less than six months after the date of the second. ERLE, J., was of opinion that, under this contract, the plaintiffs had not a sufficient possession to maintain trover, and he directed a verdict for the defendant on the plea of not possessed, reserving leave for the plaintiffs to move to enter a verdict for them for £112 10s., being the value of the 300 casks at 7s. 6d. each, if the court should be of opinion that they had sufficient possession to enable them to maintain the action. The plaintiffs obtained a rule nisi accordingly.

Martin and Cowling showed cause against the rule.

Davison and Willees supported the rule.

PARKE, B.—I am of opinion that the rule ought to be absolute. *Gordon v. Harper* (1), which must now be considered as settled law, shows that, if a person has an interest in goods for a certain time by agreement with the owner, the latter, during the time that he is not in possession, cannot maintain trover against a wrongdoer who takes the goods. That case might, with propriety, have been differently decided in the first instance; but it has been followed by others, and the Court of Common Pleas somewhat extended the rule in *Bradley v. Copley* (2). There it was held that, where a person in possession of goods had an uncertain interest determinable by the owner, until that event happened the owner could not maintain trover, although, according to a passage in SHEPPARD'S TOUCHSTONE, p. 272, a contract of that description with respect to real estate would not prevent the owner from recovering in ejectment.

The question is, In what condition was David under this contract? Had he a certain interest at the time of the sale, or an uncertain interest determinable at

- A** the option of the plaintiffs so as to bring the case within the principle of *Bradley v. Copley* (2)? That depends on the terms of the invoice, which gave him some right to the casks. The contract must be construed with reference to the course of trading between the parties—the vendor in Dublin selling porter to a person in Wales. The object was to put the vendee in possession of the porter, and he was to have the casks for keeping the porter until he had an opportunity of disposing of it.
- B** Then what was his situation as soon as the porter was emptied from the casks? Was he more than a mere bailee during pleasure, the plaintiffs having a right to say “You have no longer any claim to the possession of the casks; that was determined when they were emptied, and we insist on their being delivered to us”? That being so, the plaintiffs are entitled to maintain trover against a stranger who seizes the casks, and the sheriff is in that position.
- C** The true construction of the contract is to give David an interest only until the casks were empty. I agree with counsel supporting the rule that, in this contract, every stipulation is for the benefit of the vendors, not the vendee. The latter is to incur all risk; he is under the obligation of sending the empty casks to Dublin at his own expense and before the end of six months from the date of the contract; if not, there is an option for the benefit of the vendors of calling on him
- D** to purchase the casks at a fixed price. Those stipulations show that the interest of the vendee was never meant to extend beyond the right to keep the casks until the porter was consumed. Possibly, he might within the six months have transferred the porter in the casks to a sub-vendee, but as soon as the casks were emptied the right to them reverted to the vendors. According to the true construction of this contract, I am satisfied that it was never intended that David should
- E** have the casks for any other purpose than keeping the porter. Indeed, I do not see what advantage there could be in his right of possession continuing after the casks were empty; for, during the residue of the six months, he could neither let them to anyone else nor make any further use of them himself without being a wrongdoer and, at the end of the six months, he was bound to return them.
- So soon as the casks were empty, the right of property and the right of possession
- F** reverted to the plaintiffs, and David was in the situation of a mere bailee during pleasure. No proposition can be more clear than that either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrongdoer; the latter by virtue of his possession, the former by reason of his property. This is laid down in 2 ROLLE'S ABRIDGMENT, p. 551, pl. 22, 30 COMYNS' DIGEST “Tresspass” (B. 4), and in other authorities. The verdict must, therefore, be entered
- G** for the plaintiffs for the price of the casks.

ALDERSON, B., and PLATT, B., concurred.

Rule absolute.

PURVIS AND OTHERS v. TRAILL

[COURT OF EXCHEQUER (Pollock, C.B., Parke, Alderson and Platt, BB.), January 19, 1849]

[Reported 3 Exch. 344; 3 New Mag. Cas. 88; 3 New. Sess. Cas. 459; 18 L.J.M.C. 57; 12 L.T.O.S. 379; 13 J.P. 219; 154 E.R. 876]

Rates—Exemption—Scientific and literary society—Exclusive use of premises by society—Acquisition and diffusion of useful knowledge—Parts of premises used for public meetings, exhibitions, and auction sales.

A society was instituted for the acquisition and diffusion of useful knowledge, and had obtained the certificate required by s. 1 of the Scientific Societies Act, 1843. It was supported in part by annual voluntary subscriptions and did not distribute any dividend, gift, division or bonus in money among its members. On a number of occasions the lecture hall of the society's premises was let for public meetings, exhibitions, and sales by auction, the money received from such lettings amounting to about one fourth of the society's whole income and being applied to the purposes of the society.

Held: the premises of the society were not being used solely for the purposes for which the society was originally instituted, and, accordingly, it was not entitled to have them exempted from rates.

Notes. The Scientific Societies Act, 1843, has been repealed by the Rating and Valuation Act, 1961, but reduction or revision of rates may now be granted by s. 11 (4) (b) of the Act of 1961 (41 HALSBURY'S STATUTES (2nd Edn.) 950).

Distinguished: *R. v. Manchester Overseers* (1851), 16 Q.B. 449. Applied: *Clarendon v. St. James's, Westminster* (1851), 10 C.B. 806; *R. v. Cockburn* (1852), 16 Q.B. 480. Considered: *Purchas v. Holy Sepulchre* (1854), 4 E. & B. 156. Applied: *R. v. Royal Medical and Chirurgical Society of London* (1857), 21 J.P. 789. Considered: *British Launderers' Research Association v. Central Middlesex Assessment Committee and Hendon Rating Authority*, [1949] 1 All E.R. 21; *Institution of Mechanical Engineers v. V. O. Cane*, [1960] 3 All E.R. 715. Referred to: *R. v. Linnæan Society* (1854), 18 J.P. 504; *I.R.Comrs. v. Forrest* (1890), 15 App. Cas. 334; *Westminster City Council v. Royal United Services Institution*, [1938] 2 All E.R. 545.

As to exemption from rates of societies exclusively established for purposes of science, see 24 HALSBURY'S LAWS (3rd Edn.) 337 et seq.; and for cases see 38 DIGEST (Repl.) 582 et seq.

Case referred to in argument:

R. v. Shee (1843), 4 Q.B. 2; 3 Gal. & Dav. 80; 12 L.J.M.C. 53; 7 J.P. 209; 7 Jur. 810; 114 E.R. 798; 38 Digest (Repl.) 548, 408.

Action for trespass for breaking and entering certain premises of the plaintiffs, in the parish of Greenwich in the county of Kent, and carrying away certain cushions, etc., of the plaintiffs.

The parties agreed to state the following Special Case for the opinion of the court. The plaintiffs were the trustees of a society called "The Greenwich Society for the Acquisition and Diffusion of Useful Knowledge." The defendant was a justice of the peace for the county of Kent, and one of the Metropolitan Police magistrates. The question was as to the liability of the plaintiffs to be rated to the poor and highway rates, under certain local Acts of Parliament, in respect of the buildings and premises of the said society, or whether they were exempt under the Scientific Societies Act, 1843, s. 1. Prior to Jan. 18, 1844, a society was instituted at Greenwich, for the purposes of science and literature exclusively (unless the court should come to a contrary conclusion), by the name of "The Greenwich Society for the Acquisition and Diffusion of Useful Knowledge." On Jan. 18, 1844, the

A barrister gave to the society a certificate of exemption from rates, pursuant to s. 2 of the Act of 1843. The other provisions of the Act had been complied with. Among the rules of the society were the following :

"8. The whole of the property and effects belonging to the society shall be invested in the names of three trustees, who shall be elected by the society at a special meeting.

"19. No dividend, gift, division, or bonus in money, shall or may, on any account, be made from the funds of the society unto or between any of its members in respect of such membership.

"20. In the event of a dissolution of the society, the property shall not be divided amongst the members, nor appropriated to their private use, but shall be given to such public association or associations for the promotion of knowledge as may be deemed by the members at their last meeting to be most deserving."

On Jan. 30, 1846, the churchwardens, overseers, etc., of Greenwich made a poor and highway rate, whereby the plaintiffs were assessed in respect of the lecture-hall and rooms of the society. The plaintiffs having refused to pay the rates, the defendant issued summonses, and eventually warrants of distress, under which the goods of the society were seized.

The society was instituted for the acquisition and diffusion of useful knowledge (unless the court, from the facts of the case, should come to a contrary conclusion), and was constituted and governed by certain rules and byelaws. The premises belonging to the society, which were vested in the plaintiffs as trustees, and in respect of which they were rated as aforesaid, consisted of a lecture hall, library and reading-rooms, which were open to the use of the members of the society, and a librarian attended daily on the premises, but no person resided there; and, subject as hereinafter mentioned, the premises were used and occupied by the society for the transaction of its business, and for carrying into effect its purposes. The society was supported in part by annual voluntary contributions, and did not in fact make any dividend, gift, division or bonus in money unto or between any of its members. Since the society had possessed the lecture hall, it has issued public printed announcements in the following terms :

"The lecture hall, capable of holding nearly 1,000 persons, and several classrooms, may be hired for public meetings, lectures, concerts, etc. For terms apply to the librarian."

In consequence of this, and in conformity therewith, the lecture hall of the society, being a part of the premises of the society, and occupied by it as aforesaid, had on several occasions, as well before as since the making of the rates in question, been used by and let to other persons unconnected with the society, for other purposes, but with the consent of the society and the trustees; and the lecture hall had been used by and let to such other persons as often as application had been made for its hire, when the trustees thought fit so to let and allow the use of the same, and had been always to be let, according to the terms of the announcement, to such persons as the trustees thought fit. Among other things, it had been let and used for meetings relating to the payment of the church rates, the corn laws, the navigation of the river Thames, a meeting to adopt a petition for the return of Frost, Williams, and Jones, which was held on Feb. 18, 1846, and one to petition for the People's Charter, which was held on Nov. 18, 1846, and for exhibitions of various kinds; as, for instance, of a celebrated dwarf, certain North American Indians and conjurers.

Other parts of the same premises of the society had been also let and used for sales by auction, and meetings of tradesmen's protection and building societies; and on the occasion of such lettings, the use of the lecture hall, or other parts of the premises of the society, had been agreed to be given for the purpose for which the respective lettings took place, sometimes for a few hours only, sometimes for

two or three hours in the morning, and for a similar period in the afternoon, and for a similar period in the morning, and again in the afternoon and the evening of one day, or two, or three successive days. One of the rooms of the premises, not being the lecture hall, had been let for a sale by auction of pictures, when such room was let for the daytime only of successive days, and was used on the evenings of such days by the society for its own purposes.

On the occasions of such lettings, sums of money had been paid in gross to the trustees on behalf of the society by the parties requiring such temporary use of such part of the premises of the society, which sums were received by the trustees on behalf of the society, and applied by them to the purposes of the society, in common with their other funds. The receipts of the society, by such letting of the lecture hall and the parts of their premises, had been found to amount to one fourth of the whole income of the society. On many of the occasions on which the lecture hall had been so let and used by persons other than the society, before and since the making of the rates, sums of money had been received and taken at the doors by and for such persons, and applied by them partly in payment of the use of the hall, and partly for their own use; and on some occasions the members of the society had in fact been admitted on payment of half the price of admission paid by other visitors, but without any agreement having been made to that effect or for that purpose.

It was contended on the part of the defendant and the parish of Greenwich that, by reason of the aforesaid use of the premises, the society and the plaintiffs were not entitled to the exemption provided by the Scientific Societies Act, 1843. The court was to be at liberty to draw any conclusion from those facts which a jury might.

The question for the opinion of the court was whether the plaintiffs were or were not entitled to the exemption provided by the Scientific Societies Act, 1843. If the court should be of opinion that the plaintiffs were entitled to such exemption, judgment was to be entered for them, with £20 damages and costs; otherwise for the defendant.

By s. 1 of the Scientific Societies Act, 1843 [repealed] :

“ . . . No person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates or cesses, in respect of any land, houses, or buildings, or parts of houses, or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction : of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the barrister-at-law or lord advocate, as hereinafter mentioned.”

Bovill for the plaintiffs.

Crowder for the defendant.

POLLOCK, C.B.—The defendant is entitled to judgment. The institutions of a country mean the laws by which it is regulated at the time we are speaking. If a society is instituted for literary purposes, it becomes a new institution when used for other and different purposes.

PARKE, B.—I agree that the defendant is entitled to our judgment. The term “institution” does not mean merely the original institution on the first establishment of a society, since that may be altered, as many institutions have been, but the purposes to which it is applied at the present time. By the original constitution of this society, the lecture rooms were to be used for lectures only, and not in the discussion of party or political purposes. That has been changed by somebody;

A and, if the alteration was made by competent authority, it is clear that the society would have ceased to be instituted for its original purposes. The Case does not find how the alteration took place, and we are not at liberty to draw any inference that it was done by competent authority. The meaning of s. 1 of the Scientific Societies Act, 1843, is not merely that the society should be instituted for the purposes mentioned in it, but that it should occupy its rooms solely for those purposes. It is true that the statute does not use the word "solely"; but it never could have been the intention of the legislature to allow a society who let its rooms for other purposes than those mentioned in the Act to be exempt from rates because there was no beneficial occupation, inasmuch as the funds were applied to the purposes of the society. On the true construction of this statute, there can be no exemption, if the society occupy for a purpose foreign to its original institution.

ALDERSON, B., and PLATT, B., concurred.

Judgment for defendant.

D

E

R. v. COLLINGWOOD AND ANOTHER

[COURT OF QUEEN'S BENCH (Lord Denman, C.J., Patteson, Wightman and Erle, JJ.), May 4, July 12, 1848]

[Reported 12 Q.B. 681; 3 New Mag. Cas. 53; 3 New Sess. Cas. 252;
17 L.J.M.C. 168; 12 L.T.O.S. 105; 12 Jur. 750;
12 J.P.Jo. 309, 454; 116 E.R. 1025]

F

Bastardy—"Single woman"—*Married woman mother of illegitimate child.*

By s. 2 of the Poor Law Amendment Act, 1844 [see now Affiliation Proceedings Act, 1957, s. 1 (37 HALSBURY'S STATUTES (2nd Edn.) 37)], a "single woman" who had been delivered of a bastard child might apply to a justice for a summons to be served on the man alleged by her to be the father of the child.

G

Held: the words "single woman" in the section included a married woman who became the mother of a bastard child.

Notes. Applied: *R. v. Pilkington* (1853), 2 E. & B. 546. Referred to: *Jones v. Davies*, [1900-3] All E.R.Rep. 243; *Brown v. Leech* (1924), 88 J.P. 208;

H

Jones v. Evans, [1945] 1 All E.R. 19; *Taylor v. Parry*, [1951] 1 All E.R. 355.

As to affiliation proceedings, see 3 HALSBURY'S LAWS (3rd Edn) 110 et seq.; and for cases see 3 DIGEST (Repl.) 442 et seq. For the Affiliation Proceedings Act, 1957, s. 1, see 37 HALSBURY'S STATUTES (2nd Edn.) 37.

Case referred to:

(1) *R. v. Luffe* (1807), 8 East, 193; 103 E.R. 316; 3 Digest (Repl.) 404, 53.

I

Also referred to in argument:

R. v. Tibbenham (Inhabitants) (1808), 9 East, 383.

St. Michael, Bath Parish v. Nunny, Somerset Parish (1723), 1 Stra. 544; 93 E.R. 689.

R. v. Wymondham (Inhabitants) (1843), 2 Q.B. 541.

R. v. Stoke Bliss (Inhabitants) (1844), 6 Q.B. 158; 1 Dav. & Mer. 135; 1 New Mag. Cas. 61; 1 New Session Cas. 267; 13 L.J.M.C. 151; 3 L.T.O.S. 179; 8 J.P. 675; 8 Jur. 536; 115 E.R. 61.

Rule Nisi calling on justices of the borough of Abingdon to show cause why a writ of certiorari should not issue to bring up an order in bastardy made by them, for the purpose of having it quashed. A

On Oct. 7, 1847, Mary Ann Rance, the wife of George Rance, who had been delivered of a male bastard child within the previous twelve months, applied for an affiliation order to be made on the alleged father, John Huggins. The justices having heard her evidence on oath, together with corroborating evidence, adjudged John Huggins to be the putative father and ordered him to pay to her 1s. 6d. a week until the child attained the age of thirteen years or should die, "or the said George Rance shall again live and cohabit with his said wife . . . or the said [wife] shall marry again after the decease of her said husband." B

Godson, *Q.C.*, for the justices and Carrington for Mary Ann Rance showed cause against the rule. C

Parry supported the rule.

Cur. adv. vult.

July 12, 1848. **LORD DENMAN, C.J.**, delivered the following judgment of the court.—The single question is whether a married woman becoming the mother of an illegitimate child is within the Poor Law Amendment Act, 1844, which authorises the justices to make an order of bastardy. The language of s. 2 of that Act applies in terms only to single women; so did the language of the Bastard Children Act, 1733, s. 1. Yet LORD ELLENBOROUGH and the whole court in *R. v. Luffe* (1), held that an order might be made on the putative father of the bastard child of a married woman, who was to be considered single under the existing circumstances and for that purpose. The Act last named is repealed, indeed, by that now in force; but the authority and the reason of the decision remains unimpaired, and the law, differently interpreted, would fail to reach a very large proportion of illegitimate children. We, therefore, think that we must hold the order good. D

Rule discharged. E

GREENOUGH v. McCLELLAND F

[COURT OF EXCHEQUER CHAMBER (Williams, J., Martin, B., Willes and Byles, JJ., Channell and Wilde, BB.), June 18, 1860] G

[Reported 2 E. & E. 429; 30 L.J.Q.B. 15; 2 L.T. 571;

6 Jur.N.S. 772; 8 W.R. 612; 121 E.R. 162] H

Guarantee—Discharge—Time given by creditor to debtor—Prejudice to surety. I

The plaintiff, at the defendant's request, lent £150 to T., less three months' interest at 20 per cent., and also drew a joint and several promissory note, directing T. to sign it and to obtain the defendant's signature as surety. The note, dated Mar. 23, 1858, was returned by T. to the plaintiff, signed by the defendant as maker. When the note became due on June 26, 1858, and again on Sept. 28, T. paid the plaintiff a further three months' interest, the plaintiff agreeing not to enforce payment for the note. These payments of further interest were made without the knowledge or consent of the defendant who knew nothing of the matter until October, 1858, when T. became insolvent. In an action by the plaintiff to recover the amount of the note from the defendant.

Held: the doctrine of equity that when a surety was prejudiced by time given to a principal debtor, relief should be given to the surety applied and judgment should be given for the defendant.

A DICTUM of LORD COTTENHAM in *Hollier v. Eyre* (1) (1840), 9 Cl. & Fin. at p. 45, applied.

Notes. Referred to: *Re Davies and Troughton, Ex parte Clennell, etc.* (Trustees of Hackney, Permanent Benefit Building Society) (1861), 4 L.T. 60; *Lawrence v. Walmisley* (1862), 5 L.T. 798; *Ewin v. Lancaster* (1865), 6 B. & S. 571; *Swire v. Redman*, [1874-80] All E.R.Rep. 1255; *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 82.

As to surety's rights against a creditor, see 18 HALSBURY'S LAWS (3rd Edn.) 464-474; and for cases see 26 DIGEST (Repl.) 109 et seq.

Cases referred to:

- C** (1) *Hollier v. Eyre* (1840), 9 Cl. & Fin. 1; 8 E.R. 313, H.L.; 26 Digest (Repl.) 109, 748.
- (2) *Manley v. Boycott* (1853), 2 E. & B. 46; 22 L.J.Q.B. 265; 21 L.T.O.S. 99; 17 Jur. 1118; 1 W.R. 324; 1 C.L.R. 273; 118 E.R. 636; 6 Digest (Repl.) 381, 2731.
- (3) *Davies v. Stainbank* (1854), 6 De G.M. & G. 679; 43 E.R. 1397, L.J.J.; 6 Digest (Repl.) 372, 2680.
- D** (4) *Pooley v. Harradine* (1857), 7 E. & B. 431; 26 L.J.Q.B. 156; 28 L.T.O.S. 367; 3 Jur.N.S. 488; 5 W.R. 405; 119 E.R. 1307; 6 Digest (Repl.) 382, 2733.

Also referred to in argument:

- E** *Rayner v. Fussey* (1859), 28 L.J.Ex. 132; 6 Digest (Repl.) 369, 2661.
- Davey v. Prendergrass* (1821), 5 B. & Ald. 187; 2 Chit. 336; 106 E.R. 1161; 26 Digest (Repl.) 182, 1345.
- Strong v. Foster* (1855), 17 C.B. 201; 25 L.J.C.P. 106; 4 W.R. 151; 139 E.R. 1047; 6 Digest (Repl.) 330, 2413.

F **Appeal** by the plaintiff from a decision of the Court of Queen's Bench (SIR ALEXANDER COCKBURN, C.J., WIGHTMAN, CROMPTON and HILL, JJ.), reported 2 E. & E. 424, in an action to recover £150 interest alleged to be due on a promissory note, dated Mar. 23, 1858, made by the defendant, whereby the defendant promised to pay to the plaintiff £150 three months after the date, but the defendant did not pay the same; and also for money found to be due on accounts stated between the plaintiff and defendant.

G By his first plea, the defendant pleaded that the promissory note was the joint and several promissory note of the defendant and of one William Titterington, and was made and signed by the defendant as surety only of and for Titterington, to secure a sum of £150 advanced by the plaintiff to Titterington, and save as aforesaid there never was any value or consideration for the making of the note by the defendant; that the note was delivered to the plaintiff on the terms that the defendant should be liable thereon as surety only for Titterington, and that the plaintiff at the time the note was made had notice and knowledge of the same having been so made by the defendant as surety, and of all the material facts; that the plaintiff while the holder of the note on June 26, 1858, without the knowledge or consent of the defendant, in consideration of £7 10s. paid by Titterington to the plaintiff as interest at the rate of 20 per cent. per annum, for the period of the next three months, agreed to, and did give to Titterington time for the payment of the note for the period of three months, and forebore to enforce payment of the same note during that time, and that if the plaintiff had not given such time payment could and would have been obtained from Titterington of the note and of all moneys due thereon. And the defendant claimed that he was wholly discharged from all liability to pay the amount of the note, or any part thereof. By his second plea to the first count that the note was such a note, and was so made, and on the same terms and considerations, and the plaintiff had such notice thereof that the defendant was wholly discharged from all liability to pay the amount of the

note or any part thereof. Third plea to the second count—that he never was indebted as alleged. On these pleas the plaintiff took issue, and also demurred to them, and the defendant joined in demurrer. A

The action was tried before WILLES, J., at Lancashire Assizes, and a verdict was found for the plaintiff for £152 10s. damages, and 40s. costs, subject to the opinion of the court on a Case Stated, the material facts of which are as follows :

One Titterington requiring a loan of £150, applied to the defendant who wrote to the plaintiff a letter requesting him to call on Titterington, which the plaintiff did. Titterington then asked the plaintiff to lend the £150 to him. The plaintiff drew a cheque for the money, less three months' interest, at the rate of 20 per cent., and gave it to Titterington, and it was duly paid. He also drew out a joint and several promissory note, and gave it to Titterington, telling him to sign it, which he did, and to obtain the defendant's signature to it as his surety, and then to return it so signed to him the plaintiff. This Titterington did, and the plaintiff received the said note accordingly signed by the defendant as maker. When the note became due, Titterington paid to the plaintiff another three months' interest at the rate of 20 per cent., and in advance, and received from the plaintiff the following receipt : B

"£7 10s. June 26, 1858. Received from Mr. Titterington £7 10s. for interest due Sept. 26 next, on his joint note. D
JOS. GREENOUGH."

On the expiration of that period, Titterington paid to the plaintiff another three months' interest at the rate of 20 per cent., and in advance, and received from the plaintiff the following receipt :

"£7 10s. Sept. 28, 1858. Received from Mr. Titterington £7 10s. for renewal of his joint note to Dec. 26 next. E
JOS. GREENOUGH."

These payments were made without any consent or knowledge of the defendant, and defendant was not informed, nor did he know of them, until the latter end of October, when Titterington became insolvent.

The jury found that the defendant was surety as between himself and Titterington, and that plaintiff knew that fact, but that he did not agree, nor did the defendant stipulate that he should be considered or treated by the plaintiff as surety, or otherwise than as maker. The question for the court was whether these facts prove the first and second pleas of the defendant, or either of them. The Court of Queen's Bench gave judgment for the defendant on the Special Case, and on the demurrers. The plaintiff appealed. F

Sir William Atherton, Q.C. (Mellish with him), for the plaintiff. G

Crompton Hutton (Edward James with him) for the defendant were not called on to argue.

WILLIAMS, J.—We are all of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. There can be no doubt that we are called on to deal with this case as if we were sitting in a court of equity, and that we ought to decide it according to the doctrines of a court of equity. So dealing with the case, we have no doubt that the defendant is discharged from liability, on the ground that the plaintiff had knowledge, at the time when he received the promissory note and entered into a binding agreement to give time to Titterington, that the relation of principal and surety existed between Titterington and the defendant. It appears on the facts that the jury found H

"that the defendant was surety as between himself and Titterington, and that plaintiff knew that fact; but that he did not agree, nor did the defendant stipulate, that he should be considered or treated by the plaintiff as surety, or otherwise than as maker." I

Therefore, if the case had occurred before the Common Law Procedure Act, 1854, and if, instead of there being this equitable plea, there had been a plea simply on the common law principle, according to *Manley v. Boycott* (2), the plea would have

A been bad on the finding of the jury that there was no stipulation, at the time of making the note, that the defendant was to be treated by the plaintiff as surety only.

The question now is, What view would courts of equity have taken of this subject? Have they treated it as essential that it should be agreed, at the time of the making of the note, that a party to it was to be looked at as a surety only, and so dealt with? No doubt at one time, in courts of common law, relief would not have been granted on this ground. The difference, it is said, between the legal and equitable doctrine depended on this, that the common law courts adhered to the language of the original contract, whereas courts of equity took a more enlarged view, and disregarded the strict language of the original contract. It is plainly a mistake to suppose that courts of equity acted on that view.

C LORD COTTENHAM, in *Hollier v. Eyre* (1), expresses very clearly what principle the doctrine in equity proceeded on. He said (9 Cl. & Fin. at p. 45):

D "The question whether the plaintiff, as between himself and the grantees, was a principal in the grant of the annuity, or only a surety for the payment of it, must be ascertained by the terms of the instruments themselves; no extraneous evidence is admissible for that purpose. . . . Although all the grantors were principals as between them and the grantees, yet, as between themselves, some of them might be sureties for others; and if it was established that such was the case as between the plaintiff and Lynch, and that the grantees knew that such was the case, they might, by their dealing, have raised an equity in favour of the plaintiff, entitling him to the protection of a court of equity against the legal consequences of the instruments he joined in executing. This distinction is well settled, and is the ground of many of the decisions."

E So LORD COTTENHAM puts it on this ground, that, although the courts of common law and equity agree that it must be ascertained from the instrument whether the parties stand in the relation of principal and surety, yet in courts of equity, the surety being prejudiced by time given to the principal debtor, an equity arises in that circumstance which entitles the surety to relief in equity. TURNER, L.J., also, in the latter part of his judgment in *Davies v. Stainbank* (3), says (6 De G.M. & G. 696):

F "This court, as I apprehend, has at all times exercised jurisdiction in cases of this nature. It is, in the eye of this court, a fraud in a creditor to proceed at law against a surety after he has agreed with the principal debtor to enlarge the time for payment of the debt, and this court relieves against the fraud."

G This is, therefore, settled beyond all doubt, not that a court of equity any more than a court of law will vary the terms of the instrument, but the courts of equity have established a doctrine of equity that, when a surety is prejudiced by time given to a principal debtor, then relief shall be given to the surety in equity. At common law there was some difficulty in arriving at such a doctrine. It was urged that there was nothing illegal in a surety agreeing to submit to all the obligations of a principal, and that such a fact arises on the face of the instrument. These considerations, however, have been disregarded in equity, and the above rule established there, and this court, therefore, is bound now to treat it as established and bound, therefore, to concur in the judgment of the Court of Queen's Bench in *Pooley v. Harradine* (4).

I It is true that, on the facts, *Pooley v. Harradine* (4) is not very strongly applicable to this case, because there the plea stated that the notes were delivered to plaintiff and taken by him on an agreement that defendant should be liable as surety only, and with notice that he was surety only; whereas here there was no such agreement at the time of delivering the note. However, the Court of Queen's Bench, having reviewed all the cases in the course of its judgment, conclude their judgment by saying (7 E. & B. at p. 444):

"We give our judgment for the defendant on the present plea, on the ground that it appears to us sufficiently to state that the relation of principal and surety

existed between the defendant and the principal debtor inter se, and that the plaintiff had knowledge of that fact when the notes were made and received by him, and when he entered into a binding agreement to give time to the principal debtor."

Those two facts exist in the present case and, therefore, the principle is expressly applicable to it, and ought to be binding. When it is once established that law and equity agree in regarding the contract as binding, you violate that rule if you allow the question to be treated as one arising on the original contract, whereas it must be put on the principle of equity. In that point of view we all agree that the defence in this case was made out, and that the judgment must be affirmed.

MARTIN, B., WILLES and **BYLES, JJ., CHANNELL** and **WILDE, BB.**, concurred.

Appeal dismissed.

COOPER v. WILLOMATT

[COURT OF COMMON PLEAS (Tindal, C.J., Coltman, Maule and Cresswell, JJ.), May 23, 1845]

[Reported 1 C.B. 672; 14 L.J.C.P. 219; 5 L.T.O.S. 173;
9 Jur. 598; 135 E.R. 706]

Bill of Sale—Assignment of goods—Agreed use by assignor of goods assigned—Bona fide purchase by third party—Right of assignee to recover.

Under an agreement for the bailment of certain chattels, the bailee allowed the bailor to use the chattels on payment of a rent of 6s. a week, and subject to a condition that the bailor would not dispose of them without the consent of the bailee. In breach of the agreement the bailor sold the chattels to the defendant who believed him to be the owner.

Held: the plaintiff was entitled to maintain an action in trover for the value of the chattels, notwithstanding that the defendant had purchased them honestly and in good faith.

Notes. Considered: *Bradley v. Copley* (1845), ante p. 129. Followed: *Bryant v. Wardell* (1848), 2 Exch. 479; *Nind v. Arthur* (1848), 12 L.T.O.S. 196; *Fenn v. Bittleston* (1851), 7 Exch. 152. Applied: *Singer Manufacturing Co. v. Clark*, [1874-80] All E.R.Rep. 952. Referred to: *Ward v. Audland* (1847), 16 M. & W. 862; *Harrison v. Blackburn* (1864), 17 C.B.N.S. 678; *Payne v. Wilson*, [1895] 1 Q.B. 653; *Plasycloed Collieries Co. v. Partridge, Jones & Co.* (1912), 81 L.J.K.B. 723.

As to determination by a bailee of the bailment by wrongfully dealing with chattels, see 2 HALSBURY'S LAWS (3rd Edn.) 144; and for cases see 3 DIGEST (Repl.) 112 et seq.

Cases referred to:

- (1) *Loeschman v. Machin* (1818), 2 Stark. 311; 3 Digest (Repl.) 112, 333.
- (2) *Isaack v. Clark* (1615), 2 Bulst. 306; 1 Roll. Rep. 126; 80 E.R. 1143; 3 Digest (Repl.) 115, 357.
- (3) *Gregg v. Wells* (1839), 10 Ad. & El. 90; 2 Per. & Dav. 296; 8 L.J.Q.B. 193; 3 Jur. 555; 113 E.R. 85; 21 Digest (Repl.) 457, 1575.

A Also referred to in argument:

Farrant v. Thompson (1822), 5 B. & Ald. 826; 2 Dow. & Ry.K.B. 1; 106 E.R. 1392; 21 Digest (Repl.) 574, 685.

Gordon v. Harper (1796), 7 Term Rep. 9; 2 Esp. 465; 101 E.R. 828; 43 Digest 496, 354.

B **Rule Nisi** obtained by the plaintiff to enter a verdict in an action in trover to recover the value of certain furniture, which had come into the possession of the defendant, a furniture broker, in the following circumstances.

The original owner of the furniture, Parry Savage, having become involved in pecuniary difficulties, assigned the same by bill of sale to the plaintiff as a security for the sum of £100. An agreement, dated April 24, 1844, was then entered into

C between the plaintiff and Savage, which, after reciting such assignment, proceeded as follows:

"It is hereby agreed between the said parties, that the said Parry Savage shall have the use of the said household furniture, goods, chattels, utensils, and effects, he, the said Parry Savage, paying unto the said Edward Cooper the rent or sum of 6s. by the week, for the rent or hire of the same. The first weekly payment to become due and be made by the said Parry Savage on the 27th day of April instant. And the said Parry Savage hereby agrees to pay the said rent or sum of 6s. by the week during so long a time as he shall be allowed by the said Edward Cooper to have the use of the said household furniture, goods, chattels, utensils, things and effects; and the said Parry Savage hereby agrees that he will not alter or dispose of the same or any part thereof without the license or consent of the said Edward Cooper, his executors, administrators, or assigns, for such purpose had and obtained in writing; and that he will pay for or replace such articles or things that may be broken or damaged; and that he will deliver up the said household furniture, goods and chattels, utensils, things, and effects, in as good state and condition as they now are, on demand being made for the same by the said Edward Cooper, his executors, administrators, or assigns."

The agreement then gave to the plaintiff a right of entry on the house of Savage to remove the furniture without being subject to any action; and that if any action should be brought for so doing, the agreement might be pleaded in bar thereto. At the time of making this agreement, a written authority was given by the plaintiff to the wife of Savage to hold possession of the furniture in behalf of the plaintiff, with a direction not to allow Savage to dispose of the same without the consent in writing of the plaintiff.

Savage afterwards removed the furniture to the house of his father-in-law, and there sold the same to the defendant, who bought it, bona fide, believing Savage to be the owner. A demand was made to the defendant by the plaintiff for the property to be delivered up to him, but the defendant refused to comply with the demand.

On these facts being proved at the trial, ERLE, C.J., nonsuited the plaintiff, but gave him leave to move to enter a verdict for the amount of £27 if the court should be of opinion that, in the circumstances, he was entitled to recover. The plaintiff obtained a rule nisi accordingly.

I *Serjeant Talfourd* showed cause against the rule.
Serjeant Shee (*Bovill* with him) supported the rule.

TINDAL, C.J.—It appears to me, that, if the transaction between Cooper and Savage is assumed (as perhaps it may be) to be a demise of the goods to the latter, it is such a demise as might at any time be put an end to at the will of the former. Also, if Savage put the goods into the possession of another, meaning to give to that other a larger interest in them than he himself possessed, he must, at all events, be held to have parted with the limited interest he did possess. The

demand upon the defendant, therefore, as much put an end to the tenancy of Savage as if the demand had been made upon Savage himself. A

But, supposing the tenancy not to have been determined, I cannot get over the authority of *Loeschman v. Machin* (1). There, the hirer of certain pianos having sent them to the defendant, an auctioneer, for sale: in an action against the auctioneer, ABBOTT, J., ruled (2 Stark. at p. 312) that,

“if goods be let on hire, although the person who hires them has the possession of them for the special purpose for which they are lent, yet, if he send them to an auctioneer to be sold, he is guilty of a conversion; and that, if the auctioneer afterwards refuse to deliver them to the owner, unless he will pay a sum of money which he claims, he is also guilty of a conversion.” B

That is a position I am not prepared to dispute. I, therefore, think the rule for entering a verdict for the plaintiff in this case must be made absolute. C

COLTMAN, J.—It seems to me also that *Loeschman v. Machin* (1) is a satisfactory authority for us to act upon. *Isaack v. Clark* (2) is likewise very applicable to the present case.

MAULE, J.—I do not think we are called upon, by any of the authorities that have been cited, to hold that this action is not maintainable. *Loeschman v. Machin* (1) is not, in my judgment, to be distinguished from the present case: and it has been approved of in subsequent cases. If, however, there were no authority to support our view, I should still come to the same decision. It occurred to me, in the course of the argument, that Savage might still be liable to the weekly rent of 6s., notwithstanding the recovery of the value of the goods by the plaintiff in this action. That may be so: but still I do not think it by any means shows that the plaintiff may not set up the tortious conversion. D

There seems to be no doubt that the transaction was an honest and bona fide one on the defendant's part; and one cannot but regret that he should lose his money. Much property of this kind is, however, entrusted to persons who have no right to sell it; and yet the trade of a furniture-broker seems to be one that may be profitably carried on. The law, therefore, has not been found to be productive of any inconvenience; and, if it had, that would make no difference, seeing that it is not at all doubtful. I think the plaintiff is clearly entitled to enter a verdict for the sum agreed on. E

CRESSWELL, J.—Two points were relied upon by counsel showing cause against the rule. The first, he founded upon *Gregg v. Wells* (3), where it was held that the owner of goods who stands by and allows another to treat them as his own, whereby a third person is induced to buy them bona fide, cannot recover them from the vendee. That case differs essentially from the present; for, there the owner of the goods was present when the person to whom he had entrusted them affected to deal with them: here, however, the plaintiff did not hold out Savage as a person having authority to deal with the goods. The authority given by Cooper to Mrs. Savage to hold possession of the goods on his behalf, did not make her his agent for the purpose of assenting to the disposition of them by her husband. Then comes the question whether a person entrusted with goods in this manner, can, by selling them, be guilty of anything less than a conversion. Upon the authority of *Loeschman v. Machin* (1), as well as upon principle, I think, that, where a party acts so in contravention of the authority given to him, he can confer no right upon another by his wrongful act. For these reasons, I am of opinion that this action is maintainable. F

Rule absolute. G

ATTORNEY-GENERAL v. CHAMBERS AND OTHERS

[COURT OF APPEAL IN CHANCERY (Lord Chelmsford, L.C.), January 29, 31, April 30, 1859]

[Reported 4 De G. & J. 55; 33 L.T.O.S. 189; 23 J.P. 308;
5 Jur.N.S. 745; 7 W.R. 404; 45 E.R. 22]

Sea—Recession—Alluvion added to pre-existing dry land—Gradual and imperceptible accretion—Ownership.

Where the sea recedes gradually and imperceptibly from the land with the result that land by alluvion is added to the pre-existing dry land the accretion belongs to the owner of that dry land, whether it has been caused by natural or by artificial means, provided that it is not the result of deliberate reclamation.

Easement—User by which prescriptive right established—Acts of ownership on property of another—Effect dependent on acts themselves and nature of property on which exercised—Sufficiency of user to establish right.

The effect of acts of ownership on the property of another depend partly on the acts themselves and partly on the nature of the property on which they are exercised. If cattle are turned on enclosed pasture ground and placed there to feed from time to time, it is strong evidence that it is done under an assertion of right, but where the property is of such a nature that it cannot be easily protected against intrusion and it would not be worth the trouble of protecting it, the mere user is not sufficient to establish a right, but it must be founded on some proof of knowledge and acquiescence by the party interested in resisting it, or by perseverance in the assertion and exercise of the right claimed in the face of opposition.

Notes. Considered: *Ilchester v. Raishleigh* (1889), 61 L.T. 477; *Pearce v. Bunting, R. v. Wedd, Ex parte Pearce*, [1896] 2 Q.B. 360; *Mellor v. Walmesley*, [1905] 2 Ch. 164; *Brighton and Hove General Gas Co. v. Hove Bungalows*, [1923] All E.R. Rep. 369. Referred to: *Lind v. Isle of Wight Ferry Co.* (1862), 7 L.T. 416; *R. v. Hughes* (1866), L.R. 1 P.C. 81; *Hastings Corp'n. v. Ivall* (1875), L.R. 19 Eq. 558; *Foster v. Wright* (1878), 4 C.P.D. 438; *A.-G. v. Reeve* (1885), 1 T.L.R. 675; *Hindson v. Ashby*, [1896] 2 Ch. 1; *Mercer v. Denne*, [1904-7] All E.R. Rep. 71; *A.-G. of Southern Nigeria v. John Holt (Liverpool), Ltd.*, [1914-15] All E.R. Rep. 444; *Barwick v. South Eastern and Chatham Rail. Co.*, [1921] 1 K.B. 187; *Secretary of State for India in Council v. Fourcar & Co.* (1934), 50 T.L.R. 241; *Symes and Jaywick Associated Properties, Ltd. v. Essex Rivers Catchment Board*, [1937] 1 K.B. 548.

As to accretion of land through recession of sea, see 39 HALSBURY'S LAWS (3rd Edn.) 560, 561; and for cases see 44 DIGEST 67 et seq. As to creation of easements by prescription, see 12 HALSBURY'S LAWS (3rd Edn.) 543 et seq., and for cases see 19 DIGEST (Repl.) 57 et seq.

Cases referred to:

- (1) *R. v. Lord Yarborough* (1824), 3 B. & C. 91; 4 Dow. & Ry. K.B. 790; 2 L.J.O.S.K.B. 196; 107 E.R. 668; affirmed sub nom. *Gifford v. Lord Yarborough* (1828), 5 Bing. 163, H.L.; 44 Digest 67, 477.
- (2) *Re Hull and Selby Rail. Co.* (1839), 5 M. & W. 327; 8 L.J.Ex. 260; 44 Digest 68, 492.
- (3) *Scrutton v. Brown* (1825), 4 B. & C. 485; 6 Dow. & Ry. K.B. 536; 107 E.R. 1140; 44 Digest 69, 504.
- (4) *Smart v. Dundee Magistrates* (1797), 8 Bro. Parl. Cas. 119; 3 E.R. 481, H.L.; 44 Digest 67, 484.
- (5) *Todd v. Dunlop* (1841), 1 Robin. App. 888, H.L.

Also referred to in argument:

A.-G. to Prince of Wales v. St. Aubyn (1811), Wight. 167; 145 E.R. 1215; 11 Digest (Repl.) 674, 990.

A.-G. v. Chamberlaine (1858), 4 K. & J. 292; 70 E.R. 122; 44 Digest 69, 506.

Informations filed by the Attorney-General to establish the rights of the Crown upon the seashore in the parishes of Llanelly and Pembrey, in the county of Carmarthen.

The Solicitor-General (Sir Hugh Cairns), *W. M. James, Q.C.*, and *Hanson* for the Crown.

Roundell Palmer, Q.C., and *G. M. Gifford, Q.C.*, for the defendant Lewis.

Rasch for the defendant Rees.

LORD CHELMSFORD, L.C.—These cases arise on informations filed by the Attorney-General. The defendant Lewis is a party to both the informations, as the owner of lands in both the parishes of Llanelly and Pembrey. The defendant Rees is a party only to the information which relates to the parish of Pembrey. The prayer of each petition is the same, *mutatis mutandis*:

"That the right of Her Majesty to the seashore below high-water mark may be established and declared, and that any leases or licences to embank or build upon, or to dig or raise coal or culm [anthracite] from, the seashore may be declared null and void: that the boundary or mark to which the sea flowed at high water at ordinary high tides upon the seashore, before certain embankments and buildings were erected thereon, and also those portions of the works or mines from which coal or culm is gotten which lie under the land of Her Majesty, may be ascertained and distinguished; and that, if necessary, a commission may issue for the purpose of ascertaining and distinguishing the same."

The question then arose: What was the true boundary of the seashore, the defendants Lewis and Rees contending that the utmost limit of the Crown's right was the line of high-water mark of ordinary neap tides. For the purpose of determining this question, it was arranged, as to the defendant Lewis, that the cause should be set down on further directions, and by consent of the Lord Chancellor should be heard by him in the first instance, assisted by two common law judges. The question was accordingly argued before **LORD CRANWORTH, L.C.**, **ALDERSON, B.**, and **MAULE, J.**, and on July 15, 1854, they pronounced their judgment

"that the landward boundary of the seashore, or *litus maris*, around England and Wales, is the medium line of high water of all tides occurring in the ordinary course of nature throughout the year."

Having thus obtained a definition of the boundary of the rights of the Crown on the seashore, the next thing to be done was to ascertain and lay down the line so defined on such parts of the seashore as were adjacent to the lands of the defendants Lewis and Rees, and on the petition of the Attorney-General, by an order of the Lord Chancellor of May 1, 1857, Mr. George Parker Bidder, a civil engineer, was appointed to make the plans, and ascertain and lay down the medium line of high water directed to be made and ascertained and laid down. Mr. Bidder made his report on July 3, 1858, by which he states that he had ascertained and laid down, upon a plan annexed, so much of the shores of the rivers Bury and Lougher as was adjacent to the land of the defendant David Lewis, or his lessees in the parish of Llanelly. He continues:

"I have ascertained and laid down upon the same plan, the present medium line of high water upon those parts of those shores, of all tides occurring in the ordinary course of nature throughout the year."

Then he made a special report, saying:

"I report specially to the court that, in my judgment, the natural line of high water between [two specified] points on the said plan has been more or less

A varied by the direct or indirect operation of artificial causes; and I particularly call attention to the fact, that the present medium line of high water, as laid down upon the said plan hereto annexed, does not, in my judgment, represent the medium line as existing previous to the construction of the South Wales Railway. And further, that at [another point] the natural medium line of high water has heretofore been and still continues affected by the gradual accretion of a sand bank by the indirect operation of artificial causes; and further that the natural medium line of high water has been varied and still is continually affected by the direct operation of artificial causes at [certain] points in the harbour of Llanelly."

C Upon this report of Mr. Bidder the Crown claims to have the line of medium high tide ascertained and laid down as it would have existed at the time of filing the information but for the artificial causes to which he refers. This proposed limitation of the inquiry to the period of the filing of the information will exclude the consideration of the effects produced by the South Wales Railway mentioned in Mr. Bidder's report, which was not in existence at the time when the information was filed.

D The claim now made on the part of the Crown involves a question of novelty and of some difficulty, which may be stated in general terms to be when the well-known rule of law as to the right of land gained from the sea is applicable to a case where the alluvion or dereliction has not been the result of merely natural causes. I will take the allegations in the information which relates to Mr. Lewis's land in Llanelly. It states that certain pieces of land which are mentioned about on the seashore of the Bury river,

E "and that about thirty years ago there were erected, without any licence or consent of Her Majesty's predecessors, partly upon that piece of land which is called Penrhose Fach Farm, and partly upon the seashore in front thereof, lying within the harbour of Llanelly, extensive buildings and works, in and at which there has been and is now carried on the business of copper smelting by the former and present members of a co-partnership, in whose occupation the said buildings and works now are, and who carry on the said business under the name of Sims & Co., which said firm or co-partnership consists of the following members."

F It then mentions their names, all of whom are defendants. Then it says :

G "Subsequent to the erection of the said copper works, the said firm of Sims & Co., without the licence and consent of Her Majesty, or of Her Majesty's predecessors, raised or caused to be raised on the seashore in front of the said pieces of land called respectively, Penrhose Fach Farm, Penrhose Fawr Farm, Borth Morfa Ddu and Bryn Farm, a very extensive embankment, formed principally with the slag and rubbish produced by their copper works, and upon the said embankments the said Messrs. Sims & Co. have constructed a wharf, H coalyards, a large chimney, stock, storehouses and other buildings connected with their copper works, and also a considerable extent of railway adjoining and leading to a dock formed in or by the said embankments of slag and rubbish. That the said embankment of slag, by reason of its being carried out a considerable way into the harbour of Llanelly, and thus impeding the former run and score of the tides, has caused a considerable silting up of the parts of the I harbour which lie adjacent to it on either side, and portions of the shore of the said Bury river adjoining the land which was formerly covered by the sea at ordinary high tides have in consequence thereof become either permanently dry land, or only covered at extraordinary high tides."

It then charges that the embankment formed by Sims & Co., by throwing out slag and rubbish, was an encroachment on, and nuisance in, the port of Llanelly,

"and that, owing to the said slag embankment projecting far into said port, and the other encroachments upon said seashore, by and under the pretended

title or authority of the said defendants respectively, the sea has been prevented flowing and re-flowing over many parts of the said shore, over which it had antecedently to such encroachments flowed and re-flowed from time immemorial, and should have continued to flow and re-flow if such encroachments had not been made."

Then it charges that

"such portions of alluvial land so formed by, or gained from, the sea have not been added to the adjoining mainland by the gradual and imperceptible projection of soil or silt upon the seashore, arising from the operation of natural causes; but that the same have been produced by the works and artificial embankment raised by, and by leave and licence of, the defendants respectively."

It is charged that all

"such additions to the mainland as have been produced by or caused by illegal erections of embankments or other projections upon the seashore belong to Her Majesty, and do not belong to the owners of the adjacent lands, but belong to Her Majesty."

The defendant Lewis, by his answer, after submitting that the right of the Crown does not extend beyond high watermark of ordinary high tides, goes on:

"And does not extend to or embrace any alluvion, the same being of gradual formation, whether the same shall have been produced by natural or unknown causes, or by cuttings or embankments lawfully made, or other lawful artificial means."

Then he denies that such portions of the land so formed on the seashore as in the information was mentioned, if any such land there were, had not been added to the adjoining mainland by natural alluvion; he denies that the same, if any such there were, had been produced by the works and artificial embankments raised by, and by licence from, the defendant or the other defendants, or any of them, but whether the same land, if any such there were, had or had not been produced by such works and artificial embankments, yet, inasmuch as such works and embankments were lawfully made, and as to all or some of them under the authority of an Act of Parliament, the defendant submits that the same do not belong to Her Majesty but to the owners of the adjoining land. He further says:

"According to the best of his knowledge and belief (but he cannot answer as to his belief or otherwise, whether the other defendants to said amended information do or do not allege), the said pieces of land so formed upon the said seashore, if any such there be, have been added to the adjoining land by gradual and imperceptible projection or subsidence of soil or silt, and that the same were produced by natural causes; and that, even although such pieces of land may have been produced by the operation of artificial causes, or by embankments by cutting channels, yet the same belong to the defendants, the owners of the adjacent lands; and that such portions of alluvial land so formed by or gained from the sea, have been added to the adjoining mainland by the gradual and imperceptible projection of soil or silt upon the seashore arising from the operation of natural causes, and that the same have not been produced by the works and artificial embankments raised by, or by leave and licence of, the defendants."

I think, therefore, that the information and answer, taken together, raise the issue as to the right of the Crown to alluvion produced by artificial causes.

The fact of the line of high water having been materially raised upon parts of the shore adjoining to some part of the defendant's lands, is, I think, clearly proved by several witnesses, and may be assumed, upon the report of Mr. Bidder, to have been the result of the operation of artificial causes. These causes appear to have been partly the copper works of Sims & Co. in 1804 and 1805, and the buildings

A which were subsequently added, but principally the embankment formed by throwing slag and rubbish on the seashore by Sims & Co., by which the mainland has been raised or has silted up, and considerable portions of what was formerly seashore have been added to the mainland. This embankment appears to have extended as far as some of the land of the defendant Lewis, namely to Penrhose Farm, as stated by the witnesses Dankin and Garret, and to Bryn Farm, as shown by B David Griffith, and to have indirectly affected the line of high water upon the shore adjoining other lands belonging to him. The embankment I collect from the evidence to have been the ordinary spoil bank always produced by the regular and accustomed operations of copper works.

It will be necessary, before I consider the rights of the Crown upon the facts just stated, to clear the case of all that relates to Stradey marsh. The defendant C Lewis claims the seashore in front of this part of his property, upon the ground of uninterrupted enjoyment for sixty years. During the course of the argument I intimated a strong opinion that the acts of ownership upon which the defendant relies are quite insufficient to prove actual possession. They consist merely of turning out upon the marsh the cattle of the defendant which crossed the invisible line of boundary separating the marsh from the seashore, the cattle being allowed D thus to stray without interruption. The effect of acts of ownership must depend partly upon the acts themselves and partly upon the nature of the property upon which they are exercised. If cattle are turned upon enclosed pasture ground and placed there to feed from time to time, it is strong evidence that it is done under an assertion of right, but where the property is of a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of E protecting it, there mere user is not sufficient to establish a right, but it must be founded upon some proof of knowledge and acquiescence by a party interested in resisting it, or by perseverance in the assertion and exercise of the right claimed in the face of opposition. The defendant's rights in the seashore opposite Stradley marsh will not, therefore, be different from those which he is entitled to in respect of his other lands, and the claim of the Crown to all accretions produced by artificial causes may be considered with reference to all the defendant's lands without distinction. F

There is very little authority to guide us upon the question, which, so far as I can discover, is now raised for the first time. None of the cases cited in the course of the argument throws much light upon it. Indeed, with the exception of *R. v. Lord Yarborough* (1); *Re Hull and Selby Rail. Co.* (2), and, perhaps, G *Scratton v. Brown* (3), there is not one which bears at all upon the point of slow and insensible accretions on the seashores, whether naturally or artificially produced. In *Smart v. Dundee Magistrates* (4), which was the case of a grant of premises on the seashore described as bounded on the south by the sea flood, it was held that the grantee had no right to follow the sea or to have the land acquired from it or left by it where it had receded, but the claim of the grantee was not to follow H the sea which had receded slowly and insensibly; he insisted that, his property being described as bounded on the south by the sea flood, he was entitled both by the special terms of the grant and by the common law to take in ground from the sea by embankments and other operations of the same kind opposite to his property. *Todd v. Dunlop* (5), which was decided upon the authority of *Smart v. Dundee Magistrates* (4) was, as far as can be collected from the short statement of I the facts, not a case of gradual and imperceptible accession, but of such acquisitions of additional land by the operations of the trustees of the River Clyde. It, therefore, differed from *Scratton v. Brown* (3) where the advance of the sea had been gradual and imperceptible, the high and low water mark had varied in the same degree, and it was held that the freehold of the grantee of the shores and sea grounds shifted as the sea receded or encroached.

There is nothing, however, in any of the cases, or in the few text-writers upon the subject, which hints at the distinction now sought by the Crown to be established between effects produced by natural and by artificial causes. In order to

determine whether there is any ground for this distinction, it is essential to discover, A
if possible, the principle upon which the right to *maritima incrementa* depends.
The law is stated very succinctly by BLACKSTONE, vol. 2, p. 261, in these words :

"And as to lands gained from the sea, either by alluvion, by the washing up of
sand and earth so as in time to make *terra firma*, or by dereliction, as when the
sea shrinks back below the usual water-mark—in these cases the law is held to B
be that, if this gain be by little and little, by small and imperceptible degrees,
it shall go to the owner of the land adjoining. For *de minimus non curat lex*;
and, besides, these owners being often losers by the breaking in of the sea,
or at charges to keep it out, this possible gain is, therefore, a reciprocal con-
sideration for such possible charge or loss. But if the alluvion or dereliction
be sudden and considerable, in this case it belongs to the King, for the King C
is lord of the sea."

I am not quite satisfied that the principle *de minimus non curat lex* is the correct
explanation of the rule on this subject, because, although the additions may be
small and insignificant in their progress, yet, after a lapse of time, by little and
little, a very large increase may have taken place, which it would not be beyond D
the law to notice, and of which, if the party who has the right to it can clearly
show that it formerly belonged to him, he ought not to be deprived. I am rather
disposed to adopt the reason assigned for the rule by ALDERSON, B., in *Re Hull and
Selby Rail. Co.* (2), viz.: "That which cannot be perceived in its progress is taken
to be as if it never existed at all." As LORD ABINGER said in the same case :

"The principle as to gradual accretion is founded on the necessity which exists
for some such rule of law for the permanent protection and adjustment of E
property."

It must always be borne in mind that the owner of land does not derive benefit
alone, but may suffer loss from the operation of this rule, for if the sea gradually
steals upon the land, he loses so much of his property, which is thus silently trans-
ferred by the law to the proprietor of the seashore. If this be the true ground of F
the rule, it seems difficult to understand why similar effects, produced by a party's
lawful use of his own land, should be subject to a different law, and still more so if
these effects are the result of operations upon neighbouring lands of another pro-
prietor.

Whatever may be the nature and character of those operations, they ought not
to affect a rule which applies to a result, and not to the manner of its production.
Of course an exception must always be made of cases where the operations upon G
the party's own lands are not only calculated, but can be shown to have been
intended, to produce this gradual acquisition of the seashore, however difficult such
proof of intention may be. If, then, it had been clearly proved or admitted in this
case that the additions to the seashore in the parishes of Llanelly and Pembrey
were of gradual and imperceptible progress, so as to compel me to express my H
opinion upon the distinction taken by the Crown between accretions produced by
natural and artificial causes, I should have been prepared to repudiate the distinc-
tion and to refuse any further inquiry to ascertain the original medium line of high
water, as I consider this proceeding is closely analogous to a bill to ascertain the
boundaries, in which it is necessary for the plaintiff to establish, by the admission of
the defendant or by evidence, a clear legal title to some land in the possession of I
the defendant.

In this case, although the allegation in the information

"that the alluvial land has not been added to the adjoining mainland by the
gradual and imperceptible projection of soil and silt upon the seashore, arising
from the operation of natural causes"

is ambiguous, and may either amount to a denial of the gradual and imperceptible
nature of the accretions or of the cause by which they were produced, yet the wit-
nesses for the Crown say that the alluvial land has not been added to the mainland

A gradually and imperceptibly, but rapidly. If by the word "rapidly" the witnesses mean "perceptibly," then the Crown and not the defendant would be entitled to these accretions. But if the witnesses merely mean that at the expiration of some period of time they could perceive the changes which had taken place, although they could not discern them in their progress, then I think another important question may arise, and may call for determination—whether circumstances may

B not exist in which, though the changes were produced, yet the original limits of the Crown's right and of that of the owners of the adjoining land are now capable of being distinctly ascertained. If there is no clear line of demarcation between the mainland and the seashore by the gradual encroachment or recession of the tide, all trace of the distinction between them will be completely obliterated, and there will be full scope for the rule of alluvion to operate. But suppose that the

C separation between the mainland and the seashore is distinct, and suppose that the landholder put up a wall to prevent the encroachment of the sea upon him, and the effect of the wall is to produce a gradual and insensible accretion, which cannot be perceived from day to day, but at the end of some long period is distinctly to be seen; ought this to become the property of the landowner?

LORD TENTERDEN, in *R. v. Lord Yarborough* (1) seems to think that it ought, D for he says (3 B. & C. at pp. 106, 107):

"An accretion extremely minute, so minute as to be imperceptible, often by known antecedent marks or limits, at the end of four or five years, may become, by gradual increase, perceptible by such marks or limits at the end of a century, or even of forty or fifty years. For it is to be remembered, that if the

E limit on one side be land, or something growing or placed thereon, as a tree, a house, or a bank, the limit on the other side will be the sea, which rises to a height varying almost at every tide, and of which the variations do not depend merely upon the ordinary course of nature, at fixed and ascertained periods, but in part also upon the strength and direction of the winds, which are different almost from day to day. . . . Considering the word 'imperceptible' in this issue

F as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time."

This, however, is not in accordance with the great authority upon this subject—LORD HALE. He says, on p. 28 of his book, *DE JURE MARIS*.

G "This *jus alluvionis*, as I have before said, is *de jure communi*, by the law of England, the King's, viz., if by any marks or measures it can be known what is so gained, for if the gain be so insensible and indiscernible, by any limits or marks, that it cannot be known, *idem est non esse et non appare*, as well in maritime increases as in the increases by inland rivers."

H LORD HALE here clearly limits the law of gradual accretions to cases where the boundaries of the seashore and adjoining land are so indiscernible that it is impossible to discover the slow and gradual changes which are, from time to time, occurring; and when, at the end of a long period, it is evident that there has been a considerable gain from the shore, yet the exact amount of it, from the want of some mark of the original boundary line, cannot be determined. But where the

I limits are clear and defined, and the exact space between these limits and the new high-water line can be clearly shown, although from day to day, or even from week to week, the progress of the accretion is not discernible, why should a rule be applied which is founded upon a reason which has no existence in the particular case?

In the present state of the evidence it is impossible for me to direct any inquiry to ascertain and lay down the former line of medium tide, because it could lead to no practical result. I want information on a variety of points, which is not supplied by the evidence. With respect to the slag embankment, to which the

accretions are principally attributed, I cannot discover satisfactory proof whether it is formed on the present seashore, or upon the land occupied by Sims & Co.; whether it extends before the defendant's lands, or merely produces effects upon the line of high water opposite to them, there being some discrepancy in the evidence on this last point; whether there were originally any bounds or marks by which the seashore could be clearly distinguished from the adjoining lands; and whether the accretions which have taken place were imperceptible in their progress, or could be perceived from time to time as they were going on—upon all of which subjects the evidence is at present extremely defective and unsatisfactory. I think it will be absolutely necessary for me to direct issues to be tried for the purpose of ascertaining the following facts: (i) whether by the direct or indirect operation of the acts of the defendant, or of any other person or persons, and by what acts, the natural line of high water before the defendants' lands in the parishes of Llanelly and Pembrey has been varied; and if so, to what extent; (ii) whether the variation (if any) in the natural line of high water has been slow, gradual and imperceptible, or otherwise; (iii) whether there are, or were, any marks or bounds by which the natural line of high water can now be ascertained and laid down. Until these facts are determined, it is not in my power to dispose of the important questions which these informations involve, although I have thought it right not to withhold my opinion upon some of the questions which were raised in the course of the argument.

Order accordingly.

LORD WATERPARK v. FENNELL

[HOUSE OF LORDS (Lord Chelmsford, L.C., Lord Cranworth, Lord Wensleydale and Lord Brougham), February 21, 22, June 11, 15, July 12, 1859]

[Reported 7 H.L.Cas. 650; 33 L.T.O.S. 374; 23 J.P. 648;
5 Jur.N.S. 1135; 7 W.R. 635; 11 E.R. 259]

Evidence—Document—Parol evidence as to effect—Evidence to identify property mentioned in deed—Intention of parties—Use and enjoyment of property.

Parol evidence is generally admissible to apply the words used in a deed and to identify the property comprised in it. One cannot show that the words were intended to include a particular piece of land, but facts can be proved from which may be collected the meaning of the words used so as to include or exclude a portion of land where the words are capable of either construction: per LORD CHELMSFORD, L.C.

The construction of a deed is always for the court, but, in order to apply its provisions, evidence is admissible of all material facts existing at the time of the execution of the deed so as to place the court in the position of the grantor. The state of the subject at the time of execution may always be inquired into, and as, with respect to ancient deeds, the state of the subject at their date can seldom, if ever, be proved by direct evidence, modern usage and enjoyment for a number of years is evidence to raise a presumption that the same course was adopted from an earlier period, and so to prove contemporaneous usage and enjoyment at the date of the deed. When the evidence of all material facts is exhausted and there is still ambiguity, no parol evidence of the grantor's intentions, as distinguished from extrinsic facts, can be admissible except in the single case of there being two subjects or two objects to which the terms of the instrument are equally applicable: per LORD WENSLEYDALE:

A **Notes.** Applied: *Devonshire v. Pattinson* (1887), 20 Q.B.D. 263. Considered: *Watcham v. A.-G. for East Africa Protectorate*, [1918-19] All E.R.Rep. 455; *Re Webb, Sandom v. Webb*, [1950] 2 All E.R. 828. Referred to: *Hastings Corp'n. v. Ivan* (1874), L.R. 19 Eq. 558; *Pryor v. Petre*, [1894] 2 Ch. 11; *Van Diemen's Land Co. v. Table Cape Marine Board*, [1906] A.C. 92; *Callard v. Beeney*, [1930] 1 K.B. 353; *Johnstone v. Holdway*, [1963] 1 All E.R. 492.

B As to the admissibility of extrinsic evidence in construing documents, see 11 **HALSBURY'S LAWS** (3rd Edn.) 396 et seq.; and for cases see 17 **DIGEST** (Repl.) 309.

Cases referred to:

(1) *Weld v. Hornby* (1806), 7 East, 195; 3 Smith, K.B. 244; 103 E.R. 75; 17 **Digest** (Repl.) 337, 1428.

C (2) *Duke of Beaufort v. Swansea Corp'n.* (1849), 3 Exch. 413; 12 L.T.O.S. 453; 154 E.R. 905; 17 **Digest** (Repl.) 338, 1437.

(3) *A.-G. v. Parker* (1747), 3 Atk. 576; 1 Ves. Sen. 43; 26 E.R. 1132, L.C.; 17 **Digest** (Repl.) 337, 1427.

(4) *A.-G. v. Drummond* (1842), 1 Dr. & War. 353; 1 Con. & Law. 210; affirmed 2 H.L.Cas. 837; 14 Jur. 137; 9 E.R. 1312, H.L.; 17 **Digest** (Repl.) 338, *817.

D Also referred to in argument:

Doe d. Kingslake v. Beviss (1849), 7 C.B. 456; 18 L.J.C.P. 128; 12 L.T.O.S. 452; 137 E.R. 181; 17 **Digest** (Repl.) 50, 583.

R. v. Morris (1792), 4 Term Rep. 550.

Chad v. Tilsed (1821), 2 Brad. & Bing. 403; 5 Moore, C.P. 185; 129 E.R. 1022; 17 **Digest** (Repl.) 338, 1439.

E **Appeal** from a decision of the Court of Exchequer Chamber in Ireland in an action of trespass for breaking and entering lands of the plaintiff called Scartnaglowrane or Tincurry, in the Barony of Iffa and Offa, in the county of Tipperary, with dogs and guns, hunting and searching for game.

By the consent of the parties, an issue was directed (under the Common Law **F** Procedure Amendment (Ireland) Act, 1853, to be tried,

"whether, under the lease of Jan. 9, 1704, and the several derivative and renewal leases under which the defendant's title is acquired, the defendant is, as against the plaintiff, entitled to the right of sporting over the lands in the plaint mentioned."

G The parcels in the lease are thus described:

"All that and those the lands, tenements and hereditaments in Scatany, containing by estimation 94 acres; Gannyroane, containing by estimation 104 acres; and the village of Scartnaglowrane and part of Whitechurch and Tincurry, containing by estimation 148 acres—as fully and amply as the same was demised and granted to Sir Richard Pyne by the corporation for making hollow sword blades, now and of late in the occupation of Thomas Travers, gentleman, and his under-tenants, lying and being in the parish of Whitechurch, in the barony of Iffa and Offa, and county of Tipperary, with all the rights, members and appurtenances to the said lands and premises belonging or in anywise appertaining, excepting and always reserving mines, minerals, and all other royalties whatsoever, with liberty of ingress and egress to dig, cut, and carry away the same with horses, carriages and otherwise, with liberty of fishing, fowling, hunting and hawking, which the said Sir Richard Pyne doth hereby reserve to himself, his heirs and assigns, in and upon all and singular the premises, and also excepting always unto Thomas Travers, gentleman, and his assigns, tenants of the lands of Burgess, to Richard and John Beer, gentlemen, and their assigns, tenants of the lands of Ballyhohane, Ballygirrane and Tirbud, to Edmund Daniel, gentleman, and his assigns, tenants of the lands of Rugsagh, free liberty of commonage, and cutting of turf on the mountain of Tincurry."

I

On the trial the defendant began, and, after putting in the lease of 1704, he proved by witnesses possession of the mountain land in question by his tenants for the space of more than twenty years; that portion of it had been reclaimed, and that the tenants, who occupied this reclaimed land, had paid rent for it to the defendant and his father from the year 1826; and that the defendant and his father had sported over the lands, though from what period did not appear. It was also proved in the defendant's case that some tenants of the defendant had cut turf upon the mountain. At the close of the defendant's case, the plaintiff called upon the learned judge to withdraw the case from the jury, and to direct a verdict for him, on the ground that upon the construction of the lease of 1704 the 1,700 acres of mountain did not pass to the lessee. This, however, the judge refused to do, and the plaintiff thereupon went into evidence to show disputes between him and the defendant as to the ownership of Scartnaglowrane, and to prove instances of the defendant having been warned off, though these were carried back only a very few years, and it was not shown that the defendant went off upon being warned, but the only evidence was that he "did not and would not go off." The plaintiff's witnesses also gave a description of the village of Scartnaglowrane.

When the case was on both sides closed, the learned judge stated that before directing the jury as to what verdict they should find, which he stated it was his intention to do, he would, in order, if possible, to save further expense, take their opinion on a question of fact, whether, under the terms of the lease of Jan. 9, 1704, the 1700 statute acres of wild mountain land passed under the words "the village of Scartnaglowrane" in the lease contained. His lordship having charged them upon that question, the jury stated that they found that the 1700 statute acres of mountain did pass by the lease of January, 1704, under the words "village of Scartnaglowrane" in the lease mentioned. His Lordship thereupon being of opinion that, on the true construction of the lease of 1704, the mountain did not pass, directed the jury to find a verdict for the plaintiff. Thereupon the defendant's counsel excepted and placed upon record five exceptions to the judge's direction. These having been argued before the Court of Queen's Bench in Ireland, that court overruled all the exceptions, and gave judgment for the plaintiff. But, upon error being brought, a majority of the judges of the Court of Exchequer Chamber were of opinion that the exceptions ought to have been allowed. The judgment of the Court of Queen's Bench was, therefore, reversed, the verdict set aside, and a venire de novo awarded. Against this judgment of the Court of Exchequer Chamber the plaintiff appealed.

Sir Fitzroy Kelly, Q.C., and Prentice for the appellant.

Macdonough, Q.C., Butt, Q.C., and Hemphill for the respondent.

At the conclusion of the argument the House put to the learned judges the following question:

"Was there evidence given by the defendant for the purpose of proving that the mountain of Scartnaglowrane or Tincurry was comprehended within the terms 'village of Scartnaglowrane,' in the lease of 1701, which the judge ought to have submitted to the jury in support of the affirmative of the issue?"

The learned judges, viz., WIGHTMAN, WILLIAMS, and CROMPTON, JJ., and MARTIN, BRAMWELL and WATSON, BB., answered in the affirmative.

Their Lordships took time for consideration.

July 12, 1859. The following opinions were read.

LORD CHELMSFORD, L.C.—The exceptions raised in this case to the ruling of the learned judge seem to me to raise sufficiently the real question, which is whether there was evidence which ought to be submitted to the jury to show that the mountain of Scartnaglowrane was parcel of the premises comprised in the lease of Jan. 9, 1704, or whether the language of the lease was so clear that it required and admitted of, no explanation, and was the subject merely of judicial construction.

- A In support of the opinion of the learned judges who thought that parol evidence was inadmissible to explain the lease, it must be contended that the words used could not by possibility apply to and include the mountain land. Parol evidence is generally admissible to apply the words used in a deed and to identify the property comprised within it. You cannot indeed show that the words were intended to include a particular piece of land, but you may prove facts from which
- B you may collect the meaning of the words used so as to include or exclude a portion of land where the words are capable of either construction. The judges, therefore, who decided that there was no question of fact to be left to the jury, must have been of opinion that the language of the lease was not capable of receiving a construction which would embrace the 1,700 acres of mountain land. They must have considered that the mountain land could not pass by the words "village of Scartnaglowrane," whatever evidence of enjoyment of it by the lessee might have been produced. It appears to me that it was sufficient for the defendant, in order to enable his case to reach the jury, to show that the word "village" was not a word of such limited and confined meaning as to be incapable of comprehending a large tract of country; but the learned judge could not have withdrawn the question from them, and taken it upon himself to decide, without being of opinion
- D that the word "village" was of such precise and definite application as to exclude *ex vi termini* any such large extent of land as the mountain land in question.

I think your Lordships will be of opinion that, so far from the word "village" being a word which any one can precisely define, so as to be able at once to say what is and what is not comprehended within it, it is difficult, if not impossible, to find what was its exact meaning and extent at the time when the lease of 1704 was made.

- E That its modern popular meaning is different from its ancient signification is sufficiently apparent from the various authorities which were referred to in the course of the argument from FORTESCUE, COKE, SHEPPARD and other authors. None of the passages referred to from all these writers assists in fixing any certain meaning to the term, but they will tend to establish what is sufficient for the present purpose, that it is a word which was formerly at least of extensive signification and might have comprehended within it a district as large as the mountain of Scartnaglowrane. It is quite unnecessary to go further, because, if the word "village" was capable of this enlarged meaning, then the defendant's case ought to have been submitted to the jury, not for the purpose of then deciding on the terms of the question of fact, upon which their opinion was taken by the learned judge, whether under the terms of the lease of Jan. 9, 1704, the 1,700 statute acres of wild mountain land passed
- G under the words "the village of Scartnaglowrane," which in that form was a question for him, and not for them, but whether the defendant's evidence did not show an enjoyment of the mountain and as lessee under the lease of 1704, and as parcel of that lease.

It is unnecessary to consider the nature and effect of the defendant's evidence, and perhaps it would not be right to do so, as it must be submitted to another jury.

- H I think the learned judge ought not to have decided the case himself upon his construction of the lease, but ought to have left the evidence to the jury. Therefore, the judgment of the Court of Exchequer Chamber ought to be affirmed, and a *venire de novo* awarded.

- LORD CRANWORTH.**—Concurring, as I do, entirely in the view which has been taken of this case by my noble and learned friend, I might have satisfied myself by merely giving a silent acquiescence, but I think that would be hardly respectful to the learned judges in Ireland, who appear to have been nearly equally divided upon the point for our decision. I shall, however, make but very few observations.

The only point for our decision is whether the learned judge at the trial was right in treating the question as one entirely of law, and not at all of fact—in other words, whether he was right in treating the description of the parcels as insufficient, in point of law, to include the mountain. It is certain that, where parcels are described in old documents by words of a general nature or of doubtful import, we may—

indeed, we must—recur to usage to show what they comprehend. Where, indeed, A words have a clear and definite meaning, no evidence can be admitted to explain or control them. Thus a demise of my messuage at Dale could not by any parol evidence be shown to have been meant to describe not a messuage, but a sheet of water. The distinction is obvious. Here I agree with the opinions of the learned judges whose assistance we have had in this house, that the words of the deed were sufficient to include the mountain, and that there was some evidence (I do not speculate as to its weight), to show that, under the demise, the lessees have had the enjoyment of the mountain. The passage referred to from SHEPPARD'S TOUCHSTONE, at p. 92, is thus:

"This word 'village' or 'town' is of large extent also, and by the grant of it a manor, land, meadow and pasture land, and divers such like things may pass."

The passage shows that the word "village" is of a most comprehensive character; and though it does not refer specifically to a mountain as something which it may include, yet it makes express mention of a manor which certainly might include in it a waste mountain. If "village" might have been intended to include the mountain, is there any evidence to show that it was so intended? I think clearly there was on the face of the deed. The reservation to the lessee of the right of sporting might, perhaps, have been made with reference only to the lands under cultivation, but I can hardly understand the reservation to tenants of other lands of the right to cut turf on the mountain, if the mountain was not supposed to be included in the lease. D

It is not, however, on the evidence appearing on the face of the deed that I mainly rely. I think there is parol evidence of usage, from which it might reasonably have been inferred that under the word "village" the mountain passed. There was evidence that the defendant's father had from time to time reclaimed and brought into cultivation portions of the mountain for which he and the defendant, his son, had been receiving rent; and that their tenants alone depastured their cattle on it. This was certainly evidence to show that the defendant had a title to the mountain under the lease, the language there used being sufficient to comprise it. There is abundant evidence that the defendant and his ancestors sported over the mountain at their pleasure, and without interruption. This also, though of a more doubtful nature, ought certainly to have been submitted to the jury as affording some evidence of ownership. On these grounds, therefore, that the word "village" would, in point of law, be sufficient to include the mountain, and that there was some evidence of the exercise of ownership by the tenants over the mountain, which might be attributed to their right under the lease, I think the judge was wrong in withdrawing the case from the jury, and the Court of Exchequer Chamber was right in saying that there should be a venire de novo. E F G

LORD WENSLEYDALE.—I agree in the opinion of all the judges who have been consulted by your Lordships, that there ought to be a venire de novo, and consequently that the judgment of the Court of Exchequer Chamber in Ireland ought to be affirmed. **BRAMWELL, B.**, indeed, in the first instance intimated his opinion that upon the grammatical construction of the first clause in the use of the connective word "and," the village of Scartnaglowrane and part of Whitechurch and Tincurry were comprised in the 148 estimated acres, and if so, the mountain of Scartnaglowrane, which comprised 1,700 English acres, could not pass under the description of the village of that name. But I think it clear that the sentence is reasonably capable of the construction that the village of Scartnaglowrane was conveyed, and also part of Whitechurch and Tincurry, containing by estimation 148 acres; and if the evidence should show that the mountain of Scartnaglowrane was comprised in the term "village" as afterwards explained, the latter construction ought to be adopted. H I

In the course of the long and elaborate discussion which this case underwent in the Irish court, some observations were incidentally made which are liable to be

- A misunderstood as to the limits within which parol evidence is receivable to explain deeds, as if it could be done only in cases of doubt. Some observations were also made to the effect that what was intended by the grantor might be always submitted to the jury when parol evidence was receivable—whether parcel or not is often said, but not with strict propriety, to be a question for the jury. I apprehend that the true rule is perfectly well settled, and is fully explained in SIR JAMES WIGRAM's excellent treatise on the subject (ADMISSION OF EXTRINSIC EVIDENCE IN AID OF INTERPRETATION OF WILLS). The construction of a deed is always for the court, but in order to apply its provisions evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the court in the situation of the grantor. In deeds as well as wills the state of the subject at the time of execution may always be inquired into, and as, with respect to ancient deeds, the state of the subject at their date can seldom, if ever, be proved by direct evidence, modern usage and enjoyment for a number of years is evidence to raise a presumption that the same course was adopted from an earlier period, and so to prove contemporaneous usage and enjoyment at the date of the deed. These deeds are to be construed by evidence of the manner in which the subject has been possessed or used, as LORD COKE observes (2 Co. Inst. 282), *optimus interpres rerum usus*: *Weld v. Hornby* (1); *Duke of Beaufort v. Swansea Corpn.* (2). LORD HARDWICKE, with reference to the construction of ancient grants and deeds, says, there is no better way of construing them than by usage, and contemporanea expositio is the best way to go by. That was in *A.-G. v. Parker* (3). LORD ST. LEONARDS follows in *A.-G. v. Drummond* (4), and says one of the most settled rules of law is that you may resort to contemporaneous usage for the meaning of a deed. "Tell me what you have done under such a deed, and I will tell you what the deed means." When the evidence of all material facts is exhausted and there is still ambiguity, no parol evidence of the grantor's intentions as distinguished from extrinsic facts can be admissible, except in the single case of there being two subjects or two objects to which the terms of the instruments are equally applicable, a condition of things which does not exist in the present case.
- F The question is: What is passed under the description of the village of Scartnaglowrane, in the deed of 1704. That the word "village," in deeds of old date, might comprise land is laid down in the passage, so often repeated from the TOUCHSTONE, p. 92, where it is treated as synonymous with "town"; and the great majority of the judges, and indeed all the judges whom your Lordships have consulted, are ultimately of opinion that the word is capable of being so construed. In modern deeds such a description would not be likely to occur. There would be a full particular of the land meant to be conveyed by specifying the number of acres, or some particular description; but in ancient deeds, especially in Ireland, where it appears that small account is made of the acreage of the waste, no more than the simple description of "village" or townland may suffice. Is there then evidence of enjoyment which ought to have been submitted to the jury as proof that, at the date of the lease, the mountain of Scartnaglowrane, or Tincurry was enjoyed by the lessee. I am clearly of opinion that there is. There was evidence that the mountain of Scartnaglowrane and of Tincurry were the same mountain; that those under whom the defendant claimed sported over the mountain forty years ago, and were never stopped by anyone; that part of the mountain was reclaimed from time to time, some as early as 1836, and that the defendant's tenants had occupied and
- I paid him rent for the same; that some of it was tilled, and fell back into a wild state, and that the defendant's tenants always grazed on the mountain, and cut turf on it. This was the defendant's case. On the other side it was proved that the plaintiff had for three years paid rates and income tax for it; that he had for ten years preserved game, and prevented any person from shooting; and that the defendant was warned off, but would not go; that Lord Glengall had a deputation or licence from the plaintiff since 1846 for shooting; that the plaintiff himself was not interfered with, and that the village of Scartnaglowrane consisted of a few scattered houses.

This constituted the case on both sides, and there was certainly evidence for some thirty years of acts of ownership exercised over the mountain, the most important of which was the reclaiming parts of the waste at different times, without objection on the part of the landlord, and without any payment of rent to which he would have been entitled if the mountain was not part of the subject demised, coupled with payment of rent to the defendant from the tenants, which he was not entitled to receive unless the land was his own. The acts of pasturing and shooting over the waste were proved with some evidence to the contrary. The question for the jury arises whether all these acts of pasturing and shooting were to be considered as mere trespasses in a wild country, and the enclosures of the same nature, each of little value, made behind the landlord's back, an appropriation or a sort of stealing of land without any authority, or whether they were done in the exercise of a right claimed by the defendant, and whether the jury would presume from modern acts never properly disputed by the lessor that the lessees always, from the date of the lease, were in possession of the mountain, and had as much enjoyment of it as the nature of the case would admit. It was entirely for the consideration of the jury on the whole evidence on both sides, what character they would give to these acts. Unless the jury were satisfied that they were exercises of a right to the possession of the soil, and that the defendant and his ancestors had enjoyed it from the date of the lease, the question would be decided against the defendant, for the burden of proof lay upon him. [His LORDSHIP dealt with a question of fact which does not call for report, and concluded:] I advise your Lordships that the judgment of the Court of Exchequer Chamber in Ireland should be affirmed with costs.

LORD BROUGHAM, in concurring, said that he considered that the Court of Exchequer Chamber in Ireland rightly held that the learned judge was wrong in withdrawing the evidence from the jury, and properly directed a venire de novo. I shall, therefore, move your Lordships to give judgment for the respondent, and that a venire de novo be awarded.

Appeal dismissed.

HART v. BAXENDALE

[COURT OF EXCHEQUER CHAMBER (Patteson, Coleridge, Maule, Wightman, Cresswell, Erle, Williams and Talfourd, JJ.), February 7, 1852]

[Reported 6 Exch. 769; 21 L.J.Ex. 128; 18 L.T.O.S. 305;
16 Jur. 126; 155 E.R. 755]

Carriage of Goods—Common carrier—Loss of goods—Liability—Valuable property—No declaration of value—Delivery of property to carrier at place other than office or receiving house—Delivery to van on highway—Notice of increased charges—Carriers Act, 1830 (11 Geo. 4 and 1 Will. 4, c. 68), s. 1, s. 2.

Where a declaration under s. 1 of the Carriers Act, 1830,* of the value of property of the kinds specified in the section has not been made by the person delivering the same to a carrier for carriage the carrier is exempt from liability for the loss of the property even though the delivery of the property to him takes place, not at his office or other receiving house, but elsewhere, e.g., to a van on the highway. The carrier is not bound to give notice of his increased charges for carrying the goods before the declaration under s. 1 of the Act of 1830 is made to him. When the sender of the goods has declared their value the carrier

* See p. 574 post.

A is entitled to make a larger charge, provided that under s. 2 of the Act* he has notified the increased rates of charge by the notice on his premises prescribed by s. 2.

Notes. Considered: *Behrens v. Great Northern Rail. Co.* (1861), 6 H. & N. 366; *Robinson v. London and South Western Rail. Co.* (1865), 19 C.B.N.S. 51. Followed: *Collis v. Midland Great Western Rail. Co.* (1868), 19 L.T. 150; *Ashton v. London and North Western Rail. Co.*, [1918] 2 K.B. 488; *Rosenthal v. L.C.C.* (1924), 131 L.T. 563. Referred to: *Great Northern Rail. Co. v. Behrens* (1862), 7 H. & N. 950.

B As to the effect of the Carriers Act, 1830 (2 HALSBURY'S STATUTES (2nd Edn.) 804), see 4 HALSBURY'S LAWS (3rd Edn.) 158-163; and for cases see 8 DIGEST (Repl.) 50-58.

C Cases referred to in argument:

Batson v. Donovan (1820), 4 B. & Ald. 21; 106 E.R. 846; 8 Digest (Repl.) 44, 260.

Owen v. Burnett (1834), 2 Cr. & M. 353; 4 Tyr. 133; 3 L.J.Ex. 76; 149 E.R. 796; 8 Digest (Repl.) 51, 321.

D *Hinton v. Dibbin* (1842), 2 Q.B. 646; 2 Gal. & Dav. 36; 11 L.J.Q.B. 113; 6 Jur. 601; 114 E.R. 253; 8 Digest (Repl.) 51, 318.

Johnson v. Midland Rail. Co. (1849), 4 Exch. 367; 6 Ry. & Can. Cas. 61; 18 L.J.Ex. 366; 18 L.T.O.S. 305; 154 E.R. 1254; 8 Digest (Repl.) 13, 58.

Walker v. Jackson (1842), 10 M. & W. 161; 12 L.J.Ex. 165; 11 L.J.Ex. 346; 152 E.R. 424; 8 Digest (Repl.) 24, 140.

E **Appeal** from a decision of the Court of Exchequer in an action in which the plaintiff claimed from the defendant, a common carrier, damages for the loss of goods entrusted to the defendant for carriage which, the plaintiff alleged, was due to the negligence of the defendant.

F The defendant was a common carrier by land for hire, and carried on his business under the style or firm of Pickford & Co., at an office in Regent Street, London, and at other offices in England and Wales. The defendant notified, according to the Carriers Act, 1830, s. 2, by a notice affixed in legible characters in a public and conspicuous part of every one of the offices, the increased rate of charge required by him to be paid, over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such articles of value as in the statute and notice mentioned. According to the course of the defendant's business as a common carrier, he was in the habit of receiving such packages and parcels as in the Act of Parliament mentioned, and other parcels, at the office in Regent Street, and at his other places of business, to be conveyed by him as common carrier to the places to which he carried, among others to the station of the North-Western Rail. Co., at Camden Town, London.

H On July 31, 1849, the plaintiff sent to the office of the defendant in Regent Street, and requested the clerk who conducted the defendant's business for him there to send to the plaintiff's place of business in Regent Street for certain goods to be carried thence by the defendant in the way of his business to the station of the North-Western Rail. Co. Next day, in consequence of that message, the defendant sent his servant with a cart to the plaintiff's place of business to receive and carry the package, and the plaintiff delivered to the servant a case containing articles of value exceeding £10. The value and nature of the articles was not declared by the plaintiff, or by any person, to the defendant or to his clerk or servant, and no increased charge was paid, nor was any engagement to pay the same given or offered to the defendant or to his clerk or servant in respect of the package or the articles contained therein. The servant, with the cart, called at different offices of the defendant for parcels to carry to various places, and then drove to the defendant's

*See p. 574, post.

office in Regent Street. While the cart was there waiting for more packages and parcels to be carried to the station, the plaintiff's package was lost by theft, and, consequently, not delivered at the station. A

At the trial of the action before POLLOCK, C.B., the learned judge was of opinion that the defendant was within the protection of the Carriers Act, 1830, s. 1, and he directed the jury to find for the defendant, reserving leave for the plaintiff to move to enter a verdict for him. B

The plaintiff obtained a rule nisi accordingly, and the matter came before the Court of Exchequer on Nov. 2, 1850, and Jan. 16 and 18 and April 29, 1851.

By the Carriers Act, 1830 :

"Section 1. No mail contractor, stagecoach proprietor, or other common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following : (that is to say) : gold or silver coin of this realm or of any foreign State, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china [silks in a manufactured or unmanufactured state and whether wrought up or not wrought up with other materials], furs, or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stagecoach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of £10, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, stagecoach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package. C

"Section 2. When any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of £10, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers, to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge." D

Peacock and Willes showed cause against the rule. E

Montagu Chambers, Bramwell and *C. Pollock* supported the rule. F

PARKE, B., in giving the judgment of the court, said that the learned judges were all of opinion (with the exception of POLLOCK, C.B., who retained the opinion which he expressed at the trial) that the rule should be made absolute to enter a verdict for the plaintiff in respect of all the property lost, on the ground that the Carriers Act, 1830, did not exempt carriers from responsibility for the loss of silk, trinkets, etc., delivered to them at any other place than their office, ware- G

A house, or receiving-house, where a notice under s. 2 of the Act was affixed. The goods in the present case having been delivered to the defendant's servant in a cart at the plaintiff's house without any special contract, the defendant was responsible as a carrier at common law. The statute, having in the preamble recited the difficulty of proving actual notice, pointed out (by s. 2) to what persons the notice should be restricted, those were persons who delivered goods at the office where the notice was affixed, and they were expressly declared to be bound by it without further proof. But those who delivered goods, not at the office, but elsewhere, were in no part of the Act declared to be bound by the notice, and it could never have been intended to exempt carriers from liability to persons who delivered goods to them without receiving any notice, actual or constructive, to limit their responsibility.

C The defendant appealed to the Court of Exchequer Chamber.

Feb. 7, 1852. *Willes* (*Phipson* with him) for the defendant.

Bramwell (*C. Pollock* with him) for the plaintiff.

D **PATTESON, J.**—We are all of opinion that the judgment of the Court of Exchequer is not correct, and, therefore, there must be a *venire de novo*. We have come to that conclusion after an attentive consideration of the Act of Parliament and of the judgment of the Court of Exchequer.

The first section has a plain and obvious meaning. The recital clearly shows that one object of the Act was to provide for the giving notice by persons sending parcels of a particular description. The section then proceeds to enact that the carrier shall not be liable for the loss of certain enumerated articles—it does not say “when any notice shall have been given by him,” but

“unless at the time of the delivery [of the goods at the office of the carrier] the value and nature . . . of the property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.”

F These latter are the only words which afford any ground for saying that a carrier is bound to give some notice of some kind before he is entitled to have the value and nature of the package stated to him by the person delivering it. It was argued that all the other clauses are incorporated with the first. We think that is not so. The meaning of the legislature is that all persons sending goods of a particular description and value, whenever they deliver them to the carrier, are bound to give information of the nature and value of the articles. That is the first clause, and the object of the legislature was that such information should be given, whether the goods were delivered at the office of the carrier, or at the sender's house, or on the road, or elsewhere; and clauses follow with certain provisions as to what is then to be done. Although the value and nature of the articles may be declared, it does not necessarily follow that the carrier would be protected, but a different clause must be acted on before his liability ceases.

G However, the first step to be taken is that the sender of the goods notify their value; then it is that the carrier is entitled to have a larger charge. He cannot have that larger charge, or save himself from responsibility, by saying: “I will have such and such a sum of money,” but he must have a tariff stuck up in his office, to notify to all persons sending articles of that kind what he proposes to demand beyond the usual charge. The notice required by s. 2 to be affixed in the office is not a notice that the carrier means to avail himself of the benefit of the Act, and that all persons who send articles of a particular description and value shall tell him that they are of that description and value—for the statute requires that in the first instance—but it is only a notice of what the extra charge is to be. This construction reconciles all the provisions of the Act.

H Counsel for the plaintiff argued that the latter part of s. 2, which says that all persons who deliver at the office shall be bound by the notice there stuck up

without further proof of the same, is at variance with this view. He contended, that no person can be in the condition of not being able to maintain an action against a carrier for the loss of goods, although their value has not been declared, unless that notice has been affixed, and there has been a delivery at the office. Such a construction would vitiate the primary object of the legislature. In truth, the real question here is: Who is to take the first step? We think that the Act requires the person who sends the goods to take the first step by giving that information which he alone can give; then the carrier may charge an additional price, but he can only charge the price notified in his office, and he is bound, if required, to give a receipt when the money is paid. All that follows the first step which is to be taken by the sender of the goods; the carrier is not liable unless the declaration be made, and it must be made in all cases, whether the goods are delivered at the office or elsewhere. The declaration, when made, will lead to the consequences that, if the extra charge be paid and the goods lost, the carrier will be liable, or, on the other hand, if he refuses to give a receipt, he will lose the benefit of the statute. But in no case can the sender recover unless he has taken the step which the legislature intended he should take in the first instance. Therefore, we think that the decision appealed from was wrong and there must be a *venire de novo*.

Venire de novo.

JOHNSTONE AND OTHERS v. BEATTIE

[House of Lords (Lord Lyndhurst, L.C., Lord Brougham, Lord Cottenham, Lord Campbell and Lord Langdale), March 27, 28, April 3, May 26, 1843]

[Reported 10 Cl. & Fin. 42; 1 L.T.O.S. 250; 7 Jur. 1023;
8 E.R. 657]

Infant—Guardian—Appointment by court—Infant domiciled abroad—Temporary residence in England—Property in foreign country—Guardians appointed in foreign country by will of infant's father.

The Court of Chancery, on the application of the next-of-kin of an infant whose parents are dead, has jurisdiction to appoint a guardian of the infant although the infant is domiciled abroad and is only temporarily resident in England, his whole property is situated in a foreign country, and guardians of the infant have been appointed in the foreign country by the will of the deceased father of the infant, in any case in which it appears that it is for the interest and benefit of the infant that there shall be appointed by the court a guardian who is within the jurisdiction of the court and subject to the court. Guardians appointed abroad under foreign law have no rights, as such, in England so as to be considered as entitled to the legal custody of an infant during his residence in England, but in a proper case the court has power to appoint foreign guardians to act conjointly with a guardian or guardians who reside in England.

So held by LORD LYNDHURST, L.C., LORD COTTENHAM and LORD LANGDALE, LORD BROUGHAM and LORD CAMPBELL dissenting.

Notes. Explained: *Hope v. Hope* (1854), 19 Beav. 237; *Scott v. Bentley* (1855), 1 K. & J. 281. Considered: *Re Tweedale's Settlement* (1859), John. 109. Applied: *Re D.*, [1943] 2 All E.R. 411. Considered: *McKee v. McKee*, [1951] 1 All E.R. 942. Referred to: *Lockwood v. Fenton* (1852), 1 Sm. & G. 73; *Re Dawson, Dawson*

- A v. *Jay* (1854), 2 W.R. 311; *Scott v. Bentley* (1855), 1 K. & J. 281; *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34; *Didisheim v. London and Westminster Bank*, [1900] 2 Ch. 15.

As to the appointment of guardians by the court, see 21 HALSBURY'S LAWS (3rd Edn.) 208-210; and for cases see 28 DIGEST (Repl.) 655-661.

B Cases referred to :

- (1) *Hunter v. Potts* (1791), 4 Term Rep. 182; 100 E.R. 962; 5 Digest (Repl.) 870, 7308.
 (2) *Morrison v. Earl of Sutherland* (1749), cited in 1 Hy. Bl. at p. 672; 6 Bro.P.C. 570.

C

- (3) *De Manneville v. De Manneville* (1804), 10 Ves. 52; 32 E.R. 762, L.C.; 28 Digest (Repl.) 711, 2195.

- (4) *Mountstuart v. Mountstuart* (1801), 6 Ves. 363; 31 E.R. 1095, L.C.; 28 Digest (Repl.) 709, 2175.

- (5) *Butler v. Freeman* (1756), Amb. 301; 27 E.R. 204, L.C.; 28 Digest (Repl.) 714, 2238.

- (6) *Wilcox v. Drake* (1784), 2 Dick. 631; 21 E.R. 416, L.C.; 28 Digest (Repl.) 622, 1253.

D

- (7) *Smith v. Bate* (1784), 2 Dick. 631; 21 E.R. 416, L.C.; 28 Digest (Repl.) 653, 1476.

- (8) *Campbell v. Campbell*, cited in 10 Cl. & Fin. at pp. 107 and 136.

- (9) *Ex parte Watkins* (1752), 2 Ves. Sen. 470; 28 E.R. 301, L.C.; 28 Digest (Repl.) 661, 1580.

E

- (10) *Re Houstoun* (1826), 1 Russ. 312; 38 E.R. 121; 33 Digest (Repl.) 626, 517.

- (11) *Ex parte Lewis* (1749), 1 Ves. Sen. 298.

- (12) *Logan v. Fairlee* (1821), Jac. 193; 37 E.R. 822, L.C.; 28 Digest (Repl.) 660, 1574.

- (13) *Re Shields, Ex parte Ord* (1821), Jac. 94; 37 E.R. 786, L.C.; 33 Digest (Repl.) 632, 680.

F

- (14) *Wellesley v. Duke of Beaufort* (1827), 2 Russ. 1, L.C.; affirmed sub nom. *Wellesley v. Wellesley* (1828), 2 Bli.N.S. 124; 1 Dow. & Cl. 152; 4 E.R. 1078, H.L.; 28 Digest (Repl.) 620, 1239.

- (15) *Salles v. Savignon* (1801), 6 Ves. 572; 31 E.R. 1201, L.C.; 28 Digest (Repl.) 714, 2239.

- (16) *Stephens v. James* (1833), 1 My. & K. 627; 39 E.R. 818, L.C.; 28 Digest (Repl.) 570, 851.

G

- (17) *Pottinger v. Wightman* (1817), 3 Mer. 67; 36 E.R. 26; 11 Digest (Repl.) 354, 236.

- (18) *Ex parte Becher* (1783), 1 Bro.C.C. 556.

Also referred to in argument :

- H *Sylva v. Da Costa* (1803), 8 Ves. 316.

- Anstruther v. Adair* (1834), 2 My. & K. 513; 39 E.R. 1040, L.C.; 11 Digest (Repl.) 494, 1158.

- Sawer v. Shute* (1792), 1 Anst. 63; 145 E.R. 801; 11 Digest (Repl.) 490, 1126.

- Dues v. Smith* (1822), Jac. 544.

- Talleyrand v. Boulanger* (1797), 3 Ves. 447; 30 E.R. 1099, L.C.; 11 Digest (Repl.) 539, 1489.

I

- Blad v. Bamfield* (1674), 3 Swan. 604; 36 E.R. 992; sub nom. *Badtolph v. Bamfield*, Cas. temp. Finch, 186; 11 Digest (Repl.) 453, 894.

- Bruce v. Bruce* (1790), 2 Bos. & P. 229; 6 Bro. Parl. Cas. 566; 2 Coop. temp. Cott. 510; 126 E.R. 1251, H.L.; 11 Digest (Repl.) 359, 272.

- Warrender v. Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli.N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, 250.

- Doe d. Birtwhistle v. Vardill* (1835), 2 Cl. & Fin. 571; 9 Bli.N.S. 32; 6 E.R. 1270; 3 Digest (Repl.) 424, 204.

Munro v. Munro (1840), 7 Cl. & Fin. 842; 7 E.R. 1288, H.L.; 11 Digest (Repl.) 349, 172. A

In the Goods of Sartoris (1838), 1 Curt. 910; 163 E.R. 315; 23 Digest (Repl.) 200, 2349.

Appeal from an order of LORD COTTENHAM, L.C., dated April 17, 1841, whereby it was ordered, that an order of Mar. 19, 1841, made on the petition of the appellants should be discharged, except so far as the same discharged an order of Jan. 6 then last, made on the petition of the respondent, and that it should be referred to the master to approve of a proper person or persons to be appointed the guardian or guardians of the infant, Mary Stewart Beattie, and that the master should inquire and state to the court the infant's age, what relations she had, and the nature and amount of her fortune, and also on what evidence or ground he approved of any particular person or persons to be such guardian or guardians; and that he should also consider of a scheme for the residence of the infant, and what would be proper to be allowed for her maintenance and education, to commence from Dec. 21, 1840, the time of the death of Christina Beattie, the mother of the infant, and for the time to come, during her minority, and to state out of what funds such allowance ought to be paid; and that, after the master should have made his report, such further order should be made as should be just. B C D

Turner and Romilly for the appellants.

Sir William Webb Follett, Q.C., and *Spencer Follett* for the respondent.

Their Lordships took time for consideration.

May 26, 1843. The following opinions were delivered : E

LORD LYNDHURST, L.C.—In this case a bill was filed in the name of an infant, Mary Stewart Beattie, by her next friend, her grandfather, Duncan Stewart, against the defendants, alleging that the defendants were in possession of certain rents and profits, the produce of the estates of the infant, to a very large amount, and praying that they might account in the Court of Chancery for the sums which they had so received. It prayed also that a maintenance might be appointed for the infant, and that the estates and her person might be placed under the protection of the court. This was the scope and object of the bill. According to the uniform course of the Court of Chancery, which I understand to have always been the law of that court, upon the institution of this suit the infant plaintiff became a ward of the court, and, that being so, it was the duty of the court to provide for her care and protection. As the court cannot personally superintend its infant ward, it appoints a guardian, who is an officer of the court, for the purpose of doing that which the court cannot do itself personally. If there be a parent or a testamentary guardian within the jurisdiction of the court, the court, in that case, does not appoint a person to take care of the person of the infant, but the parent or testamentary guardian is subject to the orders and control of the court precisely in the same way as an officer appointed by its authority for the purpose of discharging the duties in question. This appointment is not made without previous inquiry and consideration. The court directs the master to inquire who are the proper persons to be entrusted with the care of the infant; and, as the custody and care may endure for some time, it is necessary that some inquiry should be made for the purpose of determining how that care should be exercised. An inquiry is made as to the property of the infant, and as to what is proper to be allowed for his maintenance, and also as to the manner in which his education shall be conducted. All these are the preliminary inquiries as to the matters of fact for the information of the court; and when the master has made his report, the report is taken into consideration by the court, and the court acts upon it according to its judgment. It does not necessarily adopt the suggestion of the master, but it uses the materials which are found by the master as the ground upon which the judgment proceeds. F G H I

The order which is complained of is merely an order of this description. LORD COTTENHAM, L.C., has directed the master to inquire who are proper persons to be

- A appointed as guardians of the infant, or, in other words, to approve of persons to be guardians, and to inquire what will be a proper maintenance for the infant, what her property consists of, and what scheme of education should be adopted. I apprehend, therefore, that the order is according to the common rule of the court, and I do not precisely understand the grounds upon which it is objected to. One objection is that, the young lady being a Scottish child, tutors and curators have
- B been appointed in Scotland by the will of the father. The father is dead, and the mother also is dead, but the child is here in England. The tutors and curators are domiciled and living in Scotland, out of the jurisdiction of the court, which can exercise no control over them. It cannot make them accountable for any misconduct in the management of the infant; and I apprehend that in all cases the court requires that there shall be a guardian appointed within the jurisdiction of the court,
- C responsible to the court, and subject to its authority. If there be a parent or a testamentary guardian residing out of the jurisdiction, the court interferes, and appoints a guardian within the jurisdiction, because it must have some person to look to, someone who is the representative of the court, on the spot, and responsible to it, who shall have the care and management of the infant. The tutors and curators domiciled in Scotland have no authority in this country. They cannot
- D control the infant. If the infant chooses to take the protection of any improper person, the tutors and curators have no power to interfere, except through the medium of the Court of Chancery. A guardian may be appointed by the authority of that court; and if a complaint is made to the Court of Chancery by the tutors and the curators, the Court of Chancery will set it right through the medium of the officer whom the court has appointed. If it is thought desirable that the child
- E should go to Scotland to reside, the tutors and curators have no power to take the child there unless the court, having appointed a guardian, thinks fit, for the benefit of the child, to direct the guardian to hand the child over to them to be carried to Scotland for education or for any other purpose.

- It seems to have been assumed in this argument, that, because the guardians are appointed by the Court of Chancery, it has, therefore, by this order decided, that she
- F is to be educated, and have her maintenance given in England, and is to continue here up to the time of her attaining the age of twenty-one. But no such consequence follows. The court may, at any time, direct her to be taken to Scotland to be educated there, if it considers that it will be for her benefit. The order does not go to the extent of saying, that there is to be no change in the residence of the child. It is subject entirely to the control, order, and discretion of the Lord Chancellor for the time being. It is supposed also that the tutors and curators appointed
- G in Scotland are not to be the guardians, or not to be among the guardians, of the child. All that the court requires is that there shall be some person within the jurisdiction, and responsible to the court, performing the duties of guardian. There is nothing inconsistent in this order with the Lord Chancellor ultimately appointing the tutors and curators who reside in Scotland as guardians, conjointly with any
- H other persons who are residing in this country.

- This, therefore, appears to me to be an order in the common course. But, it is said, that, from this order it will follow, that any child of foreign or Scottish parents, brought to England for the purpose of education, may be made a ward of Chancery, and impounded at once in this country. Undoubtedly there may be cases of that description. Cases may be supposed where the Court of Chancery, under such
- I circumstances, ought to interfere. Then it is said that fictitious cases may be set up, and that a bill may be filed expressly for that purpose by some concert or contrivance. The authority of the court may, of course, be subject to be abused in this instance as in every other instance, but the court will vindicate its own authority, and will not suffer itself to be abused, and I know no case in which it has been suggested, that, in this direction, any abuse has been committed of the authority of the Court of Chancery. Suppose a bill, obviously fictitious, were to be filed, the court would afford an instant remedy. The bill might be referred to the master for the purpose of determining whether it was for the benefit of the

infant that the suit should be prosecuted; and if the master should report in the negative, there would be an end of the suit, and the costs would fall upon the party who had so improperly instituted it; and, as a suit can only be instituted through the medium of a solicitor, the court would visit the solicitor in a further and much more exemplary manner. It does not appear to me, therefore, that the objection, that the authority may be abused, is any valid objection in a case of this description.

It is further suggested that this bill is filed solely for the purpose of making the infant a ward of the Court of Chancery. It may be so. It often happens that bills are filed solely for such purposes, and it may be a very important object, in which the interest of the infant is deeply concerned. Whether this bill is of this description or not, is wholly immaterial. It states facts which bring the case within the jurisdiction of the court. The defendants, who are in Scotland, have appeared to this bill, but they have not put in their answer, and the cause is not at issue. We cannot decide the merits of the cause in this stage of it. Such a course of proceeding was never heard of in the Court of Chancery. The cause is depending, and must be decided like every other cause. We cannot anticipate the result; but till the result takes place the child is a ward of the Court of Chancery. No person can interfere where a child is a ward of the Court of Chancery without calling down upon himself the process of the court. The appointment of guardians in this respect makes no difference. Whether there be guardians or not, the child is under the immediate control and in the custody of the Court of Chancery. The guardian is only appointed as an officer of the court, as the mode by which the jurisdiction and authority of the court is to be exercised. It may happen, indeed, in the result, that this bill may be dismissed; the next friend may have to pay all the costs, and the court may direct the infant to be handed over to the tutors and curators in Scotland, but, until the cause is decided, the child is absolutely a ward of court, and cannot be taken out of its jurisdiction. The appointment of a guardian makes no difference, except as the medium through which the jurisdiction of the court is exercised; because it is better that the court should prevent violence and misconduct, than that it should be afterwards called upon to investigate a charge of violence and misconduct for the purpose of affording a remedy. For these reasons, therefore, I humbly move your Lordships that this order be affirmed.

LORD BROUGHAM.—The appointment of guardians to infants who are unprotected appears to arise in all countries from the necessity of the case; and it would be difficult to point out any other particular in which the jurisprudence of all countries agrees more generally than in the existence of such a power usually confided by the sovereign to the courts of the realm. The nature of the appointment seems personal, as the object of it is the infant's personal protection. But there is incident to the office, also, the care of the infant's property; and in some systems of law, as that of Rome and of the countries which adopted the civil law, a distinction is made between the care of the property and that of the person, curators being given to the former, tutors to the latter.

It is very material to the present question, that we should mark the provisions of the Scottish law on this head, Scotland being beyond all reasonable doubt the domicile of the infant in this case, as it is admitted to have been the place of her birth and the place where all her property is situated. By the law of Scotland, the father may appoint a guardian to act after his decease. In default of such appointment, or of the appointed guardian accepting the office, the right of the guardianship by law devolves upon the next-of-kin, called the nearest agnate; a year, *annus deliberandi*, is given this relation to determine whether or not he will accept the office, called that of tutor legitim, or of law. In case he declines, a guardian is appointed by the Court of Session, called tutor dative. But so much is the will of the parent and the legal right of the agnate regarded, that if either the tutor testamentary or the tutor of law at any time shall elect to act, the powers and appointment of the tutor dative at once cease. The necessity of extraordinary protection to unprotected

A infants leaves no doubt of the power in the sovereign, or those to whom he has delegated it, to appoint a guardian whensoever an infant comes before him or them and requires protection.

The jurisdiction of the Court of Chancery in the present case is indisputable. The court always and in every case has the jurisdiction, but it is not in every case a matter of course that it should be exercised. On the contrary, its exercise is discretionary, and in many cases would be a plain miscarriage of the court, requiring correction by the court of appellate jurisdiction. The first question that arises in considering this matter is the degree in which the protection is wanted and the infant left unprotected, because this may be said to be the ground of the jurisdiction, but most emphatically it is the thing that calls for and thus justifies the exercise of it. As there are guardians in this case appointed by the *lex domicilii*, this leads me to consider what are the powers of a guardian beyond the territory in which he is appointed, and to which the infant belongs. Most of the authorities in the general law of Europe seem agreed that the guardian validly appointed in any given country has an authority for the protection of the ward and the administration of his personal estate everywhere *ex comitate*; and the manifest convenience of this *comitas*, as well as the evident consideration that the appointment is eminently of a personal nature, appears to justify this position. The guardian is a substitute for the parent, and the artificial relation, resembling the natural, from which it flows, ought surely to follow the same analogies, and to extend everywhere with the person. Where the choice of guardian is made either by the natural parent in exercise of his parental power, or power common to all nations, or by the substitution of the next-of-kin in default of such appointment, or by the authority of the supreme court to which the parent and infant alike owe allegiance, and which has the sole disposal of the infant's property, then surely nothing can be alleged to show that this choice should not be respected in every country in which the infant may accidentally be found for a temporary residence. There is no difference between the systems of the two countries, no peculiarity in that of Scotland, except that which makes the application of an English jurisdiction much more intolerable, because the law of the infant's domicile gives a great preference to the guardians of blood and kindred, and confines the authority of the court within very narrow limits.

The only exception to the natural authority which rests upon principle is that of the real estate. It seems reasonable enough that the power of the foreign-appointed guardian should be confined to the personalty of the infant in order to exclude his interference with the immoveable property, which is more primarily subject to the *lex loci* than the moveable, which has no *situs*, but follows the person of the owner. The authority of all, or nearly all, jurists follows these principles. VARTTEL (Bk. 2, ch. 7, s. 85) lays it down generally that the guardian appointed by the judges of the domicile is guardian wherever the pupil may have any concerns. HERRIUS says (1 Opera de Colli. Leg., s. 4, n. 8), "*Tutor datus in loco domicilii etiam bona alibi sita administrat*," but he confines this to personalty. It is to be observed, that his dictum excludes all necessity of confirmation or new appointment by the foreign courts, wherein the guardian is to sue or to be sued. MATTHEUS (DE AUCTIONIBUS, lib. 1, chap. 7, n. 10) confines the power also to personalty, though others, as STOCKMANS, make it general. BOULLENOIS (4 Obs. 51) is equally strong to this effect; and MERLIN (Repertoire, 414) expressly says that a guardian sues for debts due to his ward abroad, without any confirmation whatever of his title. Even those who have been cited on the other side, as P. VOET and J. VOET, are, in so far as personal property is concerned, only apparently at variance with the authorities, because they hold all such property to belong to the country of the infant's domicile. One thing at least is clear, that none of those jurists, not even STORY, who quotes the American laws as not recognising the authority in one State of the guardians named in another, has ever thought of contending that the foreign guardian cannot exercise the personal superintendence of his ward; still less do they ever contemplate the possibility of any court appointing guardians for a foreign infant. We may add the authority of what was held in the case of a

bankrupt's assignee, in *Hunter v. Potts* (1), by the Court of King's Bench; and in *Morrison v. Earl of Sutherland* (2), by this House in the instance of a lunatic's committee, in both of which cases the legally appointed curator in one country was held entitled to act in another. A

Can it be doubted that these principles, although not sufficient to exclude the jurisdiction of the courts in any given country, would be abundantly sufficient to restrain its exercise; in other words, that they would prescribe to the court in which the infant's protection, either as to person or property, came in question, the propriety of limiting its inquiry in the first instance to the question whether the infant was unprotected or had a guardian already appointed validly by the courts, or according to the law, of the country to which she belonged and in which her property was situated? If it were found in the result of this inquiry, that the infant had such guardians, would it not follow that to them the court should leave the matter, or at the most should only appoint them, or rather confirm their appointment, in order to remove any shadow of doubt respecting their title to act, though even to that interposition there would be a serious objection, as we shall presently see? Such I humbly conceive to be the course which the Court of Chancery, in the present instance, ought to have taken; and, the court not having taken it, I hold that there has been a miscarriage, which this court is required to correct. For, observe, how manifest is the convenience of such a course. The authority of the guardian appointed here may not be wholly nominal and nugatory, but it is, at least, exceedingly imperfect. The person he may dispose of, the property he cannot touch. Observe the absurdity of calling upon him to account here, when he cannot, by any possibility, have any money passing through his hands; he can only receive a shilling of the ward's estate by the good pleasure of the Scottish guardians, who are wholly and irremediably beyond the court's jurisdiction. Again, mark the consequences of there being an English guardian, under the authority of the court here. He cannot remove the ward out of the court's jurisdiction, although that ward is only here accidentally; she may have been brought here for her education—she must remain here till she attains majority. The penalty of resorting to our schools is her banishment forth of Scotland—the punishment she would have undergone for theft in her own country. B C D E F

The court has no choice in this matter. Discretion it does possess as to appointing a guardian and bringing the ward within the scope of its jurisdiction, but once there, it cannot suffer her to escape: *De Manneville v. De Manneville* (3); *Mountstuart v. Mountstuart* (4). It would not make the least difference upon the argument, if it were made to appear that the court might possibly, in the present day, relax the rigour of this rule, because, if the law contended for be good for anything, it was the law also when those cases were decided, that is, in 1801 and 1808, and, therefore, it is subject to all the objections which thence can arise. Nor does it materially alter the argument I am urging if we admit that on an application to the court the infant would be allowed to go to Scotland, for it is a serious grievance to any of the Queen's subjects to be prevented from going home without application to a court of equity, nor is it any answer to the inference drawn from them that the court may hereafter be applied to for a new order, allowing the ward to be removed to her own country, or for handing her over to her Scottish guardians, because the question, and the only question now before us, is the order made, and actually subsisting. G H

Let it be remembered, that it is an order extending over the whole period of the infant's minority. The guardians are appointed until she is twenty-one years of age. If this decision be affirmed, what parent can safely send or bring his children to England for any purpose, whether of education or health? He does so at the risk of their never returning to Scotland until they shall have completed their age of twenty-one years. The error which seems to me to have pervaded this argument arises from the undoubted position that the mere filing of the bill, in which any infant is concerned, makes that infant a ward of court, and that the naming a guardian is of course, because the court's powers are exercised through a I

- A guardian. But this only shows that incidental, and necessarily incidental, to a suit respecting the property or other rights of any infant, is the constitution of the wardship, and consequent appointment of the guardian. Why is this such an incidental? Because the infant must be represented and protected in the matter brought before the court. But here let it be carefully kept in mind, there is no such suit; no *lis pendens* incident to which is the wardship and guardianship.
- B The object, and the sole object, of the suit is to have a guardian appointed. Here there are guardians enough already in Scotland willing to act, and much more able to act than any the court can name, because they can be both curators and tutors, both manage the property and protect the person. But these are disregarded, in order that others may be named with half the authority, and may prevent the ward from returning home.
- C LORD HARDWICKE, in *Butler v. Freeman* (5), after showing that the court's jurisdiction is determined solely from the *patria potestas*, delegated by the Crown with the Great Seal, says:

"The court will even protect an infant against its parents, and a fortiori interferes, though there be a guardian appointed."

- D In other cases we have actual examples of such interference, as in *Wilcox v. Drake* (6), where the father's insolvency, and in *Smith v. Bate* (7), where the guardian's insolvency, were held sufficient grounds for interference to protect the infant. But LORD HARDWICKE defines the limits within which this power shall be exercised, in strict accordance with my argument. He says (*Amb. at p. 303*):
- E "I own that there must be grounds to bring this matter properly before the court; and therefore, if the father be living, and no suit instituted here, they cannot act summarily. There must be a suit pending, relative to the infant or his estate, to entitle the court to this jurisdiction."

The suit there was relative to an estate, and the bill prayed directions for its management. But there would be an end at once to this qualification, if, instead

- F of a suit pending, there was only a bill praying the appointment of a guardian; for, the only ground of the jurisdiction, or, at least, its exercise, being the suit, and the application for a guardian being in vain, according to LORD HARDWICKE, without such suit, the judgment below assumes the very application itself to be suit sufficient, none other being pending. The allegation in the bill, of property in England, makes no difference in the case: besides, it is positively denied, and
- G not re-affirmed. Such an allegation could always be made, and, if sufficient, the appointment of a guardian would be quite a matter of course. If the argument I have held is of any avail, assuredly it cannot be defeated in this manner by a naked and gratuitous suggestion.

I am, therefore, of opinion that there has been a miscarriage in this case, and that this House is called upon to reverse the erroneous order. That the Great

- H Seal had jurisdiction over the question, and was called upon to entertain it up to a certain point, is quite manifest, because on an allegation, whether by bill or by petition, that the infant, being within the jurisdiction, was not protected, there was a necessity for entertaining the complaint, so far at least as to inquire into the state of the facts and to ascertain whether or not the law and the courts of the infant's domicile had not sufficiently provided for the guardianship. As in this
- I case guardians have been appointed in the country of the infant's domicile, the Great Seal ought, in my humble judgment, to withdraw and leave the guardian of the domicile in possession of the ward. If it be said that the Scottish guardian is out of the jurisdiction and that mischief might have arisen to the ward without a remedy, or that the good intentions of the court might be defeated by leaving the custody to persons over whom it has no control, the answer is obvious, and it is satisfactory. The property, at all events, must be left so unprotected in every respect whatever. Over that the court can have no control. But the Scottish guardians, who have the care of it, may also extend their care to the person,

though in England. Nor will they be unaccountable in performing that office; they are accountable to the Scottish court, and they will be compelled by that court to do their duty, and visited with punishment for neglecting it, as well touching the person as touching the property. The same law and the same judicature to which we must of absolute necessity leave the whole care of the property, may well be left to take care also of the person, and to dispose of all the questions that may arise in connection with that case.

LORD COTTENHAM.—But for the difference of opinion which I was aware existed upon this subject among the members of your Lordships' House, I certainly should have thought it a case which was purely of course, and this an order which is consistent with every day's practice in the Court of Chancery, to the pronouncing of which I never in my experience have known any exception. But knowing that this did not strike the noble and learned Lords in the same light, I have thought it my duty to review the whole of these proceedings from the commencement, and to see whether there is anything in what has been stated which should induce me to alter the opinion I formed in the first instance.

Before I proceed to state to your Lordships the result of this investigation, there is one point which seems to have struck my noble and learned friend very forcibly, on which I would wish to make one or two observations, namely, the supposed sort of imprisonment within the large limits of this country, which he seems to have imagined is imposed upon an infant, who has the misfortune, as he would represent, of having guardians appointed by the Court of Chancery in this country. There is no such imprisonment, there is no other restraint than the necessity of asking the leave of the court before the infant is taken out of the limits of the jurisdiction. If there is any such restraint, any such imprisonment, I certainly never heard of it during the administration of my duties when I had the honour of holding the Great Seal. When an application of that sort was made to me, the only subject upon which, as it occurred to me, I ought to form an opinion, was whether, under all the circumstances, it was for the interest and benefit of the child that the application should be granted. The misfortune, therefore, supposed to be inflicted upon the child is, that the mind of the Lord Chancellor for the time being should be exercised upon the question whether it is for the interest of the child or not that it should be allowed.

A case very similar to the present occurred while I was Lord Chancellor (*Campbell v. Campbell* (8)). A Scottish child was brought into this country, and the same contest arose. An application was made to appoint a guardian. The Scottish tutor or curator resisted this, and upon the same ground upon which it has been resisted in this case, viz., that the Scottish tutor and curator had authority over the child in opposition to the power of the Great Seal, and to the exclusion of any person to whom the Court of Chancery might think fit to entrust the duty of superintending and taking care of the child. I certainly was not much impressed with the argument; it was very shortly urged, and I believe not very strongly felt by those who urged it. Upon that occasion I formed the same opinion which I did in the present case, that the Scottish tutor or curator had no authority or power in this country, and that, therefore, the child was entirely without protection and it was a case in which it was the bounden duty of the Court of Chancery to appoint an officer of its own to take care of the child. It afterwards occurred that it would be beneficial to the child to go back to the country to which she belonged. An application was made to me. I investigated the whole of the case. I found that the child's friends all resided in Scotland; that she had no connections in England; and that there were means furnished for an excellent education for the child in Scotland; and, therefore, without doubt or difficulty, I allowed her to be taken back to Scotland, where I believe she has been ever since. This only shows that the hardship which is supposed to exist by the Court of Chancery taking, as it were, possession of these infants, and depriving them of all the advantages of being brought up among their own relations in their own country, has no place

A whatever, if, under all the circumstances, it appears for the interest of the child that it should be permitted to go back to its own country.

It is important, before entering upon the consideration of the questions in this case, thoroughly to understand the proceedings in the cause, so far as relates to the manner in which those questions have been brought before this House. The infant having been made a ward of court by the filing of the bill, a petition was
B presented, praying that the infant's grandfather and great aunt might be appointed guardians upon an allegation and affidavit that they were the nearest relations and that there was no person within the jurisdiction of the court entitled to or empowered to act as guardians, but not stating the appointment of the appellants as tutors and curators in Scotland. The vice-chancellor, by the order of January, 1841, appointed the grandfather and great aunt to act as guardians, according to
C the prayer, which I thought ought not to have been done as a permanent appointment, without a previous reference to the master. A petition was afterwards presented by the appellants, the Scottish tutors and curators, praying that this order might be discharged; and that, if the court should think proper to interfere touching the guardianship of the infant, that they, the petitioners, might be declared to be, or if not already such, might be appointed, guardians, but that if
D the court should not think proper to appoint them guardians, then that an order might be made by way of reference or otherwise having due regard to the father's testamentary disposition, to his domicile, and to the circumstances and situation of the property of the infant. The only part of the petition to which the prayer that the petitioners might be declared to be guardians, can be referred, is an allegation that the instrument appointing them tutors and curators was, in its
E nature, testamentary, and as such, not only constituted a good appointment of tutors and curators according to the law of Scotland, but also constituted a good appointment of guardians according to the law of England. The same proposition was attempted to be supported by the affidavits, and particularly that of Francis Hart Dyke, but I do not find any allegation or attempt to prove that tutors and curators appointed according to the law of Scotland are, as such, recognised in this country
F as guardians, so as to be considered as entitled to the legal custody of infants during their residence in England.

Upon this petition, the vice-chancellor made an order, discharging his former order, and appointing the appellants to act as guardians of the infant during her minority, or until further order, without prejudice to the question whether they were entitled to the guardianship under the statute of 12 Chas. 2, c. 24 [Tenures
G Abolition Act, 1660]. The order appointing the appellants to act as guardians and not declaring them to be so, and reserving only the question as to the claim to be testamentary guardians, would be a decision against their claim to be entitled to the custody of the infant as tutors and curators in Scotland, if any such claim had been made before him. The order would, indeed, be irregular, if the petitioners were entitled to be recognised as guardians in any character, except
H as appointed by the court. From this order an appeal was brought before me in the Court of Chancery; and from the report in 1 Ph. 17, I find that, although the claim as testamentary guardians was slightly alluded to, no reference whatever was made to the title supposed to exist in Scottish tutors and curators to be treated in this country as lawful guardians. No such claim having been made before me, I neither formed nor expressed any opinion upon it, but I held that
I the Scottish instrument did not appoint the appellants testamentary guardians under the statute of Charles II. Having decided against the only ground upon which the present appellants claimed right to the guardianship, there were but two modes of proceeding, either to appoint the appellants at once as persons selected and preferred, though not legally appointed by the father, or to make the usual reference to the master. To appoint the appellants at once would, for the reasons stated by me in the report in 1 Ph. 17, have been improper, and contrary to the acknowledged practice of the court. The reference, therefore, became a matter of course. It excludes no one, and concludes no question, except the only

one argued before me—that the appellants are not testamentary guardians under the statute of Charles II—a decision in which the appellants have acquiesced, not having thought it worth while to raise it again, either by the printed cases in the reasons assigned for the appeal or by the argument at the Bar, it being always kept in mind that, if the appellants were testamentary guardians under the statute of Charles II, it would be irregular, and improper for the court to appoint them. Finding, therefore, that the only point upon which I was called upon in the Court of Chancery is not now in dispute, I do not feel that reluctance to take any part in this appeal which I should have felt if the propriety of my decision upon any point raised before me had been called in question; and I have some satisfaction in finding that this is the state of the case, because a new point has now been raised for the first time, of great importance, if capable of being supported, and calculated, if supported, very much to cripple the Great Seal, and to deprive many infants of the benefit of its protection. The proposition is that the law of England recognises the right and authority of a Scottish tutor and curator with respect to an infant resident in England, and, although it may interfere to aid the authority, or to supersede or control it if improperly exercised, it has no right to take the child under its own care by the appointment of guardians. If that be so, then, no doubt, the order appealed from is wrong, but so is the order of the vice-chancellor of Mar. 19, 1841, sought by the appeal to be established, for that order is as inconsistent with the alleged right of a Scottish tutor and curator, as the order appealed from, and yet that order was obtained upon the application of the appellants themselves, attempted to be supported in their resistance to the appeal before the Lord Chancellor, and now asked to be restored, as would be the necessary consequence of the success of the present appeal. The order of Mar. 19, 1841, is not the subject of appeal, and cannot, therefore, be altered by this House, but the House, it was argued, might vary the order of April 17, 1841, so as to correct the order of Mar. 19, 1841. This House, however, can only deal with that order so far as the Lord Chancellor would have dealt with it when the appeal was before him. He could not have altered it for the benefit of the then respondents and now appellants. He might have refused all or granted all, or any part of what the then appellants asked, but he could not, upon that proceeding, have declared the Scottish tutors and curators entitled in this country to be recognised as guardians of the infant. If this House should be of opinion that such right exists, how could effect be given to that opinion in the present appeal? Certainly not by discharging the order appealed from, which would re-establish the order of Mar. 19, 1841, which assumes that the appellants have no claim of right, unless they can show that they are testamentary guardians under the statute 12 Chas. 2, c. 24 [Tenures Abolition Act, 1660] and certainly not by any variation of that order, which the parties appealing from it, the present respondents, did not ask.

The proposition raised at the Bar is, however, of such general importance, that it would be to be lamented if this appeal were to be disposed of without a due consideration of its merits. If the Scottish tutors and curators are entitled to exercise the duties of that office in England, and, therefore, to be recognised by the Court of Chancery, as having lawful right to the care and custody of the infant while in this country, it must be considered what are the rights and duties to be exercised and recognised in this country. Are they those rights and duties which belong to the office of tutors and curators in Scotland, or the rights and duties which belong to guardians in England? For they differ in several essential particulars. In Scotland the office determines upon the child attaining the age of twelve years. In England it continues up to the age of twenty-one. In Scotland a majority controls the minority. In England all must concur. If, therefore, the Court of Chancery is bound to recognise the rights and duties of Scottish tutors and curators as they exist by the law of Scotland, it must take upon itself to administer foreign law, for it is not disputed but that the court has jurisdiction over them if they do not properly execute their duties, that is, their duties according to the law of Scotland. Follow this to any of its consequences, and its absurdity will be appar-

- A ent. It cannot be contrary to the duty of a tutor and curator in Scotland to promote the marriage of the infant without the consent of the Court of Chancery in England or to remove the infant from England to Scotland. Is the Court of Chancery, therefore, to permit such proceedings with respect to an infant being a ward of court, because it has tutors and curators in Scotland? Would it be the duty of the court, upon any complaint made, first, to imagine in what manner and to what extent the Court of Session would interpose, and to regulate its own interference by that rule? This, in the case of a Scottish child, with Scottish tutors and curators, might be ascertained without difficulty or delay; but if such be the rule as to a Scottish child, it must equally apply to all other foreign children; and thus the court might have to administer the laws of other countries, however remote and uncivilised.
- C It was urged that the court must recognise the authority of a foreign tutor and curator, because it recognises the authority of the parent of a foreign child. This illustration proves directly the reverse, for, although it is true that the parental authority over such a child is recognised, the authority so recognised is only that which exists by the law of England. If, by the law of the country to which the parent belonged, the authority of the father was much more extensive and arbitrary than it is in this country, is it supposed that the father would be permitted here to transgress the power which the law of this country allows? If not, then the law of this country regulates the authority of the parent of a foreign child living in England by the laws of England, and not by the laws of the country to which the child belongs. If foreign tutors and curators are to exercise in this country the rights and duties which belong to their office in the country to which they belong, more deference would be paid to the authority of their office than to that of a parent. If the rights and duties of foreign tutors and curators of a child in this country are not to be regulated by the law of the country to which the child belongs, what are the rights and duties supposed to belong to them which the courts of this country are bound to recognise? They cannot as such be treated as testamentary guardians, there being no testamentary appointment under the Act of Charles II, or as guardians appointed by the Court of Chancery, there being no such appointment. They cannot be English guardians without being able to derive their authority from some one of those sources from which the English law considers that the right of guardians must proceed; and it has before been shown that the rights and duties of a foreign tutor and curator cannot be recognised by the courts of this country with reference to a child residing in this country.
- G The result is that such foreign tutor and curator has no right as such in this country; and this so necessarily follows from reason, and from the rules which regulate, in this respect, the practice of the Court of Chancery, that it could not be expected that any authority upon the subject should be found. It appears, however, that the very case came before LORD HARDWICKE in *Ex parte Watkins* (9). A child had had a guardian appointed by the governor of the Leeward Islands, and on the child coming to this country, LORD HARDWICKE was applied to to appoint a guardian. The question does not appear to have been contested, but the facts were distinctly stated, and LORD HARDWICKE by the usual order referred it to the master to approve of proper persons to be appointed guardians. This is the only case directly in point which has been referred to on either side, but there are other matters of frequent occurrence which proceed upon the same principle. If a commission of lunacy be in force against a person in Ireland or in the colonies, and the party afterwards comes to England, it is a matter of course to take out a new commission in this country: *Re Houstoun* (10). But why, if the foreign committee has the same power and authority in this country that he has in his own? *Ex parte Lewis* (11) turned upon a totally different question, which was whether the party having been found non compos at Hamburg, satisfied the term "lunatic" in 4 Geo. 2, c. 10 [Lunatics Act, 1730], so as to give the Lord Chancellor jurisdiction to direct a conveyance, the words being: "All persons, being lunatics, or the committee of such persons."

Writers upon the civil and international law were quoted as to the comity of nations in recognising rights and duties existing under the laws of other countries. These are well collated and observed upon by Mr. STONY, and the result he draws from them is by no means favourable to the argument of the appellants, but had it been otherwise, the law and practice of this country must decide the question.

If, then, there be no right in this country in these Scottish tutors and curators as such, what order could have been made in preference to that appealed from? Ought the application of the child's relations to discharge the vice-chancellor's order of April 17, 1841, to have been refused, and the order of the vice-chancellor appointing the appellants to act as guardians to have been thereby established? That is, was it proper, if the tutors and curators had not as such any right in this country, to appoint them, they being out of the jurisdiction, and to take the child from the care of its nearest relation, without the usual inquiry before the master? In *Ex parte Watkins* (9), LORD HARDWICKE refused to act without inquiry; and in *Logan v. Fairlee* (12), LORD ELDON refused to appoint a person residing in Scotland to be guardian, although the infant appears to have been in that country. In *Ex parte Ord* (13), LORD ELDON held that the committee of a lunatic going abroad could not continue committee, and the well-known practice of the court is not to appoint persons guardians who are out of the jurisdiction, unless associated with others who are within it. In *Wellesley v. Duke of Beaufort* (14), LORD ELDON appointed another to act as guardian of a child, merely on the ground of the father being abroad. Upon these grounds it would have been impossible to have established the order of April 17.

Independently of that objection, would it have been right, without inquiry, to have given to these four Scottish gentlemen, by the appointment of the court, the power of guardians of this child? It appeared from the affidavit that the child was of delicate health and required peculiar care; that the mother had been most anxious that the child should continue under the care of its nearest relation in this country; and that a contest had arisen, or had become unavoidable, between those nearest relations and the Scottish tutors and curators for the care and custody of the child. Such a case would probably have called for an inquiry as against testamentary guardians, and certainly required it before disposing of the contest, by investing one of the parties to it with the authority of guardian appointed by the court. Whether the order appointing the appellants guardians should stand, or the usual reference to the master be directed, was the only question before me in Chancery, and is, in fact, the only question now before the House. The appellants, who obtained that order of April 17, 1841, and never sought to have it varied, cannot now complain of it or ask the House to vary it. It appointed them guardians, and they were contented to accept the appointment from the court, and yet they now ask the House to declare (the order standing unappealed from by them) that they are entitled to exercise all the authority of guardians without, and independently of, the authority of the court.

It has been said that, if the court had jurisdiction, it ought not in this case, in its discretion, to have exercised it. This is not very intelligible to those who are accustomed to the proceedings in Chancery. It means, I presume, that the court ought not to have interfered, but when the order appealed from was made the question as to interference or non-interference had gone by. The court had interfered by appointing guardians, and none complained of the fact of interference, but only as to the manner in which it had been conducted. What, upon this doctrine of non-interference, ought to have been the order upon the appeal to the Lord Chancellor? To have refused the application, and thereby to have left the appellants appointed guardians by the interference of the court, or to have granted what was prayed simpliciter and so to have left the respondents guardians by the interference of the court, or to require the usual assistance of an inquiry by the master before deciding upon the future custody of the infant, which was the order made and now appealed from.

In truth, however, independently of form, the doctrine of non-interference has

- A no place in the case of an infant for whose protection no legal right of guardianship in any person in this country exists. The court, being informed that there is no such right of guardianship, supplies the omission as of course, by its own appointment. It is true that, in lunacy, there is a discretion exercised as to whether the commission should issue, although there may be no doubt as to the lunacy, but there are obvious distinctions between the two cases, one of which is that a
- B commission of lunacy is of itself an evil, although often necessary to prevent a greater. This does not apply to the appointment of a guardian to an infant where none already exists, and the application for that purpose is never refused. All infant wards of the court are under the protection of the court. If there be a father living, or a guardian regularly appointed, the court does not interfere except to assist the father or guardian, unless in certain cases in which the misconduct of
- C the father or guardian renders interference necessary for the protection of the child. But, if there be no father, or guardian regularly appointed, the court protects the child through the means of its officer, whom it appoints to perform that duty in the character of guardian. If there were no father, or other person entitled of right to act as guardian, it is impossible that an order referring it to the master to make the inquiries necessary to enable the court to appoint proper persons to
- D act as guardians can be wrong. In the present case there is no father, and if there was no person entitled as of right to act as guardian, the order was quite of course. That there was no person entitled as of right to act as guardian would, I think, be amply established by the consideration before adverted to, if the question were open for consideration, but it is not competent for the appellants to raise that question, the object of this appeal being to establish an order under which they were
- E themselves appointed guardians. Under these circumstances the order appealed from was the only order which could have been made, and the grounds upon which the appellants have complained of it are incompetent for them to take, and are insufficient upon the merits.

LORD CAMPBELL.—I am of opinion that the order of the Lord Chancellor should be reversed; that the second order of the vice-chancellor should be set aside, as well as the first; and that the petition for the appointment of guardians should be dismissed.

- I do not doubt the jurisdiction of the Court of Chancery on this subject, whether the infant be domiciled in England or not. The Lord Chancellor representing the Sovereign, as *parens patriæ*, has a clear right to interpose the authority of the
- G court for the protection of the persons and property of all infants resident in England, even where testamentary guardians have been appointed, and still more where the father is alive, and actually himself resident in England. Upon an appeal against any order of the Court of Chancery for the appointment of guardians to an infant, the only question is whether the jurisdiction of the court has been properly exercised, and the criterion is whether it is for the benefit of the infant.
- H Notwithstanding what has been said by my noble and learned friend who last addressed your Lordships, I can see no difficulty whatever in a court of appeal admitting that the court below has jurisdiction to interfere to appoint guardians, and going on to inquire whether its jurisdiction has been properly exercised. To justify the appointment of guardians, it cannot be enough to show that there is an infant having a temporary residence in England, placed here by the authority of
- I its father resident abroad, and judiciously and tenderly cared for by persons appointed by him for that purpose, the person of the infant requiring no care from the Court of Chancery, and the infant having no property in this country. If the father were alive, the court would not appoint guardians; and can it make any difference whether the infant is so resident in England, by the authority and under the superintendence of its father, or of tutors or guardians appointed by its deceased father, and confirmed by the legal tribunal of the country in which he was domiciled at his death, and in which all the property of the infant is situated? Is it possible that the Court of Chancery, whenever applied to, is bound to appoint

guardians to an infant resident in England for a temporary purpose, if its father be dead? The mere death of the father of an infant domiciled abroad, and resident here for health, or education, or amusement, with the consent of those in whom the parental power is vested by the law of the country of its domicile, cannot necessarily require the appointment of guardians by the Lord Chancellor to be invariably and inflexibly made, without considering whether the personal safety or personal interests of the infant require the interference of the court, the infant having no property to be protected, and the appointment being manifestly injurious to the infant itself, as well as perplexing, annoying, and detrimental to its foreign guardians. A B

In the present case a bill has been filed, alleging that the infant has property in England by the receipt here of some part of the rents and profits of her Scottish estates, so that she is eo ipso a ward of the court, and, being a ward of the court, guardians must be appointed to her. But the bill is avowedly filed for the sole purpose of the appointment of guardians to change the custody of the infant, and the allegation in the bill and the petition as to property in England is unsupported by affidavit, and is proved to be false. If, therefore, such a bill, which may be filed by anyone, is of itself sufficient to impose the obligation of appointing guardians, we come back to the absurd proposition that the court is bound to appoint guardians to any foreign infant brought into England, for whatever purpose, and for however short a time. The filing of the bill can impose no necessary obligation to appoint guardians, although thereby, in some sense, the infant immediately becomes a ward of court, for the same consequence follows whenever a bill is filed relative to the estate or person of an infant, or for the administration of property in which the infant is alleged to be interested, although the child be under the immediate tutelage of a father or under the care of a statutory or common-law guardian, or of a guardian appointed by the court, or the infant be resident abroad. E The position will not hold good that a guardian must be appointed to every infant so made a ward of court, as an infant may be made a ward of court as well during the father's life as after his death, and as well where there are testamentary guardians as where there are none. The filing the bill entitles the infant to all necessary protection from the court, but does not compel the court to interfere in a manner which would be injurious to the infant. F

In this case the appointment cannot be justified in respect of the property; it can only be justified with a view to the care of the person. If the care of the person of the infant required the appointment of guardians, the court might undoubtedly interfere for that purpose, irrespectively of any consideration of property; and it is said that she is to be taken as wholly unprotected, because, according to the authorities, the tutors appointed by the law of Scotland can, in no degree, and for no purpose, be recognised in England. I must first observe, that this would be a very inconvenient doctrine, and would lead to the general necessity of appointing guardians for all foreign infants found in England who have lost their fathers. I suppose it is admitted that the existence and power of the father, although he be resident abroad, would be recognised by the Court of Chancery, although it is said, that the existence and authority of the tutors, as guardians, appointed by the law of the country in which the child is domiciled, would not be so recognised. But after a diligent attention to all the cases cited, and all the writers referred to on this subject, I can find no authority for this distinction. G H

The foreign jurists are very much divided as to the extent to which a guardian to an infant appointed in one country shall be recognised in another. BOULLENOIS, I (Obs. 4, p. 51), MERLIN (Rep. Absens., c. 3, art. 3, s. 2, n. 2), VARILITE (s. 2, n. 2), VATTEL (bk. 2, c. 7, s. 85), HUBERUS, (DE CONFLICTU LEGUM, b. 1, c. 3, s. 2), and HERTIUS (Opera De Col. Leg. s. 4), all expressly lay down that the guardian duly appointed by the law of the country where the infant is domiciled is, in every other country, to have the same powers, and is entitled to assert any claims over the moveable property of his ward and to sue for debts due to his ward in foreign countries without having any confirmation of the guardianship by the local authorities, although the powers over immoveable property belonging to the ward must

A entirely depend on the *lex loci rei sitæ*. On the other hand, PAUL VOET (*De Stat.* ch. 2, s. 4), and other jurists, deny that the appointment of guardians has any extra-territorial authority, so as to entitle the foreign guardian, *virtute officii*, to exercise any rights, powers, or functions over the property of his ward situated in a different State from that in which he was appointed guardian; and such appears from STORY to be the law in the different States of the American union (CONFLICT OF LAWS, c. 13, s. 504 a). But, in none of these writers is there the least intimation of opinion that the foreign guardian, whether he may assert right of property and sue in his own name or not, will not be recognised so far as the care of the person of the infant is concerned, or that foreign tribunals will appoint new guardians, superseding those appointed by the law of the country where the infant is domiciled because the infant happens, for a temporary purpose, to be within the territory over which those tribunals exercise jurisdiction.

C Reference has been made to several cases to be found in our own reports; but I think none of them will be found to support the order appealed against, or to throw much light on the subject. It is said to have been the opinion of this House in *Morrison v. Earl of Sutherland* (2) (cited in 1 Hy. Bl. 677, 682), that an English guardian has authority to institute a suit for the personal property of his ward in Scotland upon the ground that the administration of his personal estate, granted by the law of his place of domicile, must be taken to be everywhere of equal force with a voluntary assignment by himself. But we have no authoritative report of this decision, and as it does not seem to have been acted upon either in England or in Scotland, I do not think that any reliance can be placed upon it. However, *Ex parte Otto Lewis* (11), is a direct authority to show that E for some purposes the courts of this country will recognise a curator or guardian appointed by a foreign tribunal. That was a petition, grounded on the statute 4 Geo. 2, c. 10 [Lunatics Act, 1730], that a lunatic heir of a mortgagee might be directed to convey to the mortgagor, the words of the act being "that all persons, being lunatic, or the committees of such persons, shall convey." There had been no commission in this country, but, there having been a proceeding before the F proper jurisdiction, the senate of Hamburg, where the lunatic resided, upon which he was found non compos and a curator or guardian appointed for him and his affairs, LORD HARDWICKE said that he would take notice of that appointment and ordered that, on payment of the mortgage-money, there should be a conveyance to the mortgagor. In *Ex parte Watkins* (9), it is said that the governor of the Leeward Islands had appointed a guardian, but that failed as soon as the infant G came to England, so that another guardian was to be appointed, and there was a reference to the master for that purpose. But we are not in the slightest degree informed what was the nature of that appointment, and the infant may have been domiciled in England and might have had property in England and nowhere else. Reliance has been placed on *Re Houstoun* (10), showing that where a person has been found a lunatic in Jamaica and is brought to England by one of his committees a commission of lunacy ought to issue against him here, and there is no H doubt that a committee of a lunatic under a commission in Ireland will not be allowed to deal with the property of the lunatic in England, until there has been a commission and he has been appointed committee in England. But this is indisputably necessary for the proper management of the property of the lunatic in England, for the court in Jamaica or in Ireland appointing the committee could I exercise no control over him in respect of the property in England, and the Court of Chancery in England could not do so until, being appointed under an English commission, he should become amenable to that court.

The only other authority cited in the first argument on this part of the subject was *Salles v. Savignon* (15), which, if accurately reported, although it does not bear very closely upon the recognition of a foreign guardian, would go to show that the Lord Chancellor may make all infants, in all parts of the world, wards of Chancery, and may, at any time, treat any person who may afterwards come within his jurisdiction, having had dealings with an infant so made a ward of court while

abroad, answerable for what was done out of the limits of his jurisdiction. My A
noble and learned friend said that no case had ever occurred in which there had
been a complaint of an excessive jurisdiction on the part of the Court of Chancery.
It is possible he may approve of what was done in this case, but I beg to put the
question with great respect: On what sound principles of jurisprudence can the
interference of the court, in the case I have referred to, be justified? The parties
were in the same situation as if the marriage had taken place in France or in China, B
and it is utterly impossible to say that the foreign gentleman, by marrying a foreign
lady in a foreign country, before any step had been taken to make her a ward
of Chancery, was guilty of any contempt of the court, actual or constructive.

There has been communicated to me the note of a case, not in print, which has
been referred to, that of *Campbell v. Campbell* (8), before LORD COTTENHAM, which
is supposed to show that the present order is in conformity with the established C
practice of the Court of Chancery. According to that note, a female infant, domiciled
in Scotland, happened to be in London in the care of a tutor and curator
appointed by the law of Scotland, likewise domiciled in Scotland, and then in
London. The young lady had recovered a very large sum of money (I believe
£17,000) from a noble marquis for a breach of promise of marriage. The agent
of the noble marquis, having the money in his hands to pay over to her, filed a bill D
in the Court of Chancery in her name against himself, and paid the money into
court. It was stated that the money was paid into court before the application,
but, at all events, there was within the jurisdiction of the court a sum of £17,000
belonging to the infant, and it was in respect of that sum of £17,000 belonging
to the infant within the jurisdiction of the court that the bill was filed. Thereupon
an application was made to LORD COTTENHAM to appoint a guardian to the infant, E
and a guardian was appointed. That was probably a very proper order, but, is it
supposed that, if the young lady had been in London for a temporary purpose
under the judicious care of Colonel Campbell, her Scottish guardian, without any
property in England, LORD COTTENHAM would have made an order for the appoint-
ment of English guardians?

To show the power of the Court of Chancery in the appointment of guardians, F
reference was made to *Stephens v. James* (16), where guardians were appointed by
BROUGHAM, L.C., to an infant, who had been carried to America before the bill was
filed, making her a ward of court, but in that case there was large property within
the jurisdiction of the court to be managed for the benefit of the infant. It is said,
however, that, in the present case, the order is to be supported on the ground
that the infant was domiciled in England. She was undoubtedly domiciled in G
Scotland at the time of her father's death. *Pottinger v. Wightman* (17) must be
taken conclusively to have settled the general doctrine that, if after the death of
the father an infant lives with the mother, and the mother acquires a new domicile,
it is communicated to the infant. But in the present case, the mother's Scottish
domicil continued till she acquired another, and I find great difficulty in fixing
any time when it can be said that she had acquired a new domicile. However this H
may be, I am clearly of opinion that, if the order would have been improper had
that domicile remained, it was equally improper on the supposition that an English
domicil had been acquired. The question would still be: Is the appointment of
guardians wanted, and will it be for the benefit of the infant? Where there is
personal property to a considerable amount within the jurisdiction of the court
not exposed to any risk, and about which there is no dispute, domicile may be I
material for guiding the discretion of the Lord Chancellor whether he should inter-
fere for its due management, but in this case LORD COTTENHAM considered the
domicil immaterial—and so far I agree with him.

Then it is urged that the appointment of the tutors was not meant by the father
to have any operation beyond the territory of Scotland. To this objection LORD
COTTENHAM appears to have given considerable weight, and here I feel bound to
differ from him. I do not think that it was intended, or that it can operate as an
appointment of guardians in England under the English statute 12 Chas. 2, c. 24

- A [Tenures Abolition Act, 1660], but I cannot doubt the intention of the father by the appointment that the infant should remain under the care and superintendence of the tutors, not only in Scotland, but in any country into which, for her health or education, it might be necessary to send her. Can it be supposed to have been his intention that, if she were permitted to pay a visit to her grandfather at Chester, their power over her was to be for ever gone; that she was
- B thenceforth to become a ward of the Court of Chancery; that she should not be permitted to marry, or be at liberty to re-visit her own country, without the permission of the Lord Chancellor?

- Even with respect to a child of English parents, born and domiciled in England, the court ought not to interfere to appoint guardians unless there be property belonging to the infant to be taken care of, or unless the personal security, proper
- C education, or marriage of the infant requires the appointment of guardians. This rule, which is extremely reasonable in itself, is to be collected from *Ex parte Becher* (18), and it seems to have been uniformly acted upon. Not an instance has been or can be cited of the Court of Chancery interfering to appoint guardians, the infant having no property within the jurisdiction of the court. In *Wellesley v. Duke of Beaufort* (14), where guardians were appointed, the father being absent
- D from this country, there was large property within the jurisdiction, and the appointment of guardians was clearly for the benefit of the infants. In the present case not only would the will of the father be defeated, but a heavy expense incurred by the double accounting in the Court of Session and in the Court of Chancery. Moreover, I know not how the order is to be carried into effect. An appointment of receivers to collect the rents of real estates in Scotland or France, or any other
- E foreign country, might be treated with very little respect where it is to operate, and might give rise to a collision of jurisdiction very much to be deprecated. Such a proceeding, I believe, cannot be rested either on precedent or principle.

- It has been urged at the Bar that where a bill is filed fraudulently in the name of an infant, alleging property within the jurisdiction, there might be a summary application to the court to take it off the file, but the objection would be made that
- F this fact cannot be tried on affidavit, and it now sufficiently appears to the court, and is not seriously disputed, that the allegation of property within the jurisdiction is merely colourable. Then it is contended, that the suit should go on to its conclusion, and that then justice will be done. But if the order stands, and guardians are appointed, the infant will undoubtedly have to remain under their care, and her property must be administered in the Court of Chancery during her minority.

- G
- LORD LANGDALE.**—This case, so far as it now appears, for it is still subject to inquiry and investigation, is of the most simple description. An infant, whose whole property is alleged to be in Scotland and whose tutors and curators are usually resident in Scotland, is now residing in England, and entitled to the protection of the English laws. Her grandfather, also resident in England, assuming (as he
- H has a perfect right to do) to be the next friend of his grandchild, files a bill in her name in the Court of Chancery, praying, among other things, that her fortune and person may be protected by the court, and that proper directions may be given for her maintenance and education.

- It may have been right or wrong to institute this suit, but the sound and proper mode of trying that question is to apply to the Court of Chancery on behalf of the
- I infant and to have it inquired into and ascertained whether the suit is beneficial or prejudicial to the interests of the infant. If, upon inquiry, it appears to be contrary to the interests of the infant that that suit should be prosecuted, the court stays the further prosecution and charges the costs upon those by whom the suit has been improperly commenced, but, in this case there has been no application made for any such inquiry, and, upon the bill being filed, the infant became a ward of the Court of Chancery, and at the same time it became the duty of the court to protect her interests, or to see that they were duly protected. The usual and regular mode of doing this is by appointing guardians. It is true that, if an infant

be improperly detained by any unauthorised person, the Lord Chancellor may, by writ of habeas corpus, have the infant brought before him, and set free. But upon a habeas corpus, I apprehend that the Lord Chancellor has no more authority than is possessed by a judge at common law, and for the protection of the infant that authority is of a very different kind and of greatly inferior efficacy to that which is possessed by the Court of Chancery on the appointment of guardians. A

This is very nearly the order which, in ordinary cases, is made by the court for the protection of infants within its jurisdiction on whose behalf its protection is required. In approving of guardians under the order, the master is bound to use his best discretion, to make all necessary and proper inquiries, and to take all the circumstances of the infant into his consideration. The Scottish tutors and curators, whom I assume for the purpose to have been properly appointed, being out of the jurisdiction, and consequently, not being subject to the control of the court, it would not seem to be consistent with sound discretion to appoint them sole guardians unless other arrangements could be at the same time made to secure for the infant that protection which it is the duty of the court to afford. But I think that the appointment of tutors and curators by the father, though it may not be valid in England, is entitled to the most attentive consideration. One obvious mode of attending to it, and at the same time of securing the authority and control of the court over the person of the infant while in England, would be to associate in the guardianship some persons residing in England with the tutors and curators in Scotland, and an offer of this kind was made to the complaining parties by the Lord Chancellor before he pronounced the order in question. B C D

It has been supposed the order will lead to direct conflict between the laws or the courts of England and Scotland, and that the order is so expressed as to exclude the Scottish tutors and curators from the office of guardians. I conceive this to be wholly erroneous. We ought to presume that the courts of England and Scotland will be equally anxious to do that which may appear to be most beneficial to the infant. The person is in one country, the property is said to be wholly in the other. Instead of conflicting with one another, why should not the respective courts of the two countries be mutually assistant in promoting their common object? Although it is not to be expected that either the master would approve, or the court appoint, persons resident out of the jurisdiction to be sole guardians, yet there is nothing in the order to prevent the Scottish tutors and curators from proposing themselves to be guardians, together with one or more persons resident in England, and in the peculiar circumstances of the case it may possibly appear, upon inquiry, to be beneficial to the infant to have guardians both in England and Scotland. E F G

One part of the order requires the master to consider of a scheme for the residence of the infant, and, it being supposed in the argument that there is some general and inflexible rule binding the court to keep its infant wards within the jurisdiction, it is thence inferred that, under this order, the master cannot consider whether the infant ought at any time to be permitted to reside in or to visit Scotland. It is, undoubtedly, a general and useful rule that an infant ward is not to go out of the jurisdiction without special leave and in the absence of special circumstances; but when such occur (and it may appear that they exist in this case) the special leave is always given. There are infant wards of the court now abroad with leave given, sometimes for the general benefit of the infant, sometimes for the sake of health or peculiar instruction, and even for the sake of amusement. The infants who become wards of the Court of Chancery have indeed great and peculiar protection, but they are not debarred of any freedom or of any advantages which the most careful, considerate, and liberal parent would desire his child to possess. Those who imagine that the court acts necessarily upon any fixed and inflexible rules in the management, appear to me to forget the paternal discretionary nature of the jurisdiction, the great care and anxiety with which the interests of the infant wards are constantly attended to, the changes of regulation which are so easily made, even from day to day if required by a change of circumstances, and the extent to H I

A which all technical and positive rules are made to bend to the peculiar circumstances which may be from time to time presented by individual cases. If it should ultimately appear most beneficial to the infant to reside sometimes in Scotland and sometimes in England, and if it should, unhappily, become necessary to call upon the courts of the two countries to exercise their power, I know of nothing which would render it impracticable for the English Court of Chancery to order

B the guardian resident in England to deliver up the infant to the guardian resident in Scotland, and why should we doubt that the Scottish court would consider beneficial to the infant the same course of management which, upon evidence and consideration, had been approved by the English Court of Chancery, and, if necessary, order the guardian resident in Scotland (being the tutor and curator there) to deliver up the infant to the guardian resident in England? It is not reasonable

C to suppose that the guardians to be appointed under the order will conflict, or that the courts of the two countries will conflict, in such a matter.

It is possible that, in carrying out any scheme, difficulties may arise, more especially if those whose duty it is to concur in all things for the benefit of the infant should refuse or neglect to do so. If difficulties should occur, they must be met, as they best may, by adopting that course which, under the circumstances,

D shall appear to be for the benefit of the infant, but, at present, it does not appear to me that there is any difficulty whatever. The infant is here, and entitled to the protection of the Court of Chancery, and it is, among other things, to be inquired where she ought to reside. Whether she ought to remain here or to be sent to Scotland, it is in either case necessary to appoint a guardian who may have legal control over her person, to protect her while here, or, if proper, to deliver her to the

E person duly appointed to protect her in Scotland. It has been said that it would be unsafe and imprudent to take the infant to reside in Scotland, and the tutors and curators have expressed no intention to remove her to Scotland, and in this state of things the complaint made of this order is somewhat singular. The tutors and curators seem to say that the infant ought to be in England, where she cannot be protected by the courts of Scotland which have no jurisdiction over her person

F in England; at the same time they say that she ought not to be protected by the Court of Chancery in England, and that, therefore, in the result, she ought to be left in England to the care or neglect of the tutors and curators resident in Scotland, free from the control of a responsibility to the laws relating to guardianship which prevail in either country. For the reasons which I have stated, I am of opinion that the order complained of ought to be affirmed.

G *Appeal dismissed.*

STUART v. MOORE

H *Johnstone v. Beattie* was discussed in *Stuart v. Moore* which came before the House of Lords in May, 1861, on appeals from the Court of Session and *STUART, V.-C.*

In *Stuart v. Moore* the facts were as follows: The Marquis of Bute, a Scottish peer, afterwards made a British peer, having real estates in England and Scotland, died in England on Mar. 18, 1848, leaving an only son for whom his will appointed no guardian. The infant was born in Scotland in 1847. On May 11, 1848, LORD COTTENHAM, L.C., appointed the mother guardian of the infant. On May 30, 1848, a tutor-at-law, or Scottish guardian, was appointed

I in Scotland. The mother died on Dec. 28, 1859. On Feb. 7, 1860, General Stuart and Lady Elizabeth Moore were appointed by *STUART, V.-C.*, joint guardians. Lady Elizabeth Moore, in April, 1860, clandestinely and fraudulently carried the infant to Scotland. She was then discharged from the guardianship, but refused to deliver up the infant to the sole remaining guardian, General Stuart, and detained him in Scotland. General Stuart applied to the Scottish court to order the child to be delivered up to him, but that court refused to make the order until it was determined whether the infant was domiciled in Scotland or not; charged the Scottish tutor-at-law with the care of the infant; and interdicted and prohibited him from taking the infant out of Scotland. *STUART, V.-C.*, thereupon ordered the English guardian to appeal against the Scottish order; and the Scottish tutor-at-law at the same time appealed against an order of the vice-chancellor. Both appeals were argued together.

LORD CAMPBELL, L.C., in expressing his opinion, said: The refusal [of the Court of Session] to interfere is rested on the decision of this House in *Johnstone v. Beattie*. I regret that decision, and I must confess that in some of the proceedings in that case, and in the language of some members of your Lordships' House who took part in that decision, there was ground for the Scottish judges apprehending that the Court of Chancery was encroaching on their jurisdiction. The application for English guardians there made was certainly with the intention to supersede the Scottish guardians, who had been appointed to the female child in Scotland under her father's will, she being domiciled in Scotland, being in England only for a temporary purpose, having landed estates in Scotland, having no property whatever in England, there being a prayer in the bill for appointing English guardians, so that the Scottish guardians should account to them, and there being no suggestion that the Scottish guardians had in any respect misconducted themselves, or were in any respect incompetent to take charge of her education. But all that can be considered as judicially decided by the House was, that, if there be a foreign child in England with guardians duly appointed in the child's own country, the Court of Chancery may, without any previous inquiry whether the appointment of other guardians in England is or is not necessary and would or would not be beneficial for the child, make an order for the appointment of English guardians. Allowing the jurisdiction of the Court of Chancery, I thought that it was not properly exercised for the good of the infant, and that such an exercise of it was a dangerous precedent for the appointment of guardians to any foreign child residing casually in England, for health, education, or amusement, the necessary consequence of which is, that the ward, till reaching the age of twenty-one, cannot leave the realm of England without leave of the Court of Chancery. But the House did not decide, and no member of the House said that foreign guardians are to be entirely ignored, or laid down anything to countenance the notion that a guardian who has been duly appointed in a foreign country and comes into England or Scotland to reclaim a ward stealthily carried away from him, is to be treated as a stranger and an intruder. On the contrary, an alien father, whose child had been so carried away from him, and brought into England, would undoubtedly have the child restored to him in England by a writ of habeas corpus; and I believe that the same remedy could be afforded to a foreign guardian standing in loco parentis on the ravishment of his ward . . . I can take upon myself to say that *Johnstone v. Beattie*, whether properly or improperly decided, is no authority whatever for the interlocutor appealed against. In perfect harmony with that decision, the petition, praying for the restitution of the ward to the guardian might have been immediately granted.

LORD CRANWORTH said: It appears to me that there was sufficient before the Court of Session to make it their duty at once to order the infant to be delivered up to the guardian who had been selected by the Court of Chancery. I would make a passing observation upon *Johnstone v. Beattie*. Perhaps it might have been more consonant to the principles of general law to have held that every country would recognise the status of guardian in the same way as they undoubtedly would recognise the status of parent or the status of husband and wife. But supposing that not to have been the view taken by this House, then there is nothing in that decision of *Johnstone v. Beattie* that could have been decided otherwise, or that could at all interfere with or touch the present question. For all that was decided there was that the status of guardian not being a status recognised by the law of this country unless constituted in the country, it was not a matter of course to appoint a foreign guardian to be English guardian. But that was only a matter to be taken into consideration. That was all that was decided in that case; and whether or not (as I have already said) it might have been better to have held that the status of guardian was to be itself recognised, without further inquiry, is quite immaterial to the present question.

LORD WENSLEYDALE said that he agreed entirely with his noble and learned friends who had preceded him in the advice which they had given to their Lordships. He made no comment on *Johnson v. Beattie*.

LORD CHELMSFORD said: I cannot help deeply regretting that so many precious months have been consumed in which the courts of the two countries, instead of cordially co-operating to advance the best interests of the infant, have placed him, as it were, in the centre, as a prize to be contended for by conflicting jurisdictions. I should be sorry to see the authority of the Scottish courts broken in upon by any invasion of the English courts, but I think there was no cause for the jealousy which has unhappily been excited upon the present occasion. I agree that, if the circumstances had been reversed, if the Scottish court had assumed the guardianship of the infant and the infant had been improperly removed from their jurisdiction, and the guardian had come to this country to re-claim possession of his infant ward, the English courts would have facilitated the guardian in his object; and I think that they would not have examined with a very nice and critical eye the proof of the orders which had emanated from the Scottish authority, or if there had been any imperfection in the proof, they would have facilitated the court in obtaining the necessary means of establishing their authority. He also did not refer to *Johnstone v. Beattie*.

A

HILTON v. EARL GRANVILLE

[COURT OF QUEEN'S BENCH (Lord Denman, C.J., Patteson, Coleridge and Wightman, JJ.), February 5, 10, 1844]

[Reported 5 Q.B. 701; 1 Dav. & Mer. 614; 13 L.J.Q.B. 193;
2 L.T.O.S. 419; 8 Jur. 311; 114 E.R. 1414]

B

Custom—Reasonableness—Necessary element in valid custom—Custom resulting in damage to or destruction of property.

To a claim by the plaintiff in respect of damage done to houses belonging to him by the foundations being weakened and rendered incapable of supporting them through the working by the defendant of mines under or adjacent to the property the defendant pleaded that he was entitled to work the mines as he had under an immemorial custom.

C

Held: a custom to be valid must be reasonable; a custom which might result in damaging or destroying property without paying compensation was bad and could not be given legal effect; and, therefore, the plaintiff succeeded.

D

Notes. Considered: *Humphries v. Brogden* (1850), 12 Q.B. 739; *Carlyon v. Lovering* (1857), 1 H. & N. 784; *Rowbotham v. Wilson* (1857), 8 E. & B. 123; *Rogers v. Taylor* (1858), 6 W.R. 249; *Salisbury v. Gladstone* (1861), 9 H.L.Cas. 692; *Blackett v. Bradley* (1862), 1 B. & S. 940; *Buccleuch v. Wakefield* (1870), L.R. 4 H.L. 377. Approved: *Bell v. Love* (1883), 10 Q.B.D. 547. Followed: *Wolstanton, Ltd. and Duchy of Lancaster v. Newcastle-under-Lyme Borough Council*, [1940] 3 All E.R. 101. Referred to: *Williams v. Bagnall* (1866), 15 W.R. 272; *Taylor v. Shafto* (1867), 8 B. & S. 228; *Buchanan v. Andrew* (1873), L.R. 2 Sc. & Div. 286; *Hall v. Byron* (1877), 4 Ch.D. 667; *Gill v. Dickinson* (1880), 5 Q.B.D. 159; *Consett Industrial and Provident Society v. Consett Iron Co.*, [1922] All E.R.Rep. 285; *Newcastle-under-Lyme Corp'n. v. Wolstanton, Ltd.*, [1947] 1 All E.R. 218; *Re An Application of the National Coal Board*, [1959] 3 All E.R. 58.

E

As to the validity of a custom, see 11 HALSBURY'S LAWS (3rd Edn.) 160–168; and for cases see 17 DIGEST (Repl.) 8–17.

F

Cases referred to:

- (1) *Broadbent v. Wilks* (1742), Willes, 360; 125 E.R. 1214; affirmed sub nom. *Wilkes v. Broadbent* (1745), 2 Stra. 1224; 1 Wils. 63; 17 Digest (Repl.) 13, 118.
- (2) *White v. Sayer* (1621), Palm. 211; 81 E.R. 1047; 13 Digest (Repl.) 24, 256.
- (3) *Paddock v. Forrester* (1842), 3 Man. & G. 903; 1 Dowl.N.S. 527; 3 Scott, N.R. 715; 11 L.J.C.P. 107; 133 E.R. 1404; 19 Digest (Repl.) 219, 1616.
- (4) *Bateson v. Green* (1793), 5 Term Rep. 411; 101 E.R. 230; 11 Digest (Repl.) 43, 584.
- (5) *Arllett v. Ellis* (1827), 7 B. & C. 346; 9 Dow. & Ry.K.B. 897; 5 L.J.O.S.K.B. 301; 108 E.R. 752; 11 Digest (Repl.) 41, 560.
- (6) *Clarkson v. Woodhouse* (1782), 3 Doug.K.B. 189; 5 Term Rep. 412, n.; 99 E.R. 606; affirmed (1786), 3 Doug.K.B. 194, Ex. Ch.; 11 Digest (Repl.) 59, 876.
- (7) *Folkard v. Hemmett* (1776), 5 Term Rep. 417, n.; 101 E.R. 234; 11 Digest (Repl.) 59, 874.

H

I Also referred to in argument:

- Follet v. Troake* (1705), 2 Ld. Raym. 1186; 92 E.R. 284; 11 Digest (Repl.) 35, 460.
- Partridge v. Scott* (1838), 3 M. & W. 220; 1 Horn. & H. 31; 7 L.J.Ex. 101; 150 E.R. 1124; 19 Digest (Repl.) 74, 420.
- Wyatt v. Harrison* (1832), 3 B. & Ad. 871; 1 L.J.K.B. 237; 110 E.R. 320; 19 Digest (Repl.) 178, 1200.
- Dodd v. Holme* (1834), 1 Ad. & El. 493; 3 Nev. & M.K.B. 739; 110 E.R. 1296; 19 Digest (Repl.) 183, 1234.

Harris v. Ryding (1839), 5 M. & W. 60; 8 L.J.Ex. 181; 151 E.R. 27; 33 Digest (Repl.) 848, 1024. A

Earl of Cardigan v. Armitage (1823), 2 B. & C. 197; 3 Dow. & Ry.K.B. 414; 107 E.R. 356; 17 Digest (Repl.) 300, 1074.

Flight v. Thomas (1839), 10 Ad. & El. 590; 7 Dowl. 741; 2 Per. & Dav. 531; 8 L.J.Q.B. 337; 3 Jur. 822; 113 E.R. 224; 19 Digest (Repl.) 195, 1359. B

Action for damage to two houses, one occupied by the plaintiff and the other held under him by a tenant.

The declaration stated that the plaintiff was lawfully possessed of a messuage or dwelling-house situate in the manor of Newcastle under Lyme in the county of Stafford, beneath which messuage or dwelling-house there were foundations which the plaintiff of right enjoyed for the support of the messuage or dwelling-house. Another messuage or dwelling-house, situate in the manor and county aforesaid, was in the possession and occupation of one John Hilton, as tenant to the plaintiff, supporting which messuage there were foundations which the plaintiff for himself and his tenants of the messuage of right enjoyed for the support of the messuage. The plaintiff alleged that the defendant had worked mines under ground near to the said messuages and removed the ores, minerals and other produce of the mines with the result that the foundations of the messuages were greatly weakened and damaged and were rendered unsafe and incapable of supporting the messuages, and, by reason whereof the messuages had cracked and sunk in, and were in danger of falling down. The defendant pleaded that he had a prescriptive right to work the mines as he had, and, further, that he was entitled to do so under an immemorial custom. Each party demurred. C D

LORD DENMAN, C.J.—It is understood to be the practice that the party first demurring begins. E

Erle for the defendant.

Kelly for the plaintiff.

Cur. adv. vult. F

Feb. 10, 1844. **LORD DENMAN, C.J.**, read the following judgment of the court.—This is an action on the case for injuring two ancient houses, one occupied by the plaintiff, the other held under him by a tenant. These acts are justified by a prescription, stated in the third plea, and by a custom, set out in the fourth, by which a right is claimed for the defendant as lessee of the manor of Newcastle under Lyme. These pleas are demurred to as setting forth a prescription or custom which cannot be sustained at law, because unreasonable. In considering the question, we make no distinction between the two pleas. They are the same with reference to the objection. If either the prescription or the custom is bad on that account, the other must be bad likewise, and, if the one is valid in law, the other may be valid also. We also think that the question whether these houses are freehold or copyhold does not affect that which I have just stated. If the custom can so far prevail as to attach on all the freehold houses within the manor, it might also attach on all ancient copyhold houses, such as the defendant has described these two houses. G

The principle upon which this custom is said to be invalid is laid down by WILLES, C.J., in *Broadbent v. Wilks* (1). The paragraph (Willes, at p. 363) was cited by both parties in the argument: H I

“The objection that this custom is only beneficial to the lord, and greatly prejudicial to the tenants, is, we think, of no weight; for it might have a reasonable commencement notwithstanding, for the lord might take less for the land on account of this disadvantage to his tenant. But the true objections to this custom are, that it is uncertain and likewise unreasonable, as it may deprive the tenant of the whole benefit of the land, and it cannot be presumed that the tenant at first would come into such an agreement.”

A The custom thus held invalid was this :

"When and as often as the lord of the manor or his tenants of the collieries or coal mines . . . have sunk pits in the freehold lands in Halton . . . for the working of the said collieries there to get coals coming and arising from thence [the lord and his tenants] have used and been accustomed to throw cast and place . . . the earth clay stones . . . coming therefrom together in heaps on the land near to such pits . . . there to remain and continue, and to [place] wood there for the necessary use of the said pits, and to take and carry away from thence with carts . . . part of the said coals so laid and placed there, and to burn and make into cinders there other part of the said coals . . . at his and their will and pleasure."

C WILLES, C.J., after pointing out the uncertainty of the alleged custom, proceeds (Willes, at p. 363) :

"And certainly no custom can be more unreasonable than the present. It may deprive the tenant of the whole profits of the land; for the lord or his tenants may dig coal pits when and as often as they please, and may in such case lay their coals, etc., on any part of the tenant's land, if near to such coal pits, at what time of the year they please, and may let them lie there as long as they please . . . so they may be laid on the tenant's land and continue there for ever, though it may be more convenient for the lord to bring them on his own land, which is absurd and unreasonable."

E The case was removed by writ of error from the Court of Common Pleas into this court and after being argued several times, the judgment was unanimously affirmed. LEE, C.J., said (2 Stra. at p. 1225) that the question was

"whether this was a reasonable *lex loci*, which they held it not to be, inasmuch as it laid a great burden upon the land of the plaintiff, without any consideration appearing, either public or private. That it savoured of an arbitrary power, and might (as laid) put it in the power of the lord totally to deprive the tenant of the benefit of the land, there being no restriction in time, and the word near was too vague and uncertain."

The report in WILSON, after mentioning the vagueness of that word, remarks also (1 Wils. at pp. 64, 65) that the custom is

"very unreasonable, for it laid such a great burden upon the tenant's land, without any consideration or advantage to him, as tended to destroy his estate, and defeat him of the whole profits of his land, and savours much of arbitrary power, being pleaded to be at the will and pleasure of the lord, and to do it as often, and when he pleases . . . and what was said at the Bar touching the public utility of coal pits to the realm cannot be considered, for the pits may be worked without this custom, for ought that appears to the contrary . . . and to support this custom would be to take away the whole benefit of the land granted originally to the copyholder by the lord; and it is a void custom and contrary to law, that the lessor shall have common encounter son demise quia est part del chose demise: *White v. Sayer* (2) (Palm. 212), and this custom being pleaded to be at the will and pleasure of the lord, tends to make him judge in his own cause, which the law will not endure."

I There can be no necessity for showing by a comparison of details that the custom now pleaded is far more oppressive than that which was thus deliberately condemned by both courts. The words "at the will and pleasure of the lord" do not, indeed, appear in the present record, but such is the effect of the claim, for the defendant and his subtenants assume the power of entering any lands within the manor and searching for minerals without any restriction as to times and seasons, or the mode of occupation or culture.

Several cases were cited to show that such a custom might be valid. The most recent, *Paddock v. Forrester* (3), though arising in the same district, has no bearing whatever on the point before us. The plaintiff there sued for trespass in

digging and taking away his land and the coal ore there. The defendant justified in his third plea under a custom stated generally, and, in his fourth, under the same custom as qualified by a right to compensation. The general custom was traversed: under the special custom, the defendant pleaded that he had made sufficient compensation. At a trial at Bar in the Court of Common Pleas, the court directed a verdict for the plaintiff on the third plea, holding that it was not supported by proof of the qualified custom. The greatest reliance, however, was placed on some decisions in which a custom derogatory to the lord's oral grant has been holden valid. *Bateson v. Green* (4) is the strongest of these cases, where the lord of a manor defended himself successfully against a commoner whose extent of common he had curtailed by taking clay, on proof that the lord had constantly done so. The language of LORD KENYON is certainly large, though considered by BAYLEY, J., in *Arlett v. Ellis* (5) to be subject to some restriction. If, indeed, it must be taken to import that a lord, after granting rights of common, may help himself to any portion of the common land to the exclusion of his grantees, such a doctrine is incompatible with many other cases, and cannot be supported in principle. The two decisions which are in the notes to *Bateson v. Green* (4) (*Clarkson v. Woodhouse* (6), and *Folkard v. Hemmett* (7)) are much more cautiously worded; and in that of *Folkard v. Hemmett* (7) DE GREY, C.J., expressed himself conformably to what we consider the true legal principle:

"The defendants justify under the usage. I will not call it a custom, because I look on it as a reserved right of the lord."

Assuredly, whatever the lord can reasonably be supposed to have reserved out of his grant the usage may adequately prove that he did reserve. But a claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument.*

Judgment for plaintiff.

* These remarks of LORD DENMAN were criticised in *Rowbotham v. Wilson* (post p. 601) when that case was before the Court of Exchequer Chamber. MARTIN, B., there said (6 E. & B. 150): "I think the owner of land may grant the surface subject to the quality or incident that he shall be at liberty to work the mines underneath and not be responsible for any subsidence of the surface. If the law of itself, under certain circumstances, protects from the consequences of an act, I think a man may contract for such protection in a case where the law of itself would not apply. 'Modus et conventio vincunt legem.' I am aware that in *Hilton v. Lord Granville* there is a passage in the judgment of the court adverse to this, but, in my opinion, the view taken by the Court of Queen's Bench, as expressed by LORD CAMPBELL in the judgment in the present case, is the more correct." When *Rowbotham v. Wilson* was in the Court of Queen's Bench, LORD CAMPBELL, C.J., in his judgment, said: "In the present case we are of opinion that there is evidence to show that, upon the severance of the surface and the minerals, the owner of the surface took it as a separate tenement, without that continuing and unqualified right to support from the subjacent strata to which the owner of the surface would be *prima facie* entitled. He had an easement for the support of the surface, but it was of a qualified character. There was a servitude imposed upon the owner of the minerals, but this servitude likewise was of a qualified character. Both easement and servitude were subject to the right of the owner of the minerals to work and get them in a careful manner, although the surface might thereby be injured. The owner of the surface had it conveyed to him with this qualified easement only, and with this qualified easement he was contented to accept it. Notwithstanding some expressions of LORD DENMAN, C.J., in *Hilton v. Earl Granville*, we are of opinion that upon the severance of the surface and the minerals into separate tenements, to be held by different owners, such an arrangement might effectually be made as to the right of support to the surface from the minerals. There is here nothing in derogation of the grant of the surface. The grantee of the surface may still hold in fee simple with all the rights and incidents belonging to that estate. He would not have the perfect easement of support from the minerals: but this (as must be supposed for valuable consideration) he has been contented to waive; and he takes his tenement with an easement of support of a qualified character. No deceit is practised upon him; and no attempt is made to create an estate in law without the usual incidents belonging to that estate. Therefore, no rule of law is violated."

A

ROWBOTHAM v. WILSON

[HOUSE OF LORDS (Lord Wensleydale, Lord Chelmsford and Lord Kingsdown),
June 8, 11, 19, 1860]

B

[Reported 8 H.L.Cas. 348; 30 L.J.Q.B. 49; 2 L.T. 642;
24 J.P. 579; 6 Jur.N.S. 965; 11 E.R. 463]

Land—Right to support—Prima facie right of owner—Need for claimant to property in minerals to show grant or conveyance—Presumption of right to get minerals—Presumption against right of mineowner to do avoidable damage to surface.

C

Prima facie the owner of the surface of land is entitled to all below it ex jure naturæ, and those who claim property in the minerals below, or any interest in them, must show some grant or conveyance by him or from the Crown. The rights of the grantee must depend on the terms of the deed by which they are conveyed or reserved when the surface is conveyed, but prima facie it must be presumed that the minerals are to be enjoyed, and, therefore, that a power to get them must also be granted or reserved as a necessary incident. A similar presumption prima facie arises that the owner of the minerals is not to injure the owner of the soil above by getting them, if it can be avoided, but it rarely happens that these mutual rights are not precisely settled by the deed by which the right to the mines is acquired, and then the only question would be as to the construction of that deed.

D

E Deed—Covenant—Construction—Construction to effect intended purpose—Interpretation of covenant as grant of right.

The covenantee is entitled to render a covenant in a deed available in any manner in which it would answer the intended purpose.

A covenant by a person granted an allotment of land by an Inclosure Act and award declaring that he was willing and desirous to accept his allotment "subject to any inconvenience or incumbrance which may arise from working and getting the mines" beneath the allotment,

F

Held, by LORD CHELMSFORD, to be capable of being interpreted as a grant of the right to work the mines without molestation, denial, or interruption, even to the taking away the support, and damaging the surface, of the allotted land.

G

Easement—Grant—Sufficiency of words showing intention to give grantable easement.

No particular words are necessary for the grant of a right or an easement, and any words which clearly show an intention to give an easement which is by law grantable are sufficient to effect that purpose.

H

Notes. Considered: *Shafto v. Johnson* (1863), 8 B. & S. 252, n.; *Murchie v. Black* (1865), 19 C.B.N.S. 190; *Buccleuch v. Wakefield* (1870), L.R. 4 H.L. 377; *Hext v. Gill*, [1861-73] All E.R.Rep. 388; *Eadon v. Jeffcock* (1872), L.R. 7 Exch. 379; *Smith v. Darby* (1872), L.R. 7 Q.B. 716; *Public Works Comrs. v. Angus & Co.*, *Dalton v. Angus & Co.*, [1881-5] All E.R.Rep. 1; *Pountney v. Clayton*, [1881-5] All E.R.Rep. 280; *Bell v. Love* (1883), 10 Q.B.D. 547. Explained: *Dixon v. White* (1883), 8 App. Cas. 833; *Sitwell v. Londesborough*, [1905] 1 Ch. 460. Distinguished: *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Society*, [1904-7] All E.R.Rep. 977. Considered: *Davies v. Powell Duffryn Steam Coal Co.*, [1921] All E.R.Rep. 421; *Borys v. Canadian Pacific Rail. Co.*, [1953] 1 All E.R. 451. Referred to: *Dugdale v. Robertson* (1857), 3 K. & J. 695; *Solomon v. Vintners Co.* (1859), 4 H. & N. 585; *Scots Mines Co. v. Leadhills Mines* (1859), 34 L.T.O.S. 34; *Blackett v. Bradley* (1862), 1 B. & S. 940; *Proud v. Bates* (1865), 6 New Rep. 92; *Richards v. Harper* (1866), 25 L.J.Ex. 130; *Woodall v. Hingley* (1866), 14 L.T. 167; *Williams v. Bagnall* (1866), 15 W.R. 272; *Richards v. Jenkins* (1868), 18 L.T. 437; *Aspden v. Seddon* (1875), 10 App. Cas. 394;

Ramsay v. Blair (1876), 1 App. Cas. 701; *Hall v. Byron* (1877), 4 Ch.D. 667; *A Darley Main Colliery Co. v. Mitchell*, [1886-90] All E.R.Rep. 449; *Consett Waterworks Co. v. Ritson* (1889), 64 L.J.Ch. 293, n.; *North British Rail. Co. v. Park Yard Co.*, [1898] A.C. 643; *Butterley Co. v. New Hucknall Colliery Co.*, [1910] A.C. 381; *Thomson v. St. Catharine's College, Cambridge and Mappins Mabro' Old Brewery* (1918), 118 L.T. 758; *Westhoughton U.D.C. v. Wigan Coal and Iron Co.*, [1919] 1 Ch. 159; *Consett Industrial and Provident Society v. Consett Iron Co.*, [1922] All E.R.Rep. 285; *I.R.Comrs. v. New Sharlston Collieries Co.*, [1937] 1 All E.R. 86; *Wolstanton, Ltd., and Duchy of Lancaster v. Newcastle-under-Lyme Borough Council*, [1940] 3 All E.R. 101.

As to the right to the support of land as affecting mines, see 26 HALSBURY'S LAWS (3rd Edn.) 339 et seq.; and for cases see 33 DIGEST (Repl.) 735 et seq.

Cases referred to:

- (1) *Bonomi v. Backhouse* (1858), E.B. & E. 622; 27 L.J.Q.B. 378; 32 L.T.O.S. 156; 4 Jur.N.S. 1182; reversed (1859), E.B. & E. 646; 28 L.J.Q.B. 378; 33 L.T.O.S. 331; 5 Jur.N.S. 1345; 7 W.R. 667; 120 E.R. 652, Ex. Ch.; affirmed sub nom. *Backhouse v. Bonomi*, [1881-5] All E.R.Rep. 1; 9 H.L.Cas. 503; 34 L.J.Q.B. 181; 4 L.T. 754; 7 Jur.N.S. 809; 9 W.R. 769; 11 E.R. 825, H.L.; 19 Digest (Repl.) 178, 1197.
- (2) *Humphries v. Brogden* (1850), 12 Q.B. 739; 20 L.J.Q.B. 10; 16 L.T.O.S. 457; 116 E.R. 1048; sub nom. *Humfries v. Brogden*, 15 Jur. 124; 19 Digest (Repl.) 180, 1207.
- (3) *Trevivian v. Lawrence* (1704), Holt, K.B. 282; 2 Ld. Raym. 1036, 1048; 6 Mod. Rep. 256; 1 Salk. 276; 3 Salk. 151; 87 E.R. 1003; 21 Digest (Repl.) 256, 370.

Also referred to in argument:

- Smart v. Morton* (1855), 5 E. & B. 30; 3 C.L.R. 1004; 24 L.J.Q.B. 260; 25 L.T.O.S. 97; 1 Jur.N.S. 825; 119 E.R. 393; 19 Digest (Repl.) 181, 1211.
- Harris v. Ryding* (1839), 5 M. & W. 60; 8 L.J.Ex. 181; 151 E.R. 27; 33 Digest (Repl.) 848, 1024.
- Roberts v. Haines* (1856), 6 E. & B. 643; 25 L.J.Q.B. 353; 2 Jur.N.S. 999; affirmed sub nom. *Haines v. Roberts* (1857), 7 E. & B. 625; 119 E.R. 1377; sub nom. *Roberts v. Haines*, 27 L.J.Ex. 49; 29 L.T.O.S. 233; 3 Jur.N.S. 886; 5 W.R. 631 Ex. Ch.; 11 Digest (Repl.) 67, 916.
- Spencer's Case* (1583), 5 Co. Rep. 16a; 1 Smith, L.C. 62; 77 E.R. 72; 31 Digest (Repl.) 153, 2907.
- Hilton v. Lord Granville* (1844), 5 Q.B. 701; 1 Dav. & Mer. 614; 13 L.J.Q.B. 193; 2 L.T.O.S. 419; 8 Jur. 311; 114 E.R. 1414; 33 Digest (Repl.) 844, 1001.
- Caledonian Rail. Co. v. Sprot* (1856), ante p. 109; 27 L.T.O.S. 264; 2 Jur.N.S. 623; 4 W.R. 659; 2 Macq. 449, H.L.; 19 Digest (Repl.) 49, 272.

Appeal from a decision of the Court of Exchequer Chamber, affirming a decision of the Court of Queen's Bench on a Special Case, in an action brought by the appellant, D. Rowbotham, in which he alleged that he was entitled in reversion to certain houses which had been erected and standing for more than twenty years; that he was entitled to have the said houses and the foundations supported by the subjacent and adjacent soil; that the respondent had wrongfully worked certain mines under the houses and contiguous land and removed the coals and minerals therefrom without leaving any sufficient support, so that by reason thereof the houses cracked, sunk in and became dilapidated; and that as a result the appellant had been injured in his reversionary interest. There was a second count for the like injury to certain land in the possession of tenants the reversion of which belonged to the appellant.

The appellant was the reversioner in fee of the surface lands and buildings mentioned in the declaration, having become seised of the same by virtue of divers mesne conveyances from one Samuel Pears, to whom the surface land was allotted by the award hereinafter mentioned. The buildings on the land mentioned in the

A first count had been erected more than twenty years before the cause of action, and were not upon the land at the time of the execution of the award. The respondent was entitled to and worked the mines of coal, being the same mines as those allotted to Henry Howlette by the award, and the damage to the reversion was caused by the sinking of the soil.

B It was stated in the Special Case that the course and practice of mining was for the owner of the mine to get the whole of the underlying mine without leaving any pillars of the same coal by way of support, for the coal was so soft and perishable that what was left by way of support soon fell away and decayed. But instead of leaving pillars of the same coal, the course and practice of mining was to erect pillars of the refuse coal, called lamb and slack, which formed a much more durable support than pillars of the same coal would if left. The respondent's mines had C always been worked without any negligence on his part, and according to the course and practice of mining, and he left, as is usual, pillars of lamb and slack. No natural or artificial pillars could prevent the accrual of the injuries complained of, which had arisen from the natural subsidence of the surface soil in getting the mine, according to the use and practice of the country and neighbourhood.

D An Act of Parliament was passed in 1769 for dividing and enclosing the common fields, etc., in the parish and township of Bedworth, and for regulating certain charity estates within the parish, and commissioners were appointed for the purposes of the Act. The Act, after reciting that there were common fields and commonable lands, the property in which lay intermixed and dispersed in small parcels, and the owners were desirous that the lands should be specifically allotted among them in severalty, directed the commissioners, in a due and fair E proportion, to divide and allot the same. After reciting that there were lands in the parish supposed to have mines under them and that on that account the proprietors might be desirous of retaining their property therein, the Act provided that such proprietors should, in the allotment, get other lands supposed to contain mines of equal value. The award of the commissioners was to express the quantity of the land, and all orders, regulations and determination proper and necessary as to F fencing, laying out roads, etc., which were to be binding and conclusive on the several parties interested, and the lands allotted were to be in full bar, satisfaction and compensation of and for the several respective pieces and parcels of land and ground, right of soil, right of common, and other rights, interests and properties whatsoever.

G On June 21, 1770, the commissioners made an award or instrument under their powers, which allotted certain lands to Henry Howlette. It proceeded :

H "And as to the mines in the said estate of the said Henry Howlette, previous to the inclosure thereof, the same not having been required to be set out by metes and bounds, we do assign, allot and appoint unto the said Henry Howlette in lieu thereof all the mines of coal and limestone under the several allotments of land before made to him, and also all the mines of coal under the turnpike-road so far as the same ranges in the outline of his allotment, etc., on the west side of the said turnpike-road, against the allotment to Samuel Pears, and no more, the residue on the east against the house of the said Samuel Pears and Daniel Jackson being allotted to the said Samuel Pears."

I The commissioners also awarded and allotted to the said Samuel Pears "all that lot or parcel of land lying, etc., bounded on the west and south by an allotment to the said Henry Howlette"; and as to the mines on the estate of the said Samuel Pears, the commissioners allotted to the said Samuel Pears

"all the mines of coal under that part of the turnpike-road, etc., which the said commissioners adjudged to be equal in value to the mines he was previously possessed of, without being entitled to any part of the mines under his own allotment of land, which last-mentioned mines were thereby before awarded to the said Henry Howlette."

The award also contained the following covenant:

"And whereas, in order to preserve the convenience of situation of the allotment to the several proprietors interested in the said inclosure and division, it hath been found necessary in some cases to assign the mines under the whole of some particular allotments, and in other cases part of such mines, to different persons that those to whom the allotments of the surface land are awarded, and the several proprietors parties to this our award are the only persons interested in the disposal of land and mines under such circumstances, which said proprietors parties hereto do by their sealing and executing these presents testify their acceptance of their respective allotments in manner as the same are allotted to them as aforesaid, and do for themselves severally and respectively, and for their several and respective heirs, executors and administrators, successors and assigns, utterly disclaim, release and disavow all right, title, interest, claim and demand of, in, or to any of the mines under their several allotments, except such or such part thereof only as are hereinbefore particularly mentioned and described to be allotted to each of them. And the same proprietors do hereby for themselves severally and respectively, and for their several and respective heirs, executors, administrators, successors and assigns, covenant, promise, and agree to and with each other, and the heirs, executors, administrators, successors and assigns of each other, that the said mines so allotted under the circumstances aforesaid shall or lawfully may for ever after be held and enjoyed by the respective persons to whom the same are assigned according to the true intent and meaning of this award, and by them and every of them be worked and gotten accordingly without any molestation, denial, or interruption of any other person or persons parties to these presents and those claiming under them respectively, who for the time being are or may be owner or owners of the surface of the lands under which such mines are situate, and without being subject or liable to any action or actions for damage on account of working or getting the said mines for or by reason that the surface of the lands aforesaid may be rendered less commodious to the occupier thereof by sinking in hollows or being otherwise defaced and injured where such mines shall be worked, the said several proprietors parties to these presents and interested in the disposal of lands and mines under the circumstances aforesaid, having agreed with each other, and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject to any inconvenience or encumbrance which may arise from the cause aforesaid, so nevertheless as that nothing herein contained shall extend or be construed to extend to authorise or enable any of the parties for the time being entitled to the said mines to sink pits into the allotments under which the same are situate for the purpose of working the said mines without the consent of the then owners of the surface of the same allotments previously obtained, or in any manner to dig or break up the said surface without the like consent."

The award was executed by several parties, among others by Samuel Pears, but not by Henry Howlette.

In the Queen's Bench judgment was given for the respondent on both counts. That judgment was affirmed by the Exchequer Chamber, and the appellant appealed.

Serjeant Hayes and Spinks for the appellant.

Montagu Smith, Q.C., and *Field* for the respondent.

Their Lordships took time for consideration.

June 19, 1860. The following opinions were delivered.

LORD WENSLEYDALE stated the facts, and continued: I am of opinion that the judgment of the Court of Exchequer Chamber, affirming that of the Court of Queen's Bench, is right, and I advise your Lordships to affirm it.

Whether the right to the support given by the land below to the land of the owner of the surface when the strata belong to different persons is properly to be

A called "an easement," as it is by Mr. GALE in his treatise on EASEMENTS—a natural easement—or whether it is to be termed a right *ex jure naturæ* to that support, or whether the owner of the surface has merely a right to enjoy his own land in its natural state and condition, with a right of action against the owner of the land adjoining or subjacent, when the act of his neighbour does him an injury, are questions immaterial, as it appears to me, to the decision of this case, though

B the last proposition appears to be fully established by the judgment of the Court of Exchequer Chamber in *Bonomi v. Backhouse* (1), where it was held that the Statute of Limitations does not begin to run until the damage be sustained. There is no doubt that *prima facie* the owner of the surface is entitled to the surface itself and all below it *ex jure naturæ*, and those who claim the property in the minerals below, or any interest in them, must show some grant, form, or conveyance by him, or it

C may be from the Crown, as suggested by LORD CAMPBELL in *Humphries v. Brogden* (2). The rights of the grantee of the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Prima facie*, it must be presumed that the minerals are to be enjoyed, and, therefore, that a power to get them must also be granted or reserved as a necessary incident. It is one of the cases put by SHEPPARD (TOUCHSTONE 5, c. 89), in illustration of the maxim "*Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*," that by grant of mines is granted the power to dig them. A similar presumption *prima facie* arises that the owner of the minerals is not to injure the owner of the soil above by getting them, if it can be avoided. But it rarely happens that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired,

E and then the only question would be as to the construction of that deed.

The question to be decided in this case is what sort of right the respondent had upon the facts stated in the Case to get and take away the coals under the appellant's land. The origin of the appellant's right to the land and of the respondent's right to get the coals is the award made in 1770, under the private Inclosure Act for the common fields of Bedworth. A larger extent of surface, no doubt, was

F given to the allottee of the surface as the compensation for the minerals not being given to him. It is clear that the persons under whom the appellant and defendant respectively claim took with full knowledge that the one was intended to have a very large power of getting the mines, and the other the surface subject to that power, and that each of the parties to the suit had notice of their respective titles by the award itself. The appellant's case is, therefore, not a very equitable one,

G but the question still is whether that power and limitation were legally annexed to the respective rights or not.

I am clearly of opinion that they were, whether the award be considered valid or not. The objection to the validity of the award is that the commissioners had no power to separate, in any case, the minerals from the surface. If they had the power (and I think they had), then the award of the surface of the particular

H allotment to Pears and of the coal under it to Henry Howlette, was valid, and of necessity the commissioners could give to the latter, for the enjoyment of his allotment, the power to get the coal. They have done so by their award, and though Pears is made to covenant at the same time as to the manner in which the power is to be exercised, it is the act of the commissioners also, for it is evident that they intended it to be done, and no precise words are necessary. It

I may be, that they doubted of their powers, and so added the covenant.

On the supposition, therefore, that the award is valid, Howlette obtained the right to get the coal in a manner which would render the surface uneven and less commodious to the occupier. Supposing this power is not to be considered as given by the act of the commissioners, but only by the contract of the parties, Pears' contract—he being seised in fee by virtue of the award—would certainly operate as a grant by him to Howlette (who at the same instant took the fee-simple in the mines) of the power to get the minerals and to disturb the surface of his own land for that purpose by winning the mines below from some

adjoining land or bed of coal. I do not feel any doubt that this was the proper subject of a grant as it affected the land of the grantor; it was a grant of the right to disturb the soil from below and alter the position of the surface, and analogous to the grant of a right to damage the surface by a way over it; and it was admitted at your Lordships' Bar that there is no authority to the contrary. It is undoubted law that no particular words are necessary to a grant, and any words which clearly show the intention to give an easement which is by law grantable are sufficient to effect that purpose. If the words could only be read to amount to a covenant, it must be admitted that such a covenant would not affect the land in the hands of the assignee of the covenantor, but, if they amount to a grant, the grant would be unquestionably good, and bind the subsequent owners of the surface. Therefore, if the award be valid, the appellant as assignee of the surface would be bound either by the order of the commissioners or by the grant. A B C

The reason why I think the commissioners had the power to allot the surface to one and the mines to another is because the words of the Act do not necessarily limit the division into allotments of the whole interest in the land in separate entire portions of the surface and minerals together. There is nothing inconsistent with the terms of the Act in allotting the surface in some portions of land to one, and the minerals under those portions to another. The Act of Parliament recites that the property lies intermined and dispersed in small parcels, and small parcels would have probably to be assigned to each proprietor, and it might be out of question for each owner to win the coals under his own allotment by sinking a shaft in it, and it would be most convenient for all parties to have the coals assigned in such cases to a neighbouring proprietor and more of the surface given to the owner whose coal was taken away. The private Act of Parliament is really no more than an agreement between the parties to it sanctioned by the legislature, and in order to construe that agreement we may look at the surrounding circumstances at the date of it. Add to this, the Act and award having been acted upon for ninety years, every intendment must be made which would give it validity. These considerations lead me to the opinion that the commissioners had the power for the general convenience which they believed they had, and which they exercised, to give portions of the surface to one and the mines under each to another, and that the award, therefore, is valid. D E F

The opinion, however, of the majority of the judges in the courts below seems to have been that the award was bad. But supposing that it is so, and that Pears did not take a legal right to the land, nor Howlette a legal title to the mines by the award, I still think that the respondent is entitled to the verdict. It might, perhaps, be enough to say that after ninety years' enjoyment a legal right to the surface land ought to be presumed in those under whom the appellant claims, and a legal right to the minerals below also, and with a right to get them by a legal grant in those under whom the respondent claims, and if there was such a right on the finding in the Case, it could not be exercised without rendering the surface uneven from the peculiar nature of the coal, and the incapability to support the land above by artificial means. The right to get involved, therefore, of necessity the right to withdraw a certain quantity of support from the land above, and so to do all the damage which has been done, for it is found that the defendant's workings were carried on with care and skill, and without any negligence. I do not think, however, that it is necessary to have recourse to this presumption. If the commissioners had no power to award the surface to one person and the minerals to another, it would follow that the award was totally void, but Pears would still be bound by the deed which he executed, which would operate as a grant of the right to win the coals so as to injure the superjacent land. He would not be estopped from saying that he was not at the time the owner of the surface because his defect of title appeared upon the same instrument and so the estoppel would be avoided, and he would be in the same situation as if without any legal right, but at the same time fully believing that he had executed a grant of a right to get G H I

- A the minerals under a particular close to another person, and so to disturb the soil of that close, and afterwards acquired the legal title to that close. This acquisition would operate by feeding the estoppel, and make it obligatory from that time and operate as a grant of an interest in the land: *Trevivian v. Lawrence* (3). It is quite clear that after a lapse of twenty years a good title was obtained from that time, and thence I think the grant had full operation and authorised all that
- B the defendant did in getting the coals.

It may be proper to add that if the appellant had a right properly so called to the support of the minerals as an easement or ex jure naturæ, the covenant might operate as a release of that right. But that notion is at variance with the law laid down in *Bonomi v. Backhouse* (1), above cited, which I think is perfectly right. Feeling assured that the covenant operates as a grant of a right to disturb

C the surface, it is enough to decide the case on that ground. The circumstance of the appellant having afterwards built houses upon the allotment which was subject to this power makes no difference in this case, and, therefore, I think the defendant was entitled to judgment. I should add that **LORD BROUGHAM**, who heard the case, is unavoidably absent, but he authorises me to say that he entirely concurs in the view which I have taken of this case.

- D **LORD CHELMSFORD.**—This action was brought to recover damages for injuries to certain surface land, and houses standing thereon, occasioned by the respondent having wrongfully and negligently worked his mines under the land without leaving any sufficient support, by reason of which the foundations of the houses were rendered incapable of supporting them and they became dilapidated and unsafe.
- E From the facts in the Special Case stated for the opinion of the court by consent of the parties, it appears that the respondent's mines have always been worked without any negligence on his part and according to the course and practice of mining of the county and neighbourhood in which the mines are situate, and that he left (as is usual) pillars of lamb and slack according to such course and practice. The Case also states that "no natural or artificial pillars would prevent the accrual
- F of the injuries complained of, which have arisen from the natural subsidence of the surface soil in getting the mine according to the use and practice of the county and neighbourhood." This is not very clearly expressed, but I suppose the meaning to be that no natural or artificial pillars, that is, pillars of coal left in the working nor pillars erected of the refuse coal called lamb and slack, according to the use and practice of the neighbourhood, would have prevented the accrual
- G of the injuries complained of. It cannot be intended to allege (what it seems to import) that the mines could not have been worked in any manner without necessarily occasioning the subsidence of the surface land.

- The question, therefore, raised by the Special Case is whether the respondent was bound, while working his mines according to the proper and regular course and practice of mining in the county and neighbourhood, to take care to leave a
- H sufficient support to the appellant's surface land, and to his houses erected thereon. The appellant and the respondent, or those from whom they claim, have been respectively in possession, the one of the surface land, the other of the mines beneath, from the time of an award made in the year 1770, under an Inclosure Act of 1769, "for dividing and inclosing the common fields, common grounds, and commonable lands in the parish and township of Bedworth, in the county of
- I Warwick." By this award the commissioners divided the surface land from the mines, and allotted the former to one Samuel Pears, from whom the appellant derives his title, and the mines beneath to one Henry Howlette, from whom the respondent claims. The power of the commissioners to make this separation of the mines from the surface land has been denied. But it is to be observed that the Act contains nothing which prohibits a division in this manner of the lands to be inclosed, and deals with small parcels of land in a mining district where it would be extremely inconvenient that each proprietor (however small) should possess the mines within his allotment, so that the legislature must be assumed to

have intended that a division, so much for the common benefit, should be made, and, therefore, that an authority for the purpose must be implied. It is certain that the parties who signed and sealed the award never doubted the power of the commissioners in this respect, and the respective allotments have been uninterruptedly enjoyed without any question as to the title to them until the present action was brought. A

In the view which I take of the case, however, it is quite immaterial whether the award is valid or not, because upon either supposition there will still exist the covenant of Pears, which will be available to prevent the action being maintained. This covenant is in terms much more than a covenant not to sue, for Pears expressly declares that he is willing and desirous to accept his allotment "subject to any inconvenience or encumbrance which may arise from working and getting the mines." The word "encumbrance" (though not a happily chosen word for the purpose) I understand to mean any "obstruction" or "impediment" to the use of the surface land. The covenantee, according to the well-known rule on the construction of deeds, is entitled to render this covenant available in any manner in which it will answer the intended purpose. The construction adopted by the judges whose judgments were in favour of the respondent is that it may be used as a grant, and I think that when the subject-matter of the grant is correctly understood, this is the correct view. It must be borne in mind that Pears had no right, either by the award or as attached to his ownership, which was capable of being granted and transferred to another. It was a right inherent in the land to support from the subjacent land, which would pass with the land itself, but could not possess a separate existence. I was disposed to think that it was a right which might be relinquished to the owner of the mines, and that the covenant might, therefore, be used as a release, but I am satisfied that the view taken by my noble and learned friend LORD WENSLEYDALE, founded upon the nature of the right, as explained in *Bonomi v. Backhouse* (1), is correct, and that it is not such a right as can be the subject of a release. But although the thing itself, namely the right to support, cannot pass by grant, nor be extinguished by release, yet the covenant amounts to a grant of a licence to do acts which may be completely destructive of that right, and being by deed, and, therefore, presumed to be founded upon good and sufficient consideration, it is irrevocable and binding upon all who claim the surface land from Pears. The effect of Pears' deed is not to transfer to Howlette any right or interest in the coal which might serve as a support to the surface land, but it operates as the grant of a right to Howlette, his heirs and assigns, to work the mines without molestation, denial, or interruption, even to the taking away the support, and defacing and injuring the surface, of the lands, which without such a grant could not lawfully have been done. For these reasons I agree with my noble and learned friends that the judgment of the Exchequer Chamber is right and ought to be affirmed. B C D E F G

LORD KINGSDOWN.—I concur. H

Appeal dismissed.

A

GRAY v. GRAHAM

[HOUSE OF LORDS (Lord Cranworth, L.C., and other Lords), March 30, April 2, 3, August 14, 1855]

[Reported 2 Macq. 435; 26 L.T.O.S. 111]

B

Solicitor—Lien—Extent of lien—Costs of action by solicitor against client to obtain payment of costs.

If a solicitor has a lien upon his client's deeds for costs incurred by him, the client upon application refuses to pay those costs, and the solicitor is driven to bring an action to recover them, the lien extends as well to the costs of enforcing the bill of costs as to the costs incurred by the client.

C

Solicitor—Lien—Mortgage—Solicitor acting for mortgagor and mortgagee—Duty to disclose lien on mortgaged property.

A solicitor who has a lien upon the title-deeds of his client's estate and is retained by a lender to prepare a security for money to be advanced to the client on the security of the estate is bound to inform the lender of the existence of his own lien.

D

Notes. As to extent of retaining lien, see 36 HALSBURY'S LAWS (3rd Edn.) 175; and for cases see 43 DIGEST (Repl.) 289–290, 298.

Case referred to :

(1) *Lambert v. Buckmaster* (1824), 2 B. & C. 616; 4 Dow. & Ry.K.B. 125; 2 L.J.O.S.K.B. 93; 107 E.R. 513; 43 Digest (Repl.) 289, 3053.

E

Appeal by Gray, a solicitor, from a decision of the Court of Session in Scotland.

From 1827 to 1833, the appellant acted as solicitor to Charles Cunningham, and as such solicitor, he held the title deeds to certain properties owned by Cunningham. In 1830 Cunningham mortgaged these properties to a Miss Cunningham, and it was alleged by her that in procuring and preparing this mortgage, the appellant acted as solicitor to Cunningham and also to herself, but he did not disclose to her that he had any lien. In 1836, the appellant delivered a bill of costs to Cunningham for acting as his solicitor. Not receiving payment, he brought proceedings in the Scottish courts, and recovered judgment for the sum claimed in the bill of costs and interest. Cunningham died in 1840.

F

In the present appeal, the question arose as to the extent of the lien which the appellant had acquired against Cunningham, i.e., whether the lien covered the costs of the proceedings brought against Cunningham. A further question arose, whether the appellant, through his alleged failure to disclose to Miss Cunningham his claim to a lien, had lost, as against her, any lien to which he would otherwise have been entitled. The report here is confined to these two questions. Other questions were raised in the appeal, in particular the question whether any lien which the appellant had acquired against Cunningham in respect of the costs of the proceedings to recover payment of the bill of costs was also enforceable against mortgagees of the property, but the law differs in England and Scotland as to how far a mortgagor's solicitor can enforce a lien against a mortgagee of his client's property, and the appeal is not reported on this point. The respondents to the appeal were Miss Cunningham and other mortgagees of the property.

H

I

Sir Richard Bethell, Q.C., and Anderson, Q.C., for the appellants.
Rolt, Q.C., and Roundell Palmer, Q.C., for the respondents.

Their Lordships took time for consideration.

Aug. 14, 1855. **LORD CRANWORTH, L.C.,** having stated the facts, said: According to the law, certainly of this country (though there is very little authority upon this subject), if a solicitor has a lien upon his client's deeds for costs incurred by him, and the client, upon application, refuses to pay those costs, and the

solicitor is consequently driven to bring an action, undoubtedly by the law of England, though there is no direct authority upon the subject, except a case very shortly reported, *Lambert v. Buckmaster* (1), all principle goes to this, that the law of lien must extend as well to the costs of enforcing the bill of costs as to the costs incurred by the client himself. A

[HIS LORDSHIP then dealt with other matters, and continued:] The only remaining point in this case lies in a very narrow compass—that is, the proposition of Miss Cunningham, who disputes the claim of the appellant to any lien against her, upon a ground which I think the Court of Session was perfectly right in sustaining in point of law, if the facts had warranted the application of it. What the court decided was this, that where there is a borrower and a lender, and the solicitor for the borrower acts as solicitor for both parties, he, preparing the security for the lender at the expense, as will ordinarily be the case, of the borrower, if he has any demand upon the title deeds which belong to the borrower and affect his security, he is bound to disclose that fact to him, because otherwise he is deceiving his own client by leading the lender, who is as much his client as the borrower, to suppose that he is giving him the security of the estate free from any lien on his part, whereas in truth he afterwards sets up a right of retention against him. The Court of Session held that nothing was more dangerous than to allow transactions of this sort; and that where the same law agent acts for parties who have conflicting interests, the law must always be taken most strongly against him; and consequently they held in this case that there was a personal exception against the appellant setting up this lien against Miss Cunningham. As regards the law there laid down I entirely concur in the judgment of the Court of Session. B C D E

[HIS LORDSHIP then reviewed the facts on this issue, and concluded that there was no evidence that the appellant had ever undertaken to act as solicitor to Miss Cunningham, and consequently the application of the rule of law applied by the Court of Session was not warranted by the facts of the case.]

Appeal allowed in part. F

BOYSE v. ROSSBOROUGH AND ANOTHER

[HOUSE OF LORDS (Lord Cranworth, L.C., and other Lords), June 16, 17, 19, July 3, 4, 7, 10, 11, 14, 15, 1856, March 13, 1857]

[Reported 6 H.L.Cas. 2; 29 L.T.O.S. 27; 3 Jur.N.S. 373; 5 W.R. 414; 10 E.R. 1192]

Will—Setting aside—Need to prove coercion or fraud—Conduct amounting to coercion or fraud—Burden of proof—Inference from influence exercised in other transactions.

Influence, to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation of these words some latitude must be allowed. To come to the conclusion that a will has been obtained by coercion it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been I

- A created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud: if a wife by falsehood raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that the impressions which she knows he has formed to their disadvantage may never be removed, such contrivance may be equivalent to positive fraud and may render invalid any will executed under false impressions thus kept alive.
- B

When once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. To discharge this burden it is not sufficient to show that the circumstances attending its execution were consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they were inconsistent with a contrary hypothesis. Further, it must be proved that the undue influence was exercised in relation to the will itself, not in relation to other matters or transactions. But this principle must not be carried too far. Where the court sees that, at or near the time when the will sought to be impeached was executed, the alleged testator was, in other important transactions, so under the influence of the person benefited by the will that he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised.

- E **Notes.** Considered: *Parfitt v. Lawless* (1872), L.R. 2 P. & D. 462; *Boughton v. Knight*, [1861-73] All E.R.Rep. 40; *Hampson v. Guy* (1891), 64 L.T. 778; *Roe v. Nix* (1892), 9 T.L.R. 128; *Craig v. Lamoureux*, [1920] A.C. 349. Referred to: *Wright v. Wilkin* (1859), 4 De G. & J. 141; *Baudains v. Richardson*, [1906] A.C. 169.

- F As to setting aside a will on the ground of undue influence, see 16 HALSBURY'S LAWS (3rd Edn.) 207-209; and for cases see 23 DIGEST (Repl.) 127-135.

Appeal by the defendants from decrees and orders of the Court of Chancery in Ireland.

- The bill was filed in 1849 by the respondents John Thomas Rossborough, now John Thomas Rossborough Colclough, and Mary Grey Wentworth, his wife, against Thomas Boyse and the appellant Jane Stratford Boyse, his wife, its object being to impeach the alleged will of Cesar Colclough, deceased, the former husband of the appellant Jane Stratford Boyse. The bill stated that Cesar Colclough died intestate in August, 1842, without issue, seised in fee of large real estates in Wexford, and leaving Mary Grey Wentworth Rossborough, now Mary Grey Wentworth Rossborough Colclough, his heiress-at-law, and that after his decease his widow Jane Stratford Boyse, then Jane Stratford Colclough, entered into possession of all the estates, claiming to be entitled thereto by virtue of an alleged will of her husband, Cesar Colclough, dated Aug. 6, 1842, rather more than a fortnight before his death, by which he gave to her all his real and personal estate and made her his sole executrix, of which will, or alleged will, she obtained probate in the Prerogative Court of Canterbury and also in the Prerogative Court in Ireland. The bill charged that this was not the genuine will of Cesar Colclough, but that, if it was in fact executed by him, such execution was obtained by Jane Stratford, his wife, by means of undue influence exercised by her over him when he was in a state of mental imbecility and incapable of resisting her influence, or of exercising any will of his own. The bill further stated the marriage of the said Jane Stratford Colclough in 1846 with Thomas Boyse, from whom however she separated within three months after the marriage. It further stated that the plaintiffs were desirous of proceeding by ejectment to obtain possession of the estates, but were unable to do so inasmuch as at the time of the death of Cesar Colclough the entire lands and
- G
- H
- I

premises were, and still were held by tenants under leases for lives, under leases for years, or under tenancies from year to year, which tenancies were valid and binding tenancies at the time of the death of Cesar Colclough, and still continued so. It was also stated that the premises were also comprised in a term of years, still subsisting, created by a settlement, dated Jan. 6, 1846, for securing a jointure for Jane Stratford Boyse, and that Thomas Boyse and Jane Stratford Boyse intended to rely on these outstanding tenancies and terms of years as a bar to any ejectment to be brought by plaintiffs for recovery of said premises.

The prayer of the bill was :

“That the said alleged will of Aug. 6, 1842, may be set aside and declared null and void, and be delivered up to be cancelled, as having been obtained from said Cesar Colclough, the alleged testator, by undue influence and misrepresentation, and as having been executed by him when not capable of exercising his judgment in such matters, and, therefore, as not being his genuine last will and testament: or, if the court shall think fit, that an issue may be directed to the county of Wexford, to try whether the freehold estates of the said Cesar Colclough, the alleged testator, were by said alleged will devised or not; and if it shall be found that the said estates descended on the plaintiff Mary Grey Wentworth Rosborough, as his heiress-at-law, then that the said defendants may be ordered to hand over and deliver up to plaintiffs all the deeds, documents, title-deeds and papers in their or either of their hands relating to the same; and to come to an account with the plaintiffs for all the rents and profits of the said lands received by them or either of them, or for their or either of their use since the death of the said Cesar Colclough, the alleged testator, and pay over to plaintiffs what shall be found due on taking such accounts; or that plaintiffs be at liberty to proceed at law by ejectment for recovery of the said lands and premises of which the said Cesar Colclough was so seised at the time of his decease; and that the said defendants may be restrained from relying on the said outstanding tenancies or any outstanding terms of years or temporary bars as a defence against plaintiffs' said proceedings: and that plaintiffs may have such further and other relief as to the court may seem meet and the circumstances of the case may require.”

A great number of facts were set forth in the bill, for the purpose of showing that Jane Stratford had for a long course of years studiously estranged and separated Cesar Colclough from his own relatives, and had obtained such an ascendancy over his mind that he could not be considered a free agent in the management of his affairs.

The defendants Thomas Boyse and Jane Stratford his wife put in a joint answer, insisting on the validity of the will, and denying all fraud or undue influence in obtaining it, and they alleged that the testator was of perfect capacity and well able to manage his affairs, and that the will was the genuine expression of his own unbiased wishes as to the disposal of his property. The answer further stated, that on the marriage of the defendants in 1846, a settlement was executed, by which the defendant Jane Stratford Boyse became entitled to the whole of the property devised to her for her sole and separate use, and the defendants admitted, for the purposes of the suit, that the devised estates were then subject to outstanding terms and tenants' leases, which would prevent the plaintiffs from recovering in ejectment.

At the trial in July, 1852, before PENNEFATHER, B., and a special jury of the county of Wexford, a verdict was found that the document was not the last will and testament of Cesar Colclough. A motion which was afterwards made in the Irish Court of Chancery for a new trial on the ground that the verdict was not warranted by the evidence was refused by the LORD CHANCELLOR. The defendants appealed.

Sir Frederic Thesiger, Q.C., Rolt, Q.C., and Smythe for the appellants.

Sir Richard Bethell, Q.C., and Whiteside, Q.C., for the respondents.

Their Lordships took time for consideration.

- A** Mar. 13, 1857. **LORD CRANWORTH, L.C.**, delivered the following opinion in which after dealing with a preliminary point as to the jurisdiction of the court below, which does not now call for report, continued: In considering the question whether the Court of Chancery in Ireland ought to have refused the application for a new trial, I must say whether I am entirely satisfied that the whole case was explained to and understood by the jury, and that they were thoroughly aware
- B** of the principles which ought to guide them in coming to a conclusion. The first point then is: What was the issue which the jury had to try? The issue to be tried was whether a certain paper writing, bearing date Aug. 6, 1842, was the last will of Cesar Colclough deceased, the late husband of the appellant. That it bore his genuine signature and was signed by him in the presence of and attested by two witnesses, in manner required by law, can hardly be said to have been a matter in
- C** controversy—indeed, no dispute was ever raised on that point. But, though a good will, so far as related to its execution and attestation, it yet might not be an instrument having any legal validity. For if the person by whom it was made was not at the time of making it of sufficient mental capacity to enable him to dispose of his property, or, if, having sufficient disposing mind, he executed it under coercion, or under the influence of fear, or in consequence of impressions created in
- D** his mind by fraudulent misrepresentations—in none of these cases can the instrument be properly described as being his will. In the first case, the maker is by the hypothesis incapable of having a will. In the other cases supposed, though there is a power of willing, yet the instrument will not be, in contemplation of law, a true expression of that will. I say, in contemplation of law, for, perhaps, speaking with strict metaphysical accuracy, the instrument in these latter cases does
- E** truly express the testator's will, and the more correct mode of expression would be that the law will not give effect to the will of a testator when that will has been thus unduly brought about. If I meet a man in the street, and he puts a pistol to my breast and threatens to shoot me if I do not give him my purse, and to save my life I yield to his demand, or if a neighbour, meaning to steal my horse, asks me for the loan of it, stating that he wants it in order to go to market, and trusting to
- F** this representation I deliver it to him, and then he rides off and sells it—in both of these cases it was my will to hand over the purse and the horse, but the law deals with the case as if they had been obtained against my will, my will having been the result in the one case of fear, and in the other of fraud. The same principles must guide us in determining whether an instrument duly executed in point of form, so far as legal solemnities are concerned, is or is not a valid will.
- G** The inquiries must be—first, was the alleged testator at the time of its execution, a person of sound mind? and if he was, then, secondly, was the instrument in question the genuine expression of his will, or was it the expression of a will created in his mind by coercion or fraud?

On the first head, the difficulty to be grappled with arises from the circumstance that the question is almost always of one degree. There is no difficulty, in the

H case of a raving madman or of a drivelling idiot, in saying that he is not a person capable of disposing of property. But between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight from noon, but at what precise moment twilight becomes darkness is hard to determine. In this case, however, with respect to the general mental

I capacity of Mr. Colclough, I do not apprehend that any question is raised. The evidence shows irresistibly that he was a man of superior and cultivated mind, and the only question on this head of inquiry is whether, though previously of a strong and vigorous understanding, he had or had not become, before Aug. 6, 1842, so enfeebled as to be incapable of understanding the nature and affect of a will, or generally of managing or disposing of property.

[His LORDSHIP referred to the evidence, and continued:] I shall, therefore, assume that Mr. Colclough, when he executed the instrument of Aug. 6, 1842, had sufficient mind to enable him to make a will if left to exercise his judgment freely;

and I will consider the other, which is the real point of the case, namely, whether A the verdict is satisfactory supposing it to have proceeded on the ground that, though Mr. Colclough had a disposing mind, yet the document in question cannot be considered to be his will by reason of its having been obtained from him by the undue influence of his wife.

The difficulty of deciding such a question arises from the difficulty of defining with distinctness what is undue influence. In a popular sense, we often speak of a person exercising undue influence over another when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a friend of riper years, to whom he looks up and who leads him to consider habits of dissipation as venial and perhaps even creditable. The friend is then correctly said to exercise an undue influence. But if, in these circumstances, the young man, influenced by his regard for the friend C who had thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the friend had urged, or even importuned, the young man so to dispose of his property, provided only that in making such a will the young man were really carrying into effect his own intention formed without either coercion or fraud. I must further remark that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish, and this is the case with which your Lordships have now to deal. E

In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will must be an influence exercised either by coercion or by fraud. In the interpretation, F indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. G Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud: if a wife by falsehood raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives to the end that the impressions which she knows he has thus formed to their disadvantage may never be removed, such H contrivance may, perhaps, be equivalent to positive fraud and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say that, allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud. One point, however, is beyond dispute, and that is that where I once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed, and, looking to the evidence in the present case, I am unable to discover evidence warranting the conclusion at which the jury have arrived—supposing them to have proceeded on the ground of undue influence.

That Mr. Colclough might, without any undue influence operating on his mind, desire to make a will giving everything to his wife, is a proposition which cannot

- A be controverted. She had been the partner of his life for twenty-four years. He had no children. His nearest relative was a first cousin of his father, with whom, from whatever cause, he had never had more than slight and casual intercourse. His heir presumptive was a second cousin, of whose very existence he does not appear to have been aware, being the daughter of another and elder first cousin of his father, who had died very many years previously. That he should in these
- B circumstances wish to give everything to his wife could surely afford no ground for surprise; and one mode, therefore, of looking at this subject is, to consider whether, supposing him without the exercise of any sinister influence to have entertained such a wish, his conduct would have been that which, according to the evidence, he in fact pursued. Supposing, then, that Mr. Colclough on Aug. 6, 1842, being as I assume he was, sound in mind, though very infirm in body, entertained
- C the wish to give everything to his wife, what is the course which, as a reasonable man, he would be likely to pursue? He would merely send for his solicitor, and, in the absence of his wife, give him the necessary instructions, and when the will was prepared, he would execute it in the presence only of his solicitor and some other disinterested witness, for which purpose no one would be more fit than his medical attendant. This is precisely the course which he did take. The burden of
- D proof at the trial was, therefore, on the respondent to show that, though what was done bore the semblance of being the voluntary act of Mr. Colclough, yet it was an act which he was induced to perform under the influence of terror or fraud. I look in vain for any such evidence. The most I can find—if indeed that can be found—is evidence to show that the act done was consistent with the hypothesis of undue influence; that the instrument, though apparently the expression of his
- E genuine will, might in truth have been executed only in compliance with the threats or commands of his wife, or that he had been led to execute it by unfounded prejudices artfully instilled into or cherished in his mind by his wife against those who would otherwise have been the probable objects of his bounty.

- But, in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution were consistent with the
- F hypothesis of its having been obtained by undue influence. It must be shown that they were inconsistent with a contrary hypothesis. Can it be truly said that there is any inconsistency here? The undue influence must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions. But this principle must not be carried too far. Where a jury sees that, at and near the time when the will sought to be impeached was executed, the alleged testator was, in other
- G important transactions, so under the influence of the person benefited by the will that he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised. Even allowing the utmost latitude in the application of this principle, I feel compelled to say that I do not discover the proof of anything
- H sufficient to show undue influence in the obtaining of this will. That Mr Colclough did not execute it under actual duress or coercion is certain. The only persons who were witnesses to the execution were Mr. Colclough's solicitor and medical attendant, and their testimony excludes the notion of anything like actual force or violence having been made use of to control him. There is no evidence to show that his wife knew that he was making his will. Several of the servants,
- I indeed, speak to the general conduct of his wife as having been of a violent and overbearing character towards him. But this, even supposing them to have had the means of forming a just opinion as to Mrs. Colclough's conduct, is clearly insufficient to prove actual coercion in the particular act of making the will, which was certainly made and executed by Mr. Colclough apart from his wife, and when she being absent could not, even if she wished it, force him to do what he was unwilling to do.

The question then is whether the evidence shows that, though not under actual duress or coercion, he would not have executed the will but from fear of the consequences which might result to him if she should discover that he had given his

property to any one but herself. Assuming that a will so obtained might be set aside as made by coercion, the testimony of the servants is totally insufficient to prove such a case. [His LORDSHIP examined the evidence.] I confess that I feel very great difficulty in understanding how this will can be impeached on the ground of coercion.

Is there any stronger evidence to show that it was obtained by fraud? That is, defining fraud with reference to the circumstances of this case, is there any evidence to show that, in order to induce Mr. Colclough to make this or some similar will, Mrs. Colclough represented to him matters to the prejudice of Sarsfield Colclough and his family which she knew or believed to be false, or that, knowing him to entertain prejudices against his relatives resting on no foundation, she contrived by force or artifice to prevent any intercourse with them, fearing that the result of any free intercourse would be to cause a reconciliation; and even assuming that such conduct would be sufficient to invalidate the will? I can discover no evidence of the sort. Mr. Colclough had, or thought he had, good grounds for entertaining very unfriendly feelings towards his family. The suggestion that all these causes of aversion had no foundation in fact, but owed their existence to the artful contrivances of Mrs. Colclough, is a suggestion in support of which there is not, in my opinion, a tittle of evidence.

On these grounds I think that the verdict is one with which the Lord Chancellor ought not to have been satisfied, considering that it was to bind the inheritance for ever, and that he ought to have directed a new trial. [His LORDSHIP dealt with a question arising under the old procedure, and concluded:] The consequence is that the order refusing the new trial must be discharged, and the cause remitted back to Ireland with a declaration that there ought to be a new trial, with such special directions (if any) as the Lord Chancellor may deem it proper to make.

Appeal allowed.

BARBER v. BROWN AND ANOTHER

[COURT OF COMMON PLEAS (Cresswell and Crowder, JJ.), November 11, 14, 1856]

[Reported 1 C.B.N.S. 121; 26 L.J.C.P. 41; 28 L.T.O.S. 318;
21 J.P. 294; 3 Jur.N.S. 18; 5 W.R. 79; 140 E.R. 50]

Mistake—Mistake of fact—Money paid under mistake—Recovery—Rent—Recovery by tenant—Set-off by landlord of payments made on tenant's behalf.

Money paid for rent under a mistake of fact may be recovered back in an action for money had and received, and in the action ground-rents, rates and taxes, paid by the defendant in respect of the premises occupied by the plaintiff, may be set off, it being shown that the plaintiff must be taken to have sanctioned the payments made by the defendant in respect of those matters.

Notes. Referred to: *Anglo-Scottish Beet Sugar Corp'n. v. Spalding, U.D.C.*, [1937] 3 All E.R. 335.

As to the recovery of money paid under a mistake, see 26 HALSBURY'S LAWS (3rd Edn.) 921-927; and for cases see 35 DIGEST (Repl.) 158 et seq.

Case referred to:

(1) *Doe v. Hare* (1833), 2 Cr. & M. 145; 4 Tyr. 29; 3 L.J.Ex. 17; 149 E.R. 709; 31 Digest (Repl.), 271, 4042.

A Also referred to in argument:

Hasser v. Wallis (1708), 1 Salk. 28.

Newsome v. Graham (1829), 10 B. & C. 234; 5 Man. & Ry. K.B. 64; 8 L.J.O.S.K.B. 100; 109 E.R. 437; 35 Digest (Repl.) 168, 541.

Polhill v. Walter (1832), 3 B. & Ad. 114; 1 L.J.K.B. 92; 110 E.R. 43; 35 Digest (Repl.) 41, 344.

B *Crockford v. Winter* (1807), 1 Camp. 124, N.P.; 12 Digest (Repl.) 633, 4890.

Le Neve v. Le Neve (1747), 3 Atk. 646; Amb. 436; 1 Ves. Sen. 64; 26 E.R. 1172; 20 Digest (Repl.) 335, 669.

Allen v. Anthony (1816), 1 Mer. 282; 35 E.R. 679, L.C.; 20 Digest (Repl.) 348, 759.

C Action for money had and received, the sum sought to be recovered being five half-yearly payments of rent. The defendants denied liability, and claimed the right to set off certain sums.

Cleasby (Alexander Johnston with him) for the plaintiff.

Aspland (Osborne Morgan with him) for the defendants.

Cur. adv. vult.

D Nov. 14, 1856. **CRESSWELL, J.**, delivered the following judgment of the court.—This was an action for money had and received: pleas, never indebted and a set-off. The cause was tried before JERVIS, C.J., at the sittings after last Trinity Term, and the verdict was for the plaintiff, with damages as stated in the declaration, subject to the opinion of the court upon a Special Case, the material parts of which may be shortly stated.

E The plaintiff is a warehouse-keeper, carrying on business in Lower Thames Street, London, and the defendants are the executors of John Thackeray, deceased. On Jan. 11, 1811, one William Lingham was possessed under two leases, dated respectively Aug. 15, 1794, and Jan. 9, 1795, for two certain terms of years, both of which expired in Midsummer, 1854, of premises in the city of London, of which certain warehouses, called Lingham's warehouses, formed part. By an indenture of that date, in consideration of the sum of £2,000, he granted to John Thackeray an annuity for his life and the lives of two other persons, and for the lives of the survivors, and for securing the same he demised to John Thackeray the premises, including Lingham's warehouses, for the term of forty-three years from Jan. 10, 1811. By another indenture of that date, William Lingham, in the like manner for a similar consideration, granted an annuity of the same amount to one Ralph Ellis, and demised to him the premises for forty-three years to secure that annuity.

G In 1817 the premises and the annuities in the deeds mentioned were assigned for the payment of the residue of the leases granted by Lingham, subject to the annuities to Thackeray and Ellis, and to the under-leases for securing the same. In 1825 Thackeray and Ellis were let into possession of the premises so underlet to them. In 1830 the plaintiff became tenant to them of part of the premises, at a rent of £550, payable in equal moieties. John Thackeray was the last survivor of the cestuis que vie mentioned in his annuity-deed, and died in May, 1851. The defendants were his executors, and, from the time of his death till the expiration of the leases granted to William Lingham, that is, for six half-years, William Ellis, as their agent, regularly applied for and received the rent of £550, for the representative of Ralph Ellis, and accounted for the moities to each of them, deducting

I various sums paid on their account.

The plaintiff seeks to recover the sums so paid for rent since the death of Thackeray, and the defendants claim to set off various sums so paid by their agent for them, if the plaintiff shall be held entitled to recover in this action. The money paid by the plaintiff was paid under a mistake of fact, and the defendants had no right to any such payment. But the defendants say—first, that, to allow the plaintiff to recover would be to try his title in an action for money had and received; secondly, according to the facts stated in the Case, it would be inequitable to allow the plaintiff to recover the money in an action for money had and received,

it being an equitable action; thirdly, they claim to set off various sums of money A paid by them for ground-rent and rates and taxes.

As to the first point, we think it is not an action to try a disputed title to the land. There is no dispute upon the subject; it is a simple case of money paid after the title of the defendants had expired, the fact of it having so expired not being in any manner disputed. The second point depends upon the effect of an agreement bearing date Oct. 25, 1825. That agreement was in these terms. After the death of William Lingham and before his will was proved, the ground-rents due from William Lingham in respect of the premises comprised in the annuity-deeds being greatly in arrear, an arrangement was come to for discharging the same and for other matters, by an agreement bearing date Oct. 25, 1825, between John Thackeray and Ralph Ellis and Thomas Lingham and George Augustus Lingham and one Richard Ellis (those parties were the executors to William Lingham's will), which agreement was in these terms: B C

"In consideration of each of the undersigned, John Thackeray and Ralph Ellis, having, at the instance of and request of us the undersigned Thomas Lingham, George Augustus Lingham and Richard Ellis, and each and every of us, agreed to advance and pay to Mr. R. Hains, as the agent of the ground landlords of the premises on lease to the late William Lingham, half (making together the full amount) of the ground-rents due at Michaelmas last, and of one year's insurance to that time, each moiety amounting to the sum of £342; and in order to induce each of them the said John Thackeray and Ralph Ellis so to do, we, the said Thomas Lingham, George Augustus Lingham and Richard Ellis, do hereby jointly and severally engage and undertake with each of them the said John Thackeray and Ralph Ellis, that the will of the said William Lingham shall be proved in the Prerogative Court of Canterbury within fourteen days from this time, and that one moiety of the money now due to the estate of the said William Lingham from the Commissioners of his Majesty's Customs for rent of part of the said premises, and also one moiety of all other rents now due and hereafter to accrue due in respect of the said premises, shall in the first instance be applied in payment to each of them, the said John Thackeray and Ralph Ellis, of his said sum of £342, with interest thereon at the rate of £5 per cent. per annum from the date of the advancement thereof, and that the said leasehold premises shall be chargeable with the same sums and interest. And also that both moieties of the same rents and profits shall in the next place, and after payment of the ground-rents and taxes payable thereout, be applied in the manner following, that is to say: one moiety in payment and discharge of the present arrears of the annuity granted to each of them, the said John Thackeray and Ralph Ellis, by the said William Lingham, and charged upon the same premises, and all the future and growing payments of the same annuity; and that possession of such parts of the said leasehold premises as are in hand shall this day be delivered to the said John Thackeray as having the prior legal title to the possession or receipt of the rents of the premises; but all the rents and profits applicable to the payment of the said annuities, or either of them, shall be applied in payment and discharge of both of the said annuities *pari passu*, that is to say, by equal pound rate. And this undertaking shall be a sufficient authority and consent and direction to and for the tenants of such parts of the said leasehold estates as are in the possession of tenants for paying the arrears and future and growing payments of their rents to the said John Thackeray, to be by him applied for the purposes aforesaid." D E F G H I

It then provides that the costs and charges of Thackeray and Ellis in certain negotiations which led to this agreement, though not exceeding £600, shall be paid and discharged out of the rents and profits of the leasehold estates, and shall be a charge on the leasehold estates and the rents and profits thereof. Then it concludes in these terms:

A "And that, for the purpose of securing the said several sums of £342 and £342, and the said costs and charges, an underlease or underleases (and not an assignment by way of mortgage), and at a peppercorn rent, shall at our costs and charges be executed to the said John Thackeray and Ralph Ellis respectively, or to a trustee for them and him respectively; but that the sum to be secured to each of them the said John Thackeray and Ralph Ellis, for the sum of £342, and his share of such costs and charges, shall not exceed in the whole the sum of £942."

It does not appear that any such underlease was ever made. It was contended, and we think rightly contended, that the plaintiff must be taken to have had notice of this agreement.

C Then the defendants say that the operation of the agreement was to create an equitable charge on the premises leased to William Lingham for the sum of money thereby agreed to be paid by Thackeray and Ellis for the arrears of annuities then due, and all the future and growing payments of their rents, to John Thackeray, and that the sum paid by Thackeray and Ellis in pursuance of the agreement and the arrears of annuities now remaining unpaid by far exceed the money sought to be recovered in this action. But it appears to us that the agreement in question had not such an operation as the defendants now ascribe to it. The agreement shows that up to that time Thackeray and Ellis had not been let into possession, nor into the receipt of the rents and profits of the premises demised to them to secure their annuities; and it recites that the ground-rent payable to Lingham was in arrear; that Thackeray and Ellis agreed each to pay £342 of that rent, and in order to enable them to do so, Lingham's executors agreed to prove his will; that the rents of the premises should be applied first to the payment of those sums, and the leasehold premises should be chargeable with those sums, and the residue of the rents, after paying the ground-rents and the rates and taxes, should be applicable to the payment of the annuities granted to Thackeray and Ellis; and it then provided for giving possession to Thackeray of such parts of the premises and the payments to them of such parts as were realised. Further, it provided that the costs of the agreement, not exceeding £600, should be paid out of the rents which should be charged on the said leasehold estates, and it concludes that the underlease should be for the purpose of securing £342 and £342, and the costs. There is not one word about that underlease being made to secure any arrears of annuities. This agreement is, not that any further charge on the leasehold estates of Lingham should be created to secure either the arrears or future payment of annuities, but for the two sums of £342 and costs, not exceeding £600. There was to be a further charge of an underlease at a peppercorn rent, and it may be taken that that underlease would include the whole of William Lingham's term. There is no reason to suppose the sums to be secured by such underlease are still unpaid. This agreement provides that the rent shall be applied in the first place to the payment of those sums, and the residue only to the payment of the annuities. The rents received before Thackeray's death would far more than cover those sums. There is, therefore, no further equitable charge on the premises to interfere with the right of the plaintiff to recover in this equitable action.

H The remaining question relates to the set-off. If the defendants had been in possession and had after ejectment been sued for mesne profits, they would have been entitled to the allowance of ground-rent, according to *Doe v. Hare* (1); and we think the same principle would extend to the rates and taxes. If, instead of being sued for mesne profits, an action had been brought for use and occupation, we think the same allowance would be made in estimating the value of the occupation on the same principle as in this action which is to recover back money paid by mistake and without consideration, and it is just and equitable to allow the deduction with respect to those payments which, if not made by them, might have been claimed by the plaintiff or assignee of the original leases and occupier of the premises. To this it may be objected that the defendants cannot show that the

money was paid by them at the request, expressed or implied, of the plaintiff. A But from the year 1827, when the plaintiff became assignee of the original leases, he must have known that he was liable to pay the rent due to the ground landlord, and he must be taken to have known, till the agreement of 1825, that Thackeray was bound to pay the rent and the rates and taxes out of the rents received by him, and he never took upon himself the payment of the ground-rents as assignee of the lease or rates and taxes which he was liable to pay as occupier, and must be B taken to have sanctioned the continued payment of them by the party to whom he paid rent. We are, therefore, enabled to say that this money was paid at the request of the plaintiff, and must be allowed by way of set-off. Our judgment is that the plaintiff is entitled to recover five half-years' rent paid by him after the death of Thackeray, and the defendants are entitled to set off the ground-rents, rates and taxes paid by them in respect of the premises occupied by them. C

Judgment accordingly.

WARLOW v. HARRISON

[COURT OF EXCHEQUER CHAMBER (Willes and Byles, JJ., Martin, Bramwell and Watson, BB.), May 13, June 20, November 26, 1859]

[Reported 1 E. & E. 309; 29 L.J.Q.B. 14; 1 L.T. 211;
6 Jur.N.S. 66; 8 W.R. 95; 120 E.R. 925]

Auctioneer—Sale of goods—"Without reserve"—Undertaking by auctioneer—Bidder's right of action for breach.

An auctioneer who puts property up for sale without reserve pledges himself that the sale will be without reserve. This contract is made with the highest bona fide bidder who, in the case of a breach of it, has a right of action against the auctioneer. F

Auctioneer—Authority—Revocation—Right of owner of goods to revoke at any time—Indemnity to auctioneer.

The owner of goods put up for sale by auction may revoke the auctioneer's authority at any time before the contract is legally complete, but he does so at his peril, and if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified. G

Notes. Considered: *Mainprice v. Westley* (1865), 6 B. & S. 420. Distinguished: *Rainbow v. Hawkins*, [1904] 2 K.B. 322; *McManus v. Fortescue*, [1904-7] All E.R.Rep. 707; *Harris v. Nickerson* (1873), L.R. 8 Q.B. 286. Referred to: *Johnston v. Boyes*, [1899] 2 Ch. 73. H

As to the revocation of an auctioneer's authority and sales "without reserve," see 2 HALSBURY'S LAWS (3rd Edn.) 72, 73, 78, 79; and for cases see 3 DIGEST (Repl.) I 4-7, 12-16.

Cases referred to:

- (1) *Thornett v. Haines* (1846), 15 M. & W. 367; 15 L.J.Ex. 230; 7 L.T.O.S. 264; 153 E.R. 892; 3 Digest (Repl.) 13, 98.
- (2) *Denton v. Great Northern Rail. Co.* (1856), 5 E. & B. 860; 25 L.J.Q.B. 129; 26 L.T.O.S. 216; 20 J.P. 483; 2 Jur.N.S. 185; 4 W.R. 240; 119 E.R. 701; 8 Digest (Repl.) 108, 703.

A Also referred to in argument :

Robinson v. Wall (1847), 2 Ph. 372; 16 L.J.Ch. 401; 9 L.T.O.S. 389; 11 Jur. 577; 41 E.R. 986; 3 Digest (Repl.) 13, 99.

Beauwell v. Christie (1776), 1 Cowp. 395; 98 E.R. 1150; 3 Digest (Repl.) 13, 93.

Payne v. Cave (1789), 3 Term Rep. 148; 100 E.R. 502; 3 Digest (Repl.) 20, 148.

Cooke v. Oxley (1790), 3 Term Rep. 653; 100 E.R. 785; 12 Digest (Repl.) 67, 367.

B *Jones v. Nanney* (1824), M'Cle. 25; 13 Price, 76; 148 E.R. 11; 3 Digest (Repl.) 40, 285.

Warwick v. Slade (1811), 3 Camp. 127, N.P.; 12 Digest (Repl.) 589, 4560.

Gerhard v. Bates (1853), 2 E. & B. 476; 22 L.J.Q.B. 364; 22 L.T.O.S. 64; 17 Jur. 1097; 1 W.R. 383; 1 C.L.R. 868; 118 E.R. 845; 9 Digest (Repl.) 125, 673.

Simon v. Motivos (1766), 3 Burr. 1921; 1 Wm. Bl. 599; 97 E.R. 1170; 3 Digest (Repl.) 7, 53.

C *Seymour v. Maddox* (1851), 16 Q.B. 326; 20 L.J.Q.B. 327; 16 L.T.O.S. 387; 15 Jur. 723; 117 E.R. 904; 34 Digest (Repl.) 263, 1867.

Emmerson v. Heelis (1809), 2 Taunt. 38; 127 E.R. 989; 3 Digest (Repl.) 8, 59.

D **Appeal** by the plaintiff from a decision of the Court of Queen's Bench (Lord CAMPBELL, C.J., WIGHTMAN and ERLE, JJ.), reported 1 E. & E. 295, making absolute a rule to enter a nonsuit obtained by the defendant in an action for breach of contract.

The plaintiff by his declaration stated that the defendant exercised and carried on the trade and business of an auctioneer, and was retained to sell by public auction divers horses; that the defendant caused to be printed and circulated advertisements advertising an intended sale by auction on Thursday, June 24, 1858, at No. 1, Cheapside, Birmingham of (among other horses) a certain horse, namely :

E "The property of a gentleman, without reserve, Janet Pride, a brown mare without white, five years old, by Jago out of Stormy Petrel. For performances see "Racing Calendar."

F The plaintiff attended the sale, and was the highest bidder for the mare so advertised to be sold without reserve, and he alleged that thereby the defendant became his agent to complete the contract on his behalf for the purchase of the mare, yet the defendant did not complete the contract, but refused so to do, whereby the plaintiff was deprived of the benefit of the contract and was put to expense in travelling with his groom and servants to the sale, and employing a veterinary surgeon to examine the mare. The defendant denied liability.

G At the trial, before SIR ALEXANDER COCKBURN, C.J., it appeared that the plaintiff attended the sale and bid sixty guineas for the mare, and another person immediately bid sixty-one guineas. This person was Mr. Henderson, the owner of the mare. The plaintiff having been informed that the last bidder was the owner, declined to bid further, and thereupon the defendant knocked down the mare to Mr. Henderson for sixty-one guineas, and entered his name as purchaser in the sale-book.

H The plaintiff went at once into the auctioneer's office, saw Mr. Bretherton and Mr. Henderson, and claimed the mare from Mr. Bretherton as he was the highest bona fide bidder and the mare had been advertised to be sold without reserve. Mr. Henderson said: "I bought her in, and you shall not have her. I gave £130 for her, and it is not likely I am going to sell her for £63." On the same day the plaintiff tendered to the defendant £63 in sovereigns as the price of the mare, and demanded her. The defendant refused to receive the money or deliver the mare, stating that he had knocked her down to the highest bidder, and he could not interfere in the matter. There was evidence that the plaintiff had notice that the following were among the conditions of sale :

I "The highest bidder to be the buyer; and if any dispute arise between two or more bidders before the lot is returned into the stables, the lot so disputed shall be put up again, or the auctioneer shall declare the purchaser . . . (iii) The

purchaser being declared, must immediately give in his name and address with (if required) a deposit of 5s. in the pound on account of his purchase, and pay the remainder before such lot or lots are delivered. . . . (viii) Any lot ordered for this sale, sold by private contract by the owner, or advertised without reserve and bought by the owner, to be liable to the usual commission of 2 per cent."

At the trial a verdict was entered for the plaintiff for £5 5s. damages, and leave was given to amend the declaration if the court should think fit. Leave was also given to the defendant to move to enter a nonsuit. The Court of Queen's Bench made the rule absolute to enter a nonsuit, and the plaintiff appealed.

Macaulay, Q.C. (Isaac Spooner with him), for the plaintiff.

Field (Mellor with him) for the defendant.

Cur. adv. vult.

Nov. 26, 1859. **MARTIN, B.**, delivered the judgment of **WATSON, B.**, **BYLES, J.**, and himself, in which after stating the facts he continued: Upon the pleadings, as they stand, we think the judgment of the Court of Queen's Bench is right, and that the defendant is entitled to the verdict upon the issue whether or not he became the plaintiff's agent as alleged. There is, however, a power given to the court to amend, and it has been held that the power extends to the Court of Appeal, and we think that we ought to exercise it largely in order to carry out the object of the Common Law Procedure Acts, 1852 and 1854, namely, to determine the real question in controversy between the parties in the existing suit.

Upon the facts of the case, it seems to us that the plaintiff is entitled to recover. In a sale by auction there are three parties, namely, the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which includes the highest bidder. In this, as in most cases of sale by auction, the owner's name was not disclosed; he was a concealed principal. The names of the auctioneers, of whom the defendant was one, alone were published, and the sale was announced by them to be "without reserve." This, according to all the cases, both at law and in equity, means that neither the vendor nor any person on his behalf may bid at the auction, and that the property shall be sold to the highest bidder whether the sum bid be equivalent to the real value or not. For this position see *Thornett v. Haines* (1) [By s. 58(3) of the Sale of Goods Act, 1893, where a sale by auction is not notified to be subject to a right to bid on behalf of the seller it shall not be lawful for the seller or any person on his behalf to bid at the sale.]. We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward, or that of a railway company publishing a time-table stating the times when and the places to which the trains run. It has been decided that the person giving information advertised for, or a passenger taking a ticket may sue as upon a contract with him: *Denton v. Great Northern Rail. Co.* (2).

Upon the same principle, it seems to us that the highest bona fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think that the auctioneer who puts property up for sale upon such a condition pledges himself that the sale shall be without reserve, or, in other words, contracts that it shall be so, and that this contract is made with the highest bona fide bidder, who, in case of a breach of it, has a right of action against the auctioneer.

The case is not at all affected by s. 17 of the Statute of Frauds [replaced by s. 4 of Sale of Goods Act, 1893, which was repealed by Law Reform (Enforcement of Contracts) Act, 1954], which relates only to direct sales, and not to contracts relating to or connected with them. Neither does it seem to us material whether the owner or a person on his behalf bids with the knowledge or privity of the auctioneer. We think that the auctioneer has contracted that the sale shall be without reserve, and that the contract is broken upon a bid being made by or on

A behalf of the owner, whether it be during the time when the property is under the hammer or whether it be the last bid on which the property is knocked down. In either case the sale is not "without reserve," and the contract of the auctioneer is broken.

B We entertain no doubt that the owner may at any time before the contract is legally complete interfere and revoke the auctioneer's authority, but he does so at his peril, and if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified.

C We do not think that the conditions of sale stated in the case (assuming the plaintiff to be taken to have had notice of them) affect it. As to the first, Mr. Henderson could not be the buyer. He was the owner, and, if that be material, there is ample evidence that the defendant knew him to be such. Indeed, we think he ought not to have taken his bid, but to have refused it, stating as his reason that the sale was without reserve. We feel inclined to differ from the view of the Court of Queen's Bench in this, that we rather think the bid of Mr. Henderson was not a revocation of the defendant's authority as auctioneer.

D The third condition has nothing to do with the case, and the eighth condition only provides, that, if on a sale without reserve the owner act contrary to the conditions, he must pay the usual commission to the auctioneer. For these reasons, if the plaintiff think fit to amend his declaration, he, in our opinion, is entitled to the judgment of the court.

WILLES, J.—I have to state that **BRAMWELL, B.**, and myself do not express any dissent from the judgment which has just been delivered by **MARTIN, B.**, but we prefer putting our judgment upon the ground that the conduct of the parties is strong evidence to show that the auctioneer had not authority to sell without reserve, that he was without such authority ab initio, and that his conduct is evidence that that was so. If that view be correct, there ought to be a count added in the amendment, stating an undertaking by the auctioneer that he had authority to sell without reserve, and a breach of that undertaking. Suffice it to say, the result is the same, but **BRAMWELL, B.**, and I prefer putting our judgment on that ground. We do not express any dissent from what **MARTIN, B.**, has said, but we see our way more clearly in coming to the same conclusion upon the ground I have stated. The rule will be that the plaintiff be at liberty to amend and proceed to a new trial. I don't know which party it was who was unwilling to have a *stet processus* entered, but it seems to me that that would be a proper ending of the case.

Appeal allowed.

HARMER v. CORNELIUS

[COURT OF COMMON PLEAS (Williams, Willes and Byles, JJ.), June 18, July 5, 1858]

[Reported 5 C.B.N.S. 236; 28 L.J.C.P. 85; 32 L.T.O.S. 62;
22 J.P. 724; 4 Jur.N.S. 1110; 6 W.R. 749; 141 E.R. 94]

Master and Servant—Contract of service—Termination—Summary dismissal—Misconduct—Incompetence of servant to do skilled work undertaken by him.

When a person who holds himself out to do certain work is employed to do that work for a specified period there is on his part an implied warranty that he is reasonably competent to do the work. If he is found to be incompetent, his failure to afford the requisite skill is a breach of legal duty, and, therefore, misconduct, and his employer is entitled to dismiss him before the end of the period for which he was engaged.

Notes. Section 1 of the Contracts of Employment Act, 1963, which provides for a minimum period of notice to terminate a contract of employment, excludes (by sub.-s. (6)) from the provisions of that section a right which either party had to treat the contract as terminable without notice by reason of such conduct by the other party as would have enabled him so to treat it before the passing of the Act (43 HALSBURY'S STATUTES (2nd Edn.) 276).

Considered: *Lister v. Romford Ice and Cold Storage Co.*, [1957] 1 All E.R. 125. Referred to: *Cuckson v. Stones* (1858), 1 E. & E. 248; *Semtex, Ltd. v. Gladstone*, [1945] 2 All E.R. 206; *Harvey v. R. G. O'Dell, Ltd.*, [1958] 1 All E.R. 657.

As to the dismissal of a servant on the ground of incompetence, see 25 HALSBURY'S LAWS (3rd Edn.) 486; and for cases see 34 DIGEST (Repl.) 82.

Cases referred to:

(1) *Jenkins v. Betham* (1855), 15 C.B. 168; 3 C.L.R. 373; 24 L.J.C.P. 94; 24 L.T.O.S. 272; 1 Jur.N.S. 237; 3 W.R. 288; 139 E.R. 384; 43 Digest 1044, 13.

(2) *Spain v. Arnott* (1817), 2 Stark, 256, N.P.; 34 Digest (Repl.) 78, 503.

Also referred to in argument:

Ditcham v. Bond (1814), 2 M. & S. 436; 3 Camp. 526 n.; 105 E.R. 443; 34 Digest (Repl.) 224, 1627.

Burgess v. Beaumont (1844), 8 Scott, N.R. 668; 14 L.J.C.P. 13.

Keates v. Earl of Cadogan (1851), 10 C.B. 591; 20 L.J.C.P. 76; 16 L.T.O.S. 367; 15 Jur. 428; 138 E.R. 234; 31 Digest (Repl.) 191, 3220.

Sutton v. Temple (1843), 12 M. & W. 52; 13 L.J.Ex. 17; 2 L.T.O.S. 150; 7 Jur. 1065; 152 E.R. 1108; 31 Digest (Repl.) 194, 3252.

Cornfoot v. Fowke (1840), 6 M. & W. 358; 9 L.J.Ex. 297; 4 Jur. 919; 151 E.R. 450; 31 Digest (Repl.) 192, 3229.

Ormrod v. Huth (1845), 14 M. & W. 651; 14 L.J.Ex. 366; 5 L.T.O.S. 268; 153 E.R. 636, Ex. Ch.; 39 Digest (Repl.) 538, 740.

De Medina v. Norman (1842), 9 M. & W. 820; 11 L.J.Ex. 320; 152 E.R. 347; 30 Digest (Repl.) 418, 618.

Lawrence v. Knowles (1839), 5 Bing.N.C. 399; 2 Arn. 43; 7 Scott, 381; 8 L.J.C.P. 210; 132 E.R. 1152; 9 Digest (Repl.) 369, 2355.

Hibblewhite v. M'Morine (1840), 6 M. & W. 200; 9 L.J.Ex. 217; 4 Jur. 769; 151 E.R. 380; sub nom. *Hebblewhite v. M'Morine*, 2 Ry. & Can. Cas. 51; 10 Digest (Repl.) 1230, 8644.

Rule Nisi obtained by the defendant to enter verdict for him in an action for wrongful dismissal.

The plaintiff by his declaration stated that in consideration of the plaintiff entering into the service of the defendant in the capacity of a painter, on the terms

A that he was to work from eight o'clock in the morning to six o'clock in the evening each day of the plaintiff's engagement, that the defendant should retain him in his service in the capacity aforesaid for more than a month, and would pay him for his said services at the rate of £2 10s. per week during the continuance of such service. The defendant promised to fulfil those terms; and the plaintiff entered into the defendant's service in the aforesaid capacity and terms, and although the

B plaintiff was ready and willing to continue in the defendant's service in the capacity aforesaid, the defendant did not and would not retain the plaintiff in his service for more than a month, but wrongfully discharged him.

The defendant pleaded, by his second plea, that the plaintiff was not ready and willing as alleged; and by his sixth plea that the defendant was induced to make the promise mentioned in the declaration by the false and fraudulent representation

C of the plaintiff that he was competent to perform the service for which he was engaged, whereas the plaintiff was quite incompetent to perform such service, and the defendant, as soon as he discovered the said fraud and the plaintiff's incompetency, rescinded the contract, and discharged the plaintiff from his said service without having derived any benefit therefrom.

At the trial before WILLIAMS, J., and a jury, the evidence showed that the

D plaintiff expressly represented that he possessed the requisite skill. The jury found that the plaintiff was incompetent, but that he did not fraudulently represent that he was competent. A verdict was entered for the plaintiff, with leave to the defendant to move to enter the verdict for him. The defendant obtained a rule accordingly.

E *Needham*, for the plaintiff, showed cause against the rule.

D. Keene (with him *S. Temple, Q.C.*), for the defendant, supported the rule.

Cur. adv. vult.

July 5, 1858. **WILLES, J.**, delivered the following judgment of the court.—The question in this case is whether, when a person is employed to do work which

F requires skill, and he undertakes it without having skill to do it, he can be dismissed by the person who employs him, or whether he is bound to go on with the work. We are of opinion that he is liable to be discharged, and that this rule must be made absolute.

When a skilled labourer, artisan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes.

G *Spondes peritiam artis*. Thus, if an apothecary, a watchmaker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite ability and skill: see the observations of JERVIS, C.J., in *Jenkins v. Betham* (1) (15 C.B. at p. 189). An express promise or express representation in the particular case is

H not necessary. It may be that, if there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. If a gentleman, for example, should employ a man who is known never to have done anything but sweep a crossing, to clean and mend a watch, the employer would probably be held to have undertaken all risk himself. But in the case under consideration the correspondence shows, in addition to the implied representation, an express and

I particular representation by the plaintiff that he did possess the requisite skill.

The next question is this: supposing that, when the skill and competency of the party employed are tested by the employment, he is found to be utterly incompetent, is the employer bound, nevertheless, to go on employing him to the end of the term for which he is engaged, notwithstanding his incompetency? This is a question, upon which we have been furnished by the Bar with no authority, probably because such labour, being seldom retained for a long time certain, the question has not often arisen. It seems, however, very unreasonable that an employer should be compelled to go on employing a man who, having represented himself as competent,

turns out to be incompetent. An engineer is retained by a railway company to drive an express train for a year, and is found incompetent to drive or regulate the locomotive—are the railway company still bound under pain of an action to entrust the lives of thousands to his dangerous and demonstrated incapacity? A clerk is retained for a year to keep a merchant's books, and it turns out that he is ignorant, not only of book-keeping, but not sufficiently skilled in arithmetic—is the merchant bound to continue him in his employment? Misconduct in a servant is, according to every day's experience, a justification of a discharge. The failure to afford the requisite skill which had been expressly or impliedly promised is a breach of legal duty, and, therefore, misconduct, the rule of civil law *imperitia adnumeratur* applies.

We may add that a precedent of a plea founded on the implied condition of competency is to be found in the late MR. CHITTY's work on PLEADING, edited by MR. PEARSON, p. 363. In *Spain v. Arnott* (2), LORD ELLENBOROUGH, speaking of a servant who had refused to perform his duty, says: "The master is not bound to keep him on as a burdensome and useless servant to the end of the year." It appears to us that there is no material difference between a servant who will not, and a servant who cannot, perform the duty for which he was hired. For these reasons we think that the substantial part of the plea was proved, and that the rule must be made absolute.

Rule absolute.

TURRILL v. CRAWLEY

[COURT OF QUEEN'S BENCH (Lord Denman, C.J., Patteson, Coleridge and Wightman, JJ.), January 26, 1849]

[Reported 13 Q.B. 197; 18 L.J.Q.B. 155; 12 L.T.O.S. 398;
13 Jur. 878; 13 J.P. 747; 116 E.R. 1238]

Inn—Innkeeper—Lien—Goods not property of the guest—Carriage.

The plaintiff sought to recover a carriage from the defendant, an innkeeper, which the defendant claimed to be entitled to retain in satisfaction of the bill of a guest, who had brought the carriage to the inn. The defendant had thought that the carriage belonged to the guest, but it had been hired to her by the plaintiff.

Held: there was no distinction, on an innkeeper's exercise of his right of lien, between the goods of a guest and the goods of a third party in the apparent possession of a guest; in the present case there was a distinct charge for housing and caring for the carriage, the lien was reasonable, and the defendant was entitled to exercise it; and, therefore, the action failed.

Notes. Section 2(2) of the Hotel Proprietors Act, 1956, excludes from the innkeeper's right of lien a guest's horse or vehicle, but the principle of the present decision will apply to goods not excepted by the subsection.

Considered: *Threfall v. Borwick* (1872), L.R. 7 Q.B. 711.

As to the extent of an innkeeper's lien in respect of goods not those of his guest, see 21 HALSBURY'S LAWS (3rd Edn.) 465; and for cases see 29 DIGEST (Repl.) 24 et seq. For the Hotel Proprietors Act, 1956, s. 2, see 36 HALSBURY'S STATUTES (2nd Edn.) 467.

Cases referred to:

- (1) *Robinson v. Walter* (1617), 3 Bulst. 269; Poph. 127; 1 Roll. Rep. 449; 81 E.R. 227; 29 Digest (Repl.) 7, 66.
- (2) *Johnson v. Hill* (1822), 3 Stark. 172, N.P.; 29 Digest (Repl.) 26, 297.

A Also referred to in argument :

Thompson v. Lacy (1820), 3 B. & Ald. 283; 106 E.R. 667; 29 Digest (Repl.) 2, 3.

R. v. Ivens (1835), 7 C. & P. 213; 29 Digest (Repl.) 8, 78.

Jones v. Tyler (1834), 1 Ad. & El. 522; 3 Nev. & M.K.B. 576; 3 L.J.K.B. 166; 110 E.R. 1307; 29 Digest (Repl.) 13, 161.

Beedle v. Morris (1609), Cro. Jac. 224; 79 E.R. 194; sub nom. *Bedle v. Morris*, Yelv. 162; 29 Digest (Repl.) 14, 173.

Yorke v. Grenough (1703), 2 Ld. Raym. 866; 92 E.R. 97; sub nom. *York v. Grindstone*, 1 Salk. 388; 29 Digest (Repl.) 6, 51.

Gelley v. Clerk (1607), Cro. Jac. 188; Noy, 126; 4 Bac. Abr. 448; 79 E.R. 164; 29 Digest (Repl.) 5, 43.

Francis v. Wyatt (1764), 3 Burr. 1498; 1 Wm. Bl. 483; 97 E.R. 947; 18 Digest (Repl.) 282, 290.

Bevan v. Waters (1828), 3 C. & P. 520; Mood. & M. 235, N.P.; 32 Digest (Repl.) 259, 54.

Stirt v. Drungold (1617), 3 Bulst. 289; 81 E.R. 242; 29 Digest (Repl.) 26, 302.

Binns v. Pigot (1840), 9 C. & P. 208, N.P.; 29 Digest (Repl.) 26, 298.

D **Rule Nisi** obtained by the plaintiff to enter a verdict in an action of trover brought by the plaintiff, a coachmaker in Long Acre, against the defendant, an innkeeper, who kept an hotel at Norwood, to recover a carriage which the defendant had claimed to retain in satisfaction of a bill due to him from a guest, a Miss Jerdan, who had been staying at the hotel, and who had brought with her this carriage, which she had hired of the plaintiff, but which the defendant believed to be her own.

E At the trial before COLERIDGE, J., and a jury a verdict was directed for the defendant, upon a plea which alleged that the plaintiff was not possessed of the carriage at the time of the alleged conversion thereof by the defendant, but leave was given to the plaintiff's counsel to move to set it aside, and enter the judgment in his favour on that issue. A rule was accordingly obtained by the plaintiff.

F *Martin and Hayes* for the defendant showed cause against the rule.
Whateley and Hance supported the rule.

G **LORD DENMAN, C.J.**—If an innkeeper has a right to detain any of the goods of a guest for the whole of the expenses incurred by that guest, then it is clear that the defendant is right in this case, and if he is entitled to detain any particular thing for the expenses of that thing, then also he is right. On the first point I shall say nothing. I do not think it necessary here to decide the general matter. But on the second point I have no doubt. There is money expended on the carriage. It is placed in a carriage-house, which is a place of value, a place for which rent is paid, and as that rent was not tendered to this defendant, he is not bound to part with the carriage.

H **PATTESON, J.**—I am of the same opinion. There is a charge in the bill for the standing of this carriage, for which there is unquestionably a lien. It is not necessary to say more. The ground on which the rule was granted was to ascertain how far this right of lien extended, and whether it attached to a carriage brought into the inn by a guest, but not actually belonging to him. Here it was suggested that the time for which the guest had hired the carriage had expired I when the detainer took place, but that turn out not to be so, for when the carriage was detained the term of hiring still existed. If, then, the lien once attached, it is difficult to say that the owner of the carriage may now be permitted to say that the lien has come to an end.

LORD DENMAN, C.J.—There is no doubt upon that point.

COLERIDGE, J.—I am of the same opinion. It now seems to be clear that there is no distinction, with respect to an innkeeper's exercise of his right of lien, between the goods of a guest and the goods of a third person in the apparent

possession of a guest. *Robinson v. Walter* (1) is a sufficient authority for that proposition, which is reasonable in itself; and as it seems to me in proportion as a proposition is reasonable in that proportion is there less authority required to support it. Then that being so, the question here is whether this right of lien existed in the present case. I am of opinion that it did, and that the same principle is applicable to the case of a carriage as to that of a horse. A

There are many things which may be good law, and yet which have not been formally decided. Counsel supporting the rule says that the burden of maintaining this doctrine of lien is upon those who say that it exists; but the answer to that is, that the decision of courts proceed according to the wants of the times; and that in former times circumstances did not necessarily give rise to such a question as the present. Circumstances have altered now. A carriage now is in the situation in which a horse was in former times. A horse was, and a carriage is, the common means of travelling. I cannot therefore, say that, when this person came to the defendant's hotel with a carriage, she was in a different position from a traveller in former times coming with a horse. B C

This carriage is taken in, and if taken in, it must be taken care of. The innkeeper must keep it in safety. More than that, he must take care of it, clean it, and keep it fit for the use of the guest, and for doing these things there is a distinct charge made in the bill. If the innkeeper would be justified in detaining the horse for its keep and for the care bestowed upon it, he may detain it for the housing and the care of the carriage. D

WIGHTMAN, J.—The doubts upon questions of lien have from time to time become less, and it now appears to be settled law that the innkeeper is not bound to inquire whether the property brought by a guest really belongs to that guest or not. In *Johnson v. Hill* (2), it was stated by counsel that if a robber brought a horse, which he had stolen, to an inn, the innkeeper would be entitled to a lien upon it; and **ABBOTT, L.C.J.**, said that he had no doubt of the law being as it was stated. There does not appear to be any distinction between a carriage and a horse, so far as the lien is concerned. Here there is a distinct charge for taking care of the carriage, and the lien here is a reasonable lien. E F

Rule discharged.

A

CASHILL v. WRIGHT

[COURT OF QUEEN'S BENCH (Lord Campbell, C.J., Wightman, Erle and Crompton, JJ.), April 28, July 3, 1856]

[Reported 6 E. & B. 891; 27 L.T.O.S. 283; 20 J.P. 678;
2 Jur.N.S. 1072; 4 W.R. 709; 119 E.R. 1096]

B

Inn—Liability for loss of guest's goods—Negligence of guest.

A guest at an inn placed his watch and money on a table in his bedroom and left the door of the room open all night so that the things on the table were visible from outside. While the guest was asleep, this property was stolen by a thief who had been let in during the night and who left two hours later.

C

In an action by the guest against the landlord to recover in respect of the loss,

Held: in a case like the present the goods remained in the charge of the innkeeper and under the protection of the inn so as to make the innkeeper liable as for a breach of duty unless the negligence of the guest occasioned the loss so that it would not have happened had the guest used such ordinary care as a prudent man might reasonably be expected to have taken in the circumstances.

D

Notes. Considered: *Filipowski v. Merryweather* (1860), 2 F. & F. 285. Followed: *Oppenheim v. White Lion Hotel Co.* (1871), L.R. 6 C.P. 515. Considered: *Gee, Walker and Slater, Ltd. v. Friary Hotel (Derby), Ltd.* (1949), 66 (pt. 1), T.L.R. 59. Referred to: *Spice v. Bacon* (1877), 36 L.T. 896; *Medawar v. Grand Hotel Co.*, [1891–4] All E.R.Rep. 571; *Newman v. Bourne and Hollingsworth* (1915), 31 T.L.R. 209; *R. v. Bateman*, [1925] All E.R.Rep. 45; *Shacklock v. Ethorpe, Ltd.*, [1939] 3 All E.R. 372; *Gresham v. Lyon*, [1954] 2 All E.R. 786.

E

As to an innkeeper's liability for guest's property, see 21 HALSBURY'S LAWS (3rd Edn.) 451 et seq., and for circumstances in which such liability may be limited by statute, see *ibid.* 458, and the Hotel Proprietors Act, 1956, s. 2 (36 HALSBURY'S STATUTES (2nd Edn.) 467); and for cases see 29 DIGEST (Repl.) 15–19.

F

Cases referred to in argument:

Armistead v. Wilde (1851), 17 Q.B. 261; 20 L.J.Q.B. 524; 17 L.T.O.S. 155; 16 J.P. 5; 15 Jur. 1010; 117 E.R. 1280; 29 Digest (Repl.) 17, 198.

Calye's Case (1584), 8 Co. Rep. 32a; 77 E.R. 520; sub nom. *Windham and Meads Case*, 4 Leon. 96; 29 Digest (Repl.) 2, 1.

G

Burgess v. Clements (1815), 1 Stark. 249, n.; 4 M. & S. 306; 105 E.R. 848; 29 Digest (Repl.) 17, 197.

Richmond v. Smith (1828), 8 B. & C. 9; 2 Man. & Ry.K.B. 235; 6 L.J.O.S.K.B. 279; 108 E.R. 946; 29 Digest (Repl.) 13, 159.

Wilson v. Brett (1843), 11 M. & W. 113; 152 E.R. 737; 36 Digest (Repl.) 10, 28.

Farnworth v. Packwood (1816), 1 Stark. 249; Holt, N.P. 209, N.P.; 29 Digest (Repl.) 13, 157.

H

Rule Nisi obtained by the defendant to enter a verdict and for a new trial of an action tried in the Borough Court of Manchester, by the Recorder of Manchester, and brought by the plaintiff, a guest at an inn, against the defendant, the landlord, to recover the value of a gold watch and four sovereigns stolen while he was a guest.

I

It appeared that the plaintiff, while at the inn, had shown his money openly in the commercial room, and that when he went to bed he placed his watch and money on his bedroom table, and left his bedroom door open all night, so that the table and that which was upon it could be seen from the outside. After he had gone to bed (at four o'clock in the morning), the boots let in a stranger, and two hours after, the stranger left the house privately (the boots being asleep at the time) having committed the theft of the guest's property (but of nothing else), for which he was afterwards convicted. The recorder, in summing-up, left it to the jury to say, "whether the plaintiff had been guilty of gross negligence, telling

them that if he had, the defendant was entitled to their verdict; but if they did not think the conduct of the plaintiff amounted to gross negligence, he was entitled to their verdict, and they must say to what amount of damage." The jury returned a verdict for the plaintiff, with £25 damages. A

A rule was obtained by the defendant calling upon the plaintiff to show cause why the verdict found for the plaintiff should not be set aside, and a new trial had between the parties on the ground of misdirection, in that the Recorder had directed the jury that, if they did not think the conduct of the plaintiff amounted to gross negligence, he was entitled to their verdict. Whereas the recorder should have directed the jury that, if there was negligence on the part of the plaintiff conducing to the loss, the defendant was exonerated; also that the recorder should have explained what constituted gross negligence. B

Wheeler and Kay for the plaintiff, showed cause against the rule. C

H. Hill, Q.C., for the defendant, supported the rule.

Cur. adv. vult.

July 3, 1856. **ERLE, J.**, delivered the following judgment of the court.—In this case the plaintiff brought his action to recover damages for the loss of a watch and some sovereigns, supposed to have been stolen from a room in the defendant's inn where he was a guest. The defendant set up for a defence certain acts of the plaintiff, charged to have been negligence, and to have occasioned or contributed to the loss. At the trial before the recorder of Manchester, the jury were directed that the defence failed, unless they thought the plaintiff had been guilty of gross negligence. D

A rule for a new trial having been obtained, as on misdirection, two questions appear to have been raised before us. It was said, first, by the plaintiff's counsel, that the particular acts imputed to the plaintiff were of such a nature as not to amount to negligence, and that the recorder should have directed the jury that there was no evidence of negligence. If we were satisfied there was no evidence to go to the jury of any negligence on the part of the plaintiff, we should be authorised in discharging the rule for a new trial on that ground; but we cannot say there was not some evidence on which the opinion of the jury ought to have been taken. E

The other question was as to the alleged misdirection in the direction to the jury that there must be gross negligence to maintain the defence. It does not appear that there is any information given to the jury as to what they were to understand by gross negligence; but, if they were told to understand by gross negligence the absence of that ordinary care which, under the circumstances, a prudent man ought to have taken, which seems to have been the meaning given of gross negligence in some of the modern cases cited before us, the direction as to the degree of negligence might not have been objectionable. But the legal meaning of gross negligence is greater negligence or the absence of such ordinary care; it is such a degree of negligence as excludes the last degree of care and is said to amount to a *dolus*. F G H

We think the rule of law resulting from all the authorities is that in a case like the present, the goods remained in the charge of the innkeeper and under the protection of the inn so as to make the innkeeper liable as for a breach of duty, unless the negligence of the guest occasioned the loss so that it would not have happened if the guest had used such ordinary care as a prudent man may be reasonably expected to have taken under the circumstances. We think, therefore, the direction in the present case cannot be supported, and the rule for a new trial should be made absolute. I

Rule absolute.

A

CLARKE v. ROYAL PANOPTICON OF SCIENCE AND ART

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), February 11, 12, 18, 1857]

[Reported 4 Drew. 26; 27 L.J.Ch. 207; 28 L.T.O.S. 335;

3 Jur.N.S. 178; 5 W.R. 332; 62 E.R. 10]

B Corporation—Powers—Wrongful use—Mortgage granted with power of sale—Grant *ultra vires*—Mortgagee sought to be restrained from selling—Acquiescence by corporation in wrongful use of power.

A corporation had under its charter a special power of mortgaging which did not include a power to grant mortgages with a power of sale. Mortgages by the corporation were granted containing powers of sale, but no objection on behalf of the corporation was made between 1853 (when it was decided to raise money on a mortgage which should contain such a power of sale) until 1856.

C

Held: although the power to mortgage in the charter did not permit the grant of a mortgage containing a power of sale and such a power should not have been exercised, the corporation had acquiesced in that exercise for so long that it was too late to raise an objection on that ground, and the mortgagee would not be restrained from exercising the power.

D

Notes. Where the mortgage is by deed a power of sale is now conferred by the Law of Property Act, 1925, s. 101(1)(i), (5) (20 HALSBURY'S STATUTES (2nd Edn.) 655, 662), replacing the Conveyancing Act, 1881, s. 19 (1). An express power of sale, however, may still be inserted in a mortgage deed.

Referred to: *Stevens v. Theatres*, [1903] 1 Ch. 857.

E

As to express powers of sale in a mortgage deed, see 27 HALSBURY'S LAWS (3rd Edn.) 292, 293; and for cases see 35 DIGEST (Repl.) 326.

Cases referred to in argument:

Clay v. Rufford (1852), 5 De G. & Sm. 768; 35 Digest (Repl.) 151, 402.

Russell v. Plaice (1854), 18 Beav. 21; 2 Eq. Rep. 1149; 23 L.J.Ch. 441; 22 L.T.O.S. 326; 18 Jur. 254; 2 W.R. 243; 52 E.R. 9; 24 Digest (Repl.) 623, 6186.

F

Sanders v. Richards (1846), 2 Coll. 568; 63 E.R. 864; 35 Digest (Repl.) 634, 3045.

Stroughill v. Anstey (1852), 1 De G.M. & G. 635; 22 L.J.Ch. 130; 19 L.T.O.S. 367; 16 Jur. 671; 42 E.R. 700, L.C.; 35 Digest (Repl.) 323, 361.

Graham v. Birkenhead, Lancashire and Cheshire Junction Rail. Co. (1820), 12 Beav. 470, n.; 2 Mac. & G. 146; 7 Ry. & Can. Cas. 938; 2 H. & Tw. 450; 20 L.J.Ch. 445; 15 L.T.O.S. 221; 14 Jur. 494; 47 E.R. 1760, L.C.; 28 Digest (Repl.) 803, 520.

G

Motions to dissolve an injunction.

The court was asked by these two motions to dissolve an injunction granted by KINDERSLEY, V.-C., restraining a sale of the buildings and property of the Royal Panopticon of Science and Art, under a power of sale contained in a mortgage of that property. The first motion was brought by the mortgagee, who had been restrained from selling under his power of sale, and the second motion by the council of the society, against whom, as well as the mortgagee, the injunction had been granted.

H

The "Royal Panopticon of Science and Art" was formed under a charter dated Feb. 21, 1850, which directed that the council, to be constituted and provided by the deed thereafter directed to be executed, should have full power and authority on behalf of the said corporation to enter into and make and execute all contracts, purchases, sales, assurances and other acts to which the corporate seal should require to be affixed, and generally to do all acts which they should consider to be necessary for the well ordering of the affairs of the institution, and to execute all the powers in relation to the corporation, as if the same were done with the assent of the whole body, so as the same were done in conformity to the provisions of the charter or of any supplemental deed.

I

Power was also given to the corporation to purchase, acquire and hold to the corporation and their successors in perpetuity, or for any other term or estate, any lands, tenements and hereditaments, and to sell, demise, and otherwise to dispose of the same. Provided that the yearly value of such lands, tenements and hereditaments should not exceed the sum of £5,000, and no sale, mortgaged encumbrance, or other disposition of such lands, tenements or hereditaments was to be made, except with the approbation and concurrence of a general meeting of the proprietors of the corporation. Provision was also made that the proprietors should execute a deed of copartnership and settlement; and it was declared that the regulations contained in such deed should be taken to be the existing regulations of the corporation, except so far as the same might be repugnant to the charter or to the laws of the realm. It was also directed that the deed of settlement to be prepared should, within one year from the date thereof, be enrolled in the Court of Chancery. A B C

In compliance with the provision contained in the charter an indenture of settlement was, on Dec. 18, 1850, entered into and executed by the council and certain proprietors of the company, who thereby covenanted to observe, and keep, and enforce the engagements and duties contained in the several clauses of the deed. Clause 21 provided that the council, at their discretion, might call an extraordinary or special general meeting, or that twenty shareholders, holding not less than 1,000 shares, might require the council to call such meetings; and by cl. 22 it was provided that there had to be present, personally or by proxy, at any meetings not less than ten shareholders, holding 200 shares; and by cl. 23 that fourteen days' notice was to be given of any meetings. Clause 33 provided that the resolutions passed at any meetings should be entered in a book, and be signed by the chairman of the meeting, and that such book should be evidence of the same. By cl. 42 it was declared that in all cases not provided for by the charter, or that deed, it should be lawful for the council to act in such manner as they should think best for the interests of the corporation. Edward Marmaduke Clarke was, by cll. 65 and 66, appointed managing director for twenty years, at a salary of £800 a year, and that situation he continued to occupy until the closing of the institution. D E F

On Sept. 20, 1851, the council issued a circular to the proprietors, stating that 5,400 shares had been actually allotted out of the 8,000 contemplated by the charter, and that the shares so allotted represented £54,000, of which £50,000 had been received, leaving £4,000 to be received; that the whole of the cash received had been expended, and that, in addition, £4,500 had been advanced by members of the council; and measures were in progress for raising the further sum which was required. On April 23, 1852, and at subsequent periods, Augustus Shakespeare Oliver Massey advanced sums amounting in the whole to £9,000. On June 15, 1852, a letter, signed by the secretary, T. J. Brown, was forwarded to the members of the council, giving notice of a meeting of the council to be held on June 17, for the purposes of authorising the appropriation of £5,000, part of £10,000 to be lent to the corporation by A.S.O. Massey, pursuant to the resolutions of the council passed on June 3, for payment to the builder of moneys which should become due to him under his contract with the association, and carrying over such sum to an account to be called "The Royal Panopticon of Science and Art—the Building Fund"; and also for taking into consideration the deed of security to be made to A. S. O. Massey, and ordering the corporate seal to be affixed to that deed, on payment by Massey of the £10,000. G H I

In pursuance of that letter a meeting of the council was held on June 17, 1852, at which resolutions were passed authorising the corporate seal of the corporation being affixed to the deed of security to Massey for securing £10,000 and interest. This sum was repaid to Massey. On Sept. 30, an ordinary annual meeting of the proprietors of stock in the institution was called for the transaction of the ordinary business, and to consider the propriety of authorising the council to raise a sum not exceeding £25,000. A resolution was passed at that meeting authorising the council to raise a sum not exceeding that amount. On Sept. 28, 1855, in

- A pursuance of a circular of the 11th of that month addressed to the proprietors, a general meeting was held to transact the ordinary business and to obtain the approbation of the proprietors of the corporation to the mortgaging the lands, etc., of the corporation for any sum not exceeding £13,000, and in a note at the end of the circular calling the meeting it was stated that the powers of mortgaging to the extent of £25,000, authorised by the general meeting of Sept. 30, 1853, had been exhausted, but that £13,000, part of the money so raised, having been paid off, the lands, etc., of the corporation would not be charged beyond the sum of £25,000.
- B Mortgages for £2,000 and £3,000 to Samuel Gurney, Jun., and one for £10,000 to John Willson, were entered into by the council between the general meeting in 1854 and that in 1855, the latter being for sums due to him in respect of the building. On May 31, 1855, Richard Mansel O. Massey, the father of A. S. O. Massey, advanced to the corporation a sum of £10,000, out of which £2,000 was paid to A. S. O. Massey.

- C At a meeting held on Sept. 28, 1855, it was resolved to raise a sum not exceeding £13,000 by means of a mortgage of the lands, etc., of the corporation, and a committee of investigation appointed. Their report was presented at an adjourned general meeting held on Jan. 30, 1856, and it was resolved that further steps for raising money to carry on the undertaking should be taken.
- D On July 31, two circulars, signed by the secretary, were distributed to the proprietors, the one calling a meeting to arrange for the winding-up of the corporation, and the other informing them that the mortgagees intended to sell the buildings and their contents. R. M. O. Massey, A. S. O. Massey, Samuel Gurney, and John Willson, claiming to be mortgagees of the building and its contents, took possession of and instructed Messrs. Chinnock and Galsworthy to sell the same, and in consequence a sale thereof was announced for Aug. 25, 1856, subject to certain particulars and conditions of sale. The particulars stated that the sale was made by direction of the mortgagees, and comprised the building in Leicester Square, and its fixtures and contents.

- E A bill was filed by Edward Marmaduke Clarke, the managing director, on the part of himself and all the other proprietors, except the defendants, praying that the mortgages might be declared illegal as against the corporation and the proprietors of stock therein, and that the powers of sale contained in the mortgages might be declared void, and for an injunction to restrain the proposed sale of the property by the defendants. The bill also asked for the appointment of a receiver.
- F On a motion which came before the vice-chancellor at Southampton in August 1856, during the long vacation, an injunction restraining the proposed sale was granted.

- G *Baily, Q.C.*, and *C. Hall* for A. S. O. Massey, a mortgagee.
Rawlinson for S. Gurney, a mortgagee.
Glass, Q.C., and *Beale* for the council.
Terrell and Stiffe for the plaintiff, Clarke.

- H **KINDERSLEY, V.-C.**—This was a motion to dissolve an injunction granted in the long vacation on notice to restrain the mortgagee from exercising a power of sale in his mortgage. There was also a motion by another party representing the Panopticon as a corporation, also for the purpose of dissolving the injunction on the ground that they should not have been included in it.

- I With regard to the motion which was made by the mortgagee two points arise. The first question is whether it was competent to the mortgagor, or the party who executed the mortgage, to give a power of sale; and the second question is, supposing it was not competent to them so to do, whether the party who is seeking relief against the exercise of that power of sale is not precluded by concurrence or acquiescence from asking that relief. With regard to the first question, it is very remarkable that there should have been such a dearth of authority. It appears to me that there are certain clearly settled principles, by reason of which the conclusion ought to be that it was not competent to give such a power of sale. The

principles which I refer to are the following: It is clearly settled, beyond all doubt, that though a special power to sell given to a trustee may comprise a power to mortgage, yet a special power of mortgaging does not comprise a power of selling. That is a proposition beyond controversy. A

Another proposition which I take to be equally clear is that if a special power is given to a trustee involving confidence, personal judgment and discretion in him, it is not competent to that trustee to delegate the exercise of that power and discretion to another person. Many authorities might be cited in aid of these propositions, but they are so clear that it was unnecessary to cite any in support of them. Taking these two propositions, what is the conclusion which must necessarily be arrived at from them? Taking the second, that it is not competent to a trustee to delegate his authority to another, the principle of that is, that if there be a special power of sale given to a trustee, and that power involved confidence in him and an exercise of discretion on his part whether a sale should take place at all; or if it were a confidence or discretion as to the circumstances under which the sale shall take place, it would not be a matter of course that the trustee could delegate to another the exercise of that power; and if that be so, how can a trustee who has not vested in himself a power of sale give authority to another to sell? The principle simply is, that a power to mortgage does not comprise a power to sell, and a special power to mortgage also does not comprise a power to sell. B C D

It has been contended that the practice of giving to mortgagees a power of sale has become so universal that a power of sale must be considered as a necessary incident to a mortgage. In the first place I cannot admit the universality of that practice. No doubt it has become much more common than it was thirty or forty years ago for an ordinary mortgagee to require, and the mortgagor to give, a power of sale; but it is by no means universal, and many mortgages are made where the property is of a satisfactory nature, such as agricultural, for example, and of a large marketable value, where the mortgagor would refuse to give a power of sale, money being readily obtainable without giving it. E

The proposition is that a power of sale has become an incident of a mortgage, and that unless there is something to the contrary, it is a matter of course to insert a power of sale. What is the extent of that power to sell, and to whom is it to be given? Is it to be given to the mortgagee alone, or is it meant that the trustee may delegate it not only to the mortgagee himself, but also to the executors, administrators, and assigns of that mortgagee, whoever they may be? It seems very unusual that a trustee who may not sell himself may delegate an authority which he does not possess to persons whom he does not know. On what terms is the power to be with respect to the notice which is to be given, and to whom? Is it to be after failure in payment of one half-year's interest, or what? It has been suggested that, unless there is a power of sale included in the power to mortgage, it may be very disadvantageous to the cestuis que trust, for the property may be of such a character that a mortgagee may not be found to advance his money without having a power of sale; and that money could not be obtained upon equally advantageous terms as if there had been such a power; and that it would be for the benefit of the cestuis que trust that the trustee may do with the property what any prudent owner might have done. F G H

That argument, however, goes too far and destroys itself. It is clear that a trustee is not armed with the power to do what an owner may do. The owner may deal with his property in any way he thinks proper. He may deal with it in a variety of ways which, in a trustee, would be breaches of trust. He may, for example, invest in any shares in the Royal British Bank, or in the Tipperary Bank, or in any other undertaking of a similar kind; but a trustee cannot do this: he is tied down to the letter and spirit of the trust and discretion vested in him. A power of sale has become much less important since the passing of the Act for the Improvement of the Jurisdiction in Equity (15 and 16 Vict., c. 86), as by s. 48 of that Act a mortgagee coming to the court for a foreclosure may apply to the court for a sale, if he prefers a sale to a foreclosure, and the mortgagor may I

A do the same. Great power of obtaining a sale is, therefore, given to the mortgagee. That is a very good provision for all parties, and very beneficial for the *cestuis que trust*, because, if there is a mortgage without a power of sale, and the mortgagee applies to the court, he may have a sale, but the sale would be under the direction of the court. Being of opinion, therefore, that a power of sale is not incident to a mere power to mortgage, and that a special power to a mortgagee does not
B give him power to sell himself, and, therefore, does not give him power to delegate to another a power to sell, it appears to me that, with regard to the realty, I must decide in favour of the plaintiff on that ground.

The personal property, however, stands in a different position. The chattels, such as the apparatus of works of art and science, in the building, are in a different situation, and for this reason, that they are not yielding any profit, and the only
C way in which any effective mortgage of them can be made is by means of a bill of sale; otherwise no mortgage can be made of them, for no person would be so unwise as to advance his money upon property of that description, except upon that security.

By the charter, which was dated in 1850, it was declared that the corporation thereby formed should be able, notwithstanding the Statute of Mortmain, to hold
D lands, etc., for any term of years or other term, for the purposes of the institution. Powers of exchange were also given them. The object of these provisions was to make them absolute owners of the property, and they might deal with it as they pleased. Then follows a clause limiting the lands to be held to the yearly value of £5,000, and a clause to the effect that no sale, mortgage, or encumbrance of any of such land, should be made, except with the approbation and concurrence of
E a general meeting of the proprietors and members. The charter provided that a deed of settlement should be prepared, and that such deed should contain nothing contrary to the charter. That deed was so prepared and executed, but it does not appear to affect the present question. [His Honour here referred to the various mortgage transactions which had occurred, and continued:] Then comes the question, whether it was competent for the council, who were the trustees for the
F corporate body, in respect of their powers of selling, mortgaging, etc., with a special power of mortgaging only, to grant a mortgage containing powers of sale. I have already expressed my opinion that it was not competent for them to do so.

The other question is whether Clarke was precluded either on behalf of himself, or of himself and certain other shareholders, from filing a bill and complaining of the transactions which had taken place. Clarke was, from the time of the
G commencement of the institution up to 1854, a member of the council, and the managing director, he being a man of science. Being thus a shareholder, a member of the council and managing director, he was present at the meeting of the general body on Sept. 30, 1853, at which the resolution was passed authorising the raising of money; and not only was he present at that meeting, but also at a meeting of the council in December, 1853, at which it was resolved to raise money on mortgage
H with powers of sale. It does not appear from the books how the different members voted. But assuming that Clarke did vote in the minority on the ground that the mortgage was to contain a power of sale, objecting as he did to the power of sale on the ground that the council could not, consistently with the powers vested in them, give such a power; and knowing, as he must have known, that the resolution was carried, he took no steps, and from 1853 to 1856 he made no complaints of what had
I been done.

When the injunction was applied for, concurrence on the part of Clarke had not been suggested, for the representations in the bill blinded the defendants to it. That is quite enough to justify the defendants in saying that these matters were not brought to their attention, and they have a right now to raise the question. It was quite unnecessary to cite cases on the point, for it is quite clear that if the person who complains of a transaction, though it may have been *ultra vires*, if that person had concurred in it, he is precluded from relief—and in one case it was decided that where a party has filed a bill on behalf of himself and the other shareholders,

if any of those others have concurred, although he may not have been a member when the transaction took place, that is sufficient to disentitle him to relief. I am, therefore, of opinion that it was competent to the defendants to raise the question as to concurrence, and that Clarke is precluded from obtaining the injunction, and, therefore, that it must be dissolved. A

The other motion was by the body at large, asking that the injunction might be dissolved so far as it related to them. There is no reason why they should have been made parties. By the terms of their charter they had full power to deal with the property as they pleased. As to them, therefore, the injunction must be dissolved on both motions. Therefore, although the plaintiff is right on the question as to the power of sale, still, upon the questions of acquiescence and power in the council to deal with the property, the two motions must be allowed with costs. B

Orders accordingly. C

HOOPER v. COOKE D

[ROLLS COURT (Sir John Romilly, M.R.), July 14, 25, 1855]

[Reported 20 Beav. 639; 3 Eq. Rep. 988; 25 L.J.Ch. 62;
25 L.T.O.S. 286; 1 Jur.N.S. 949; 3 W.R. 636; 52 E.R. 750] E

[COURT OF APPEAL IN CHANCERY (Lord Cranworth, L.C.), January 25, 1856]

[Reported 25 L.J.Ch. 467; 27 L.T.O.S. 178; 2 Jur.N.S. 527]

Rentcharge—Arrears—Recovery—Distress and entry—Incompetency of action for ejectment.

Rentcharge—Interest in land—Extent—No estate at law.

The owner of a rentcharge has no estate at law. He cannot bring an ejectment to recover it, his remedy being by distress and entry, and he has an interest in the land only to the extent of recovering arrears due in respect of the rentcharge. He is entitled to enforce his claim only in this peculiar way. F

Notes. As to liens for expenditure on the property of another, see 24 HALSBURY'S LAWS (3rd Edn.) 161-164; and for cases, see 32 DIGEST (Repl.) 299 et seq. G

Appeal by the plaintiff from a decision of SIR JOHN ROMILLY, M.R., *infra*, dismissing a bill filed by the plaintiff, a first rentcharger, asking for an injunction to restrain the defendant, a second rentcharger, from taking possession of premises charged with several annuities until the plaintiff was paid the money expended by him in repairs.

By indentures of lease and release dated Aug. 6 and 7, 1778, a piece of land was conveyed by Peter Hooper (through whom the plaintiff claimed) to John Perry and his heirs, to the use that Peter Hooper, his heirs and assigns, should thereafter receive and take from and out of the premises thereby conveyed the yearly sum or rentcharge of £4, with power, in case of the non-payment thereof, to distrain on the premises and to enter on the same and receive the rents until the rentcharge should be fully satisfied, and all arrears which should grow due while he and they should be in possession, together with all costs, charges and expenses as should be laid out and expended by him or them, or occasioned by the non-payment thereof. In 1822, the piece of land, together with some messuages erected thereon, was sold, subject to the said rentcharge of £4, in consideration of a perpetual rentcharge of £40 which became vested in the defendant Cooke. In 1842 the premises had become greatly dilapidated and untenable, and having remained unproductive until 1855, the plaintiff whose rentcharge had not been paid since 1841 brought an action of ejectment and obtained possession of the premises. H

- A** The defendant's rentcharge of £40 had also remained unpaid since 1842. The plaintiff repaired the property in a substantial manner at a cost of upwards of £500, and had since been in possession of the rents, amounting in the whole to £396 13s. 4d. He had, however, expended a further sum of £207 7s. 4d. in necessary repairs, leaving a large sum still due in respect of his outlay, and the arrears of the rentcharge, but having received more than sufficient to cover the arrears of the
- B** rentcharge. The defendant, the owner of the rentcharge of £40, demanded possession, but the plaintiff refused to deliver up the same except on being paid the balance due in respect of the repairs and the arrears of the rentcharge. The defendant then commenced an action of ejectment, and the plaintiff being advised that he had no defence at law, allowed judgment to go by default, and filed the present bill to restrain the defendant from taking possession of the premises except on
- C** the terms of her paying the arrears of the rentcharge together with the moneys expended by the plaintiff on the premises.

Lloyd and Howe for the plaintiff.

Roundell Palmer and Whitbread for the defendant.

- SIR JOHN ROMILLY, M.R.** I have felt some difficulty in coming to a decision
- D** as to the principle which ought to govern this case. The plaintiff, in order to recover the arrears of his rentcharge, enters on the property, subject to the charge; but in consequence of the dilapidated condition of the houses, they are untenable, and the plaintiff is unable to get anything in satisfaction of his claim, and thereupon, in order to render the houses habitable, and to get rent for them, he expends a large sum in necessary repairs, and in the result, after being in possession for several
- E** years, he has received rents which are more than sufficient to satisfy all arrears of the rentcharge, but are inadequate to reimburse the plaintiff what he has expended in repairs. In this state of things the defendant, who is entitled to a rentcharge of £40 on the premises, subject to that of the plaintiff, brings ejectment against him, and the plaintiff files this bill to distrain these proceedings until he is paid.

- It was argued that the case of the plaintiff is the same as that of a landlord who
- F** is entitled under a restraint to carry away crops, and may charge the expense of cutting the crops, and, in the case of a meadow, of making the hay and also of carrying the crop away, as an expense incidental to the making the distress available. For the defendant it was contended that the plaintiff can have no greater power than what is given him by the deed; that the construction to be put on the deed is the same in equity as at law; and that he has admitted that he has no defence
- G** at law by giving judgment in the action of ejectment, and coming into equity. I concur in the argument that the plaintiff has a mere legal demand and that in this court he must make out his claim the same as in a court of law. I could not preclude the plaintiff from relief in this court from the circumstance of his having allowed judgment to go by default in the action at law, and, therefore, I do not consider that as conclusive evidence that the plaintiff has no defence at law. I
- H** might, if I thought proper, give the plaintiff leave to continue to try the right at law; but both parties have acquiesced that this court should decide the right between them—at least the plaintiff has done so by coming here and not resisting the action.

- I have come to the conclusion that the plaintiff is not entitled to relief in this court. I think that the well-recognised principle that where a person passes
- I** property to another, he also incidentally, if not expressly, gives him the power necessary to enable him to enjoy the thing given, and to render it productive, although applicable to the extent of making distress and entry, and also to the cutting and carrying away of crops, it is not in effect applicable to the present case, and does not entitle the plaintiff to lay out any money on the property, or to receive anything in consequence of having done so. To hold that it did would be, in my opinion, to put the plaintiff in the position of a mortgagee in possession and thus to permit him to alter the character and quality of the property as he thought proper.

The distinction between the plaintiff's position and that of a mortgagee is obvious.

At law the mortgagee is absolute owner of the land, and he may deal with it as he thinks fit. The mortgagor may come into equity to recover possession of the property notwithstanding his title at law is gone, and equity will give him possession, imposing upon him certain conditions, viz., he shall not have possession except on the terms of repaying the mortgagee not only all moneys due to him for principal and interest, but also all which, as owner of the property, he may have properly expended for the purpose of repairing and permanently improving the property. The owner of the rentcharge has no estate at law; he cannot bring ejectment to recover it, but his remedy is by distress and entry, and he has an interest in the land only to the extent of recovering the arrears due in respect of the rentcharge. He is entitled to enforce his claim in this peculiar way, and in no other. A mortgagor must come into equity to recover possession of the property, but the owner of land charged with a rentcharge may recover possession without the aid of this court as soon as the rentcharge is fully satisfied, and this court can impose no terms on him as it can upon a mortgagor. If the plaintiff in this case has any right, he can only obtain it at law. In my opinion the plaintiff has mistaken his position and his remedy and the bill must, therefore, be dismissed.

The plaintiff appealed.

Lloyd and Howe for the plaintiff.

Roundell Palmer and Whitbread for the defendant.

LORD CRANWORTH, L.C.—This is a bill filed by the plaintiff, a party entitled to a rentcharge of £4 a year on three houses of small value. The rentcharge was created in 1778, and the deed creating it contained the usual powers of distress and entry. This rentcharge was duly paid up to 1841, but it then fell into arrear; and in the year 1854, the property being in an extremely dilapidated state, and the plaintiff's rentcharge having been in arrear ever since 1841, the plaintiff entered into possession of the property, and expended a very considerable sum of money in putting this dilapidated property into repair; and although he has since received sufficient rent to pay him the arrears of his rentcharge, yet he has not been repaid the amount he expended in repairs. The defendant Cooke, who is entitled to a rentcharge of £40, subject to the plaintiff's rentcharge, commenced an action of ejectment against the plaintiff last year to recover possession of the property, and the present bill was filed asking an injunction to restrain the defendant, the plaintiff in the ejectment suit, from taking possession of the premises, upon two grounds—first, that the plaintiff had, according to the true construction of the instrument, a lien upon the property for the amount of the money expended in the repairs; and, secondly, that whether that were so or not, the defendant was estopped from saying that the plaintiff had not a lien, in consequence of his standing by and allowing the plaintiff to lay out money without giving him notice that he was doing repairs for which he would not be paid. The Master of the Rolls dismissed the bill, not thinking either point made out.

On the point of acquiescence, the defendant denies notice of the fact that the plaintiff was expending money in repairs; and the effect of the evidence on the question amounts to this only, that unauthorised persons told the solicitor of the defendant of the circumstances. But communications to a solicitor, to make them notice to a client, must be made in respect of some pending matter, and be such that the solicitor was bound to communicate them to the client; the mere circumstance of being the ordinary solicitor of a party amounts to nothing. But supposing the defendant knew that the plaintiff had taken possession, and that he was expending money in repairs, what of that? He knew that the plaintiff had a right to take possession; was he bound, then, to say to the plaintiff, "Your construction of the deed granting the rentcharge is probably wrong, and you are making these repairs at your own risk?" This disposes of the question of acquiescence, which, in fact, was an afterthought, for the bill as originally framed had no reference to the question of acquiescence, but was merely rested on the ground of lien.

The question still remains, has the plaintiff such a lien? I entirely concur with

A the Master of the Rolls in thinking that no such lien exists. Clearly the plaintiff had the legal right to the possession for the purpose of obtaining payment of his arrears : that cannot be said to create a lien : the rentcharge was a debt by covenant. He did enter and hold possession, and the question now is, entering under such circumstances, was he entitled to apply the rents received by him towards payment of the repairs ; for there is no doubt that if he was not, the arrears of his rentcharge

B have entirely been satisfied. That question depends upon this point, whether the expenditure upon the repairs can be considered to come within the meaning of the words, "such costs, charges, and expenses as should be laid out and expended by him or them, or occasioned by the non-payment thereof." The course I am about to take renders it unnecessary to express any opinion upon that point, although I have a very strong opinion upon it. The question is a purely legal one, and one

C which this court cannot, according to its practice, decide, unless the nature of the accounts were such as would render it very inconvenient to try the question at law. There is nothing of the sort here ; there is no complication of accounts, and no reason why a court of law cannot try it as well as a court of equity.

The questions will be—first, whether, upon the construction of the covenant, the plaintiff in equity was entitled to expend any sums of money upon the repairs of the premises ; and, secondly, if he was, whether the sums he has expended were proper expenditures. This bill has been filed upon the assumption that the ques-

D tions cannot be tried at law, which I consider was an entire misapprehension. I concur with the view of the case taken by the Master of the Rolls, that the plaintiff has failed in making out any case for equitable relief, and the appeal must be dismissed, with costs ; but upon the rights at law I express no opinion. I make this

E order upon terms that the defendant here, the plaintiff at law, withdraw the judgment he has obtained, and that the defendant at law do admit the plaintiff's title, except as it is affected by the deed of 1778.

Appeal dismissed.

G SPENCE AND ANOTHER v. CHODWICK

[COURT OF QUEEN'S BENCH (Lord Denman, C.J., Patteson, Wightman and Erle, JJ.), May 4, 1847]

[Reported 10 Q.B. 517; 17 L.J.Q.B. 313; 9 L.T.O.S. 101;
H 11 Jur. 872; 116 E.R. 197]

Shipping—Carriage of goods by sea—Exceptions relieving shipowner from liability—Act of God—Perils of the sea—Confiscation by order of foreign court.

Where cargo carried in a ship was confiscated by the order of the competent court of a foreign country, lawfully made according to the law of that country, while the ship was within the jurisdiction of that court, the shipowner was

I **held** not to be protected from liability for the loss by the exceptions in the contract of affreightment of act of God and perils of the sea.

Notes. Referred to : *The Newport* (1858), Sw. 335; *Geipel v. Smith* (1872), 41 L.J.Q.B. 153; *Jacobs, Marcus & Co. v. Crédit Lyonnais* [1881-5] All E.R.Rep. 151; *Blackburn Bobbin Co. v. Allen*, [1918] 1 K.B. 540; *Matthey v. Curling*, [1922] All E.R.Rep. 1.

As to excepted perils, see 35 HALSBURY'S LAWS (3rd Edn.) 288-303; and for cases see 41 DIGEST 406 et seq.

Cases referred to :

- (1) *Atkinson v. Ritchie* (1809), 10 East, 530; 103 E.R. 877; 41 Digest 464, 2955.
- (2) *Fletcher v. Inglis* (1819), 2 B. & Ald. 315; 106 E.R. 382; 29 Digest (Repl.) 232, 1738.
- (3) *Gosling v. Higgins* (1808), 1 Camp. 451; 170 E.R. 1018; 41 Digest 554, 3807.
- (4) *Paradine v. Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, 3236.
- (5) *Barker v. Hodgson* (1814), 3 M. & S. 267; 105 E.R. 612; 41 Digest 454, 2851.
- (6) *Sjoerds v. Luscombe* (1812), 16 East, 201; 104 E.R. 1065; 41 Digest 454, 2850.
- (7) *Blight v. Page* (1801), 3 Bos. & P. 295, n.; 127 E.R. 163, N.P.; 41 Digest 454, 2849.
- (8) *Evans v. Hutton* (1842), 4 Man. & G. 954; 2 Dowl.N.S. 600; 5 Scott, N.R. 670; 12 L.J.C.P. 17; 6 Jur. 1042; 134 E.R. 391; 41 Digest 416, 2594.
- (9) *Holman v. Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 11 Digest (Repl.) 325, 16.
- (10) *Boucher v. Lawson* (1736), Cunn. 144; Lee temp. Hard. 85, 194; 94 E.R. 1116; 11 Digest (Repl.) 440, 823.
- (11) *Pickering v. Barkley* (1648), Sty. 132, 82 E.R. 587; 41 Digest 415, 2590.
- (12) *Buller v. Fisher* (1799), 3 Esp. 67; Peake, Add. Cas. 183; 170 E.R. 540, N.P.; 41 Digest 415, 2583.
- (13) *Power v. Whitmore* (1815), 4 M. & S. 141; 105 E.R. 787; 41 Digest 599, 4244.
- (14) *Phillips v. Hunter* (1795), 2 Hy. Bl. 402; 126 E.R. 618; 5 Digest (Repl.) 871, 7310.
- (15) *Hughes v. Cornelius* (1682), 2 Show. 232; T.Raym. 473; Skin. 59; 89 E.R. 907; 21 Digest (Repl.) 219, 176.

Also referred to in argument :

- Pellecat v. Angell* (1835), 2 Cr.M. & R. 311; 1 Gale, 187; 5 Tyr. 945; 4 L.J.Ex. 326; 150 E.R. 135; 11 Digest (Repl.) 441, 831.
- Gaby v. Lloyd* (1825), 3 B. & C. 793; 5 Dow. & Ry.K.B. 641; 3 L.J.O.S.K.B. 116; 107 E.R. 927; 29 Digest (Repl.) 92, 385.
- Hill v. Idle* (1815), 4 Camp. 327; 1 Stark. 111; 171 E.R. 104, N.P.; 41 Digest 549, 3769.
- Magalhaens v. Busher* (1814), 4 Camp. 54; 171 E.R. 18, N.P.; 41 Digest 300, 1615.
- M'Leod v. Schultze* (1844), 1 Dowl. & L. 614; 13 L.J.Ex. 321; 11 Digest (Repl.) 530, 1421.
- Coggs v. Bernard* (1703), 2 Ld. Raym. 909; 1 Com. 133; 92 E.R. 107; 12 Digest (Repl.) 250, 1935.
- Hadley v. Clarke* (1799), 8 Term Rep. 259; 101 E.R. 1377; 12 Digest (Repl.) 459, 3426.

Demurrer in an action by shippers against shipowners to recover in respect of loss of cargo shipped in one of the defendant's ships.

Under a contract of affreightment the plaintiffs shipped on board the defendant's ship, then in the bay of Gibraltar, and bound for London, goods to be safely conveyed to London and there delivered in good order. A term of the contract was that the defendant should be excepted from liability in respect of loss occasioned by the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever. In the course of her voyage the ship called at Cadiz, and came within the jurisdiction of the officers of customs there and of the Revenue Court of Andalusia. While the ship was there, the goods were, according to the law of Spain, lawfully, taken out of the ship by the customs officers, against the will and without the default of the defendant, on a charge of suspicion of their being contraband under the law of Spain, and in due course they were confiscated by a decree of the Revenue Court. In an

A action by the plaintiffs to recover in respect of the loss of the goods they complained that the defendant had not safely carried and delivered the goods, but had wholly failed and neglected so to do, and had behaved and conducted himself so carelessly with respect to the carrying and delivering of the goods that the goods had become and were wholly lost to plaintiffs. The defendant denied liability and pleaded that he was not responsible for the loss of the goods which had been due to their
 B having been confiscated by the order of a competent court within whose jurisdiction they were. To this plea the plaintiffs demurred on the following grounds: that it was not averred with sufficient particularity how, or wherefore, or on what account, or by what act, neglect or default, the goods became confiscated; that it was not shown by what law or custom of Cadiz, or of the kingdom of Spain, the goods became confiscated; that it was not averred with sufficient particularity
 C that it was necessary for the purpose of the voyage for the ship to go within the jurisdiction of the Spanish court, and that it was not averred that the goods were contraband, but only that the court found them to be so.

Crompton for the plaintiffs.—The defendant's contract to convey the cargo is an absolute contract, subject to certain express exceptions; and no excuse is sufficient, unless it show that performance was prevented within one of the exceptions specified, or by the act of the plaintiffs themselves, or by the law of this country. Even the act of God, if not expressly excepted, would be no excuse: *COMYN'S DIGEST*, Condition (D 1). The danger contemplated by touching at Cadiz may have been the very reason why the plaintiffs contracted in these terms. It has been held no excuse for the shipper that the loading of a cargo was rendered impossible by pestilence: *Barker v. Hodgson* (5); or by foreign embargo or prohibition: *Sjoerds v. Luscombe* (6), *Blight v. Page* (7). In like manner it has been held that the shipowner is not excused, even where government officers of this country have prevented the performance of his contract to carry goods: *Evans v. Hutton* (8), *Gosling v. Higgins* (3). The excuse here alleged is, that performance was prevented by the revenue laws of Spain, but our courts do not notice the revenue laws of foreign countries: per LORD MANSFIELD in *Holman v. Johnson* (9) (1 Cowp. at p. 343); and the observations of LORD HARDWICKE in *Boucher v. Lawson* (10) are to a like effect.

Bovill for the defendant.—The plea raises a question which is of great importance, and not governed by any decided case. By agreement of both parties, their property is brought within the jurisdiction of a court of justice at Cadiz, and so made amenable to that jurisdiction. Proceedings take place in that court, in consequence of which the loss of his property ensues to the freighter. Those proceedings were in rem and bound the property. The shipowner contends that the freighter must bear the loss which has befallen him in the due course of performance of that contract which he has chosen to enter into. It is said that the defendant has contracted absolutely, subject to certain declared exceptions, and that he has not brought his case within them. But the act of God, which is one of the exceptions, extends to other than natural causes, and means no more than inevitable accident: *STORY ON BAILMENTS*, 318, s. 489, following *JONES ON BAILMENTS* (4th Edn.), p. 104; and inevitable accident must mean something which has occurred without the defendant's default. It must be conceded that vis major is not always an excuse; but the exceptions of "act of God" and "perils of seas" have been
 I liberally interpreted: *ABBOTT ON SHIPPING* (8th Edn.), part iv, chap. vi, p. 382. Thus, capture by pirates, accidental collision, the taking ground in a dock, have been considered perils of the seas: *Pickering v. Barkley* (11), *Buller v. Fisher* (12), *Fletcher v. Inglis* (2). Secondly, the plea shows that the loss was occasioned by the default of the plaintiffs themselves in putting contraband goods on board. Thirdly, the plaintiffs are bound by the judgment of the court of Cadiz. Both parties placed the property within the jurisdiction of that court. It is true that one country will, in general, not notice the revenue laws of another country for the purpose of invalidating contracts, although eminent text writers reprobate the

principle: STORY'S CONFLICT OF LAWS (2nd Edn.), p. 332, s. 257. But the practice is subject to the qualification that every country does notice the judgment of a foreign court on any case within its jurisdiction, and respects it, not, perhaps, as conclusive, though it is so put by LORD HARDWICKE in *Boucher v. Lawson* (10) (Lee temp. Hard. at p. 89), but, at all events, as binding prima facie: *Power v. Whitmore* (13), *Phillips v. Hunter* (14), *Hughes v. Cornelius* (15).

LORD DENMAN, C.J.—This is a bold attempt, though supported with great ingenuity, to unsettle the law which has always been understood to govern contracts of this kind, and I think that, if the law was to be questioned, a more favourable case might have been chosen for the purpose. The plea does not state the contract to be in contravention of the law of either England or Spain, as known to either party, nor does it allege anything which, on general principles, ought to affect the contract. No deceit or criminal act is charged against the plaintiffs: it does not appear that the defendant was not as well aware as the plaintiffs of all that was done and all that was likely to happen. If, indeed, the contract appeared to have been made for the purpose of defrauding the revenue laws of a foreign country, I think a question might arise whether we should give effect to it. It has been contended that the plea brings the defendant's case within the exceptions contained in the contract, or rather, perhaps, that, although this may not be so in strictness, we ought to extend the meaning of those exceptions so as to include the present and other similar cases. In my opinion, we should do very ill if we were to tamper with the rules of construction which have always been applied to such exceptions. Those rules were laid down, originally, with reference to the interests of the individuals who are parties to these contracts, and not to any notions of general policy; and they are rules now well understood. I will merely refer to the judgment of LORD ELLENBOROUGH in *Atkinson v. Ritchie* (1), which completely disposes of this part of the argument.

PATTESON, J.—The first question in this case is whether the defendant by his plea has brought himself within any of the exceptions in this contract. As LORD ELLENBOROUGH, C.J., says in *Atkinson v. Ritchie* (1) (10 East, at p. 533):

“No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance.”

The defendant's contract is to carry the plaintiffs' goods to London, and he is liable for non-performance of his contract unless its performance was prevented by one or other of the exceptions provided against, or by the act of the plaintiffs themselves, or by the law of this country. I am of opinion that the defendant was not prevented by the act of God, or the Queen's enemies, or any dangers of the seas. It is said that he was prevented by dangers of the seas, and *Fletcher v. Inglis* (2) has been relied upon in which the straining of a vessel in a dry harbour was held to be within this exception. But there the damage occurred in the regular course of navigation. The loss in this case had nothing to do with the navigation of the vessel; it was caused by the execution of the law of Spain of which both plaintiffs and defendant might be equally ignorant. We must not assume that the plaintiffs knew this law and the defendant did not know it. If the plaintiffs did not know it, the loss was not occasioned by their act. If the plea had stated that the plaintiffs knew their goods would be liable to confiscation under the law of Spain, and that the defendant did not know it, there might be a question as to his liability; I do not say how that might be. *Gosling v. Higgins* (3), which was the only case cited in point, has been distinguished on the ground that there the shipowner had a remedy over. I doubt whether that was the ground of the decision. The reference to foreign attachment is inapplicable, for such attachment is, in some sense, the act of the principal debtor, who, therefore, cannot complain of the garnishee's non-payment to him. In this case both parties, perhaps, were ignorant of the law by the operation of which the loss was occasioned. At what

A time the law was made, and whether the goods were contraband per se, or became so by something done or omitted in respect of them, we do not know. But I disclaim minute considerations of this sort. It was for the defendant to bring himself within the exceptions in his contract, and he has not done so.

WIGHTMAN, J.—I am of the same opinion. The defendant entered into an absolute contract, subject only to certain specified exceptions, to convey goods to the port of London, and it has been contended with much ingenuity that the cause for the non-performance of his contract falls within one of these exceptions. We have already expressed an opinion against so much of the plea. But the defendant takes higher ground also, and contends that his plea shows that he was prevented from performing his contract by the decree of a competent court, and that this is a valid excuse. But it is not averred that the plaintiffs did any wrongful act in respect of the cargo, or that they knew it to be contraband by the law of Spain, or that it was taken to Cadiz by their desire. The object was to convey the goods to London; and Cadiz is mentioned merely in describing the route of the ship. On the pleadings it does not appear that either party knew that the goods would be liable to seizure there, or that the voyage was likely to be frustrated by taking that route. There was no illegality in the contract itself, and the case comes within the principle recognised by LORD ELLENBOROUGH, C.J., in *Atkinson v. Ritchie* (1) (10 East, at pp. 533, 534):

E “The rule laid down in the case of *Paradine v. Jane* (4) has often been recognised in courts of law, as a sound one; i.e., that when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may; notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract.”

F LORD ELLENBOROUGH, C.J., refers to several other cases where the same principle has been recognised. The defendant here was prevented by inevitable necessity from performing his contract. But he might have provided in his contract against the consequences of such a contingency: he has not done so, and is without excuse. The case of foreign attachment furnishes no analogy. There the law enables a third person to step in and take advantage of a contract between others; the payment by the garnishee to him, is, by law, also a payment by the garnishee to his own creditor.

G **ERLE, J.**—The defendant's contract was, in effect, a contract of insurance against all but certain specified risks, and the seizure in question was not one of them. The only remaining defences which would be open to him are that the contract was illegal by the law of this country, or that the plaintiffs themselves prevented him from performing his contract. Neither of these cases is set up by the plea.

Judgment for plaintiffs.

WHEATLEY v. BASTOW

[COURT OF APPEAL IN CHANCERY (Knight-Bruce and Turner, L.JJ.), May 7, 8, 9, 1855]

[Reported 7 De G.M. & G. 261; 3 Eq. Rep. 859; 24 L.J.Ch. 727;
25 L.T.O.S. 191; 1 Jur.N.S. 1124; 3 W.R. 540; 44 E.R. 102]

Guarantee—Surety—Liability—Assignment of security by mortgagee—No notice to surety.

A., B. and C. were entitled in equal shares in reversion to a fund in court. B. borrowed £1,000 from D., secured by a mortgage deed dated Feb. 23, 1841, by which both A. and B. assigned their respective third shares. A. was expressly declared to be joined only as surety for B. E., a solicitor, who had acted professionally for other parties, also covenanted as surety for B. for payment of principal and interest. E. prepared a marriage settlement by which D. assigned the debt and securities to trustees on trusts for himself, his wife and children. The trustees neglected to obtain a stop order and no notice of the assignment was given to A. On Dec. 18, 1846, an order was obtained whereby the shares of B. and C. were sold and the proceeds disposed of by E. The petition asking for the order to sell was prepared by E., who acted without authority, and B. and C. were unaware of its presentation until after the order had been made. Furthermore E. without authority had instructed counsel to consent on behalf of A. and D., the petition falsely stated that £500 had been repaid on the loan, and the mortgage deed was set out in such a way as not to show that B. alone was liable and A. was only a surety, but made it appear that both A. and B. were equally liable. A., the surety, sought a declaration that D. and all claiming under the settlement should be bound by the statements in the petition of 1846 and that the proceeds of B.'s share retained by E. ought to be considered as received for D. or for his trustees.

Held: (i) neither A. nor D. were bound by the statements in the petition of 1846, E. having acted in the matter without express authority and without any general authority to act for either of them; (ii) the neglect of the trustees to obtain a stop order, whatever equity it might create as between them and their cestuis que trust, did not affect their rights against the surety, A.; (iii) the assignment of the debt by the creditor D. without notice to the surety A. did not operate to discharge the surety; (iv) E., appearing on the evidence to have been guilty of irregular and fraudulent conduct as a solicitor, would be ordered to show cause why his name should not be struck off the Rolls.

Notes. Distinguished: *Strange v. Fooks* (1863), 4 Giff. 408. Considered: *Bolton v. Salmon*, [1891] 2 Ch. 48; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K.B. 883. Referred to: *Eastern Counties Building Society v. Russell*, [1947] 1 All E.R. 500.

As to loss of securities held by creditor, see 18 HALSBURY'S LAWS (3rd Edn.) 516 et seq.; and for cases see 25 DIGEST (Repl.) 197 et seq. As to effect of a solicitor acting without authority, see 36 HALSBURY'S LAWS (3rd Edn.) 76 et seq.; and for cases see 43 DIGEST (Repl.) 67 et seq.

Cases referred to:

- (1) *Matthews v. Wallwyn* (1798), 4 Ves. 118; 31 E.R. 62, L.C.; 35 Digest (Repl.) 713, 3811.
- (2) *Dungey v. Angove* (1794), 2 Ves. 304; 7 De G.M. & G. 278, n.; 30 E.R. 644, L.C.; 43 Digest (Repl.) 377, 3997.
- (3) *Duke of Beaufort v. Neeld* (1845), 12 Cl. & Fin. 248; 9 Jur. 813; 8 E.R. 1399, H.L.; 1 Digest (Repl.) 439, 923.

A Also referred to in argument:

Capel v. Butler (1825), 2 Sim. & St. 457; 4 L.J.O.S.Ch. 69; 57 E.R. 421; 26 Digest (Repl.) 197, 1497.

Watson v. Allcock (1853), 4 De G.M. & G. 242; 1 Eq. Rep. 231; 22 L.J.Ch. 858; 21 L.T.O.S. 204; 17 Jur. 568; 1 W.R. 399; 43 E.R. 499, L.J.J.; 26 Digest (Repl.) 197, 1502.

B *Watts v. Hyde* (1847), 2 Ph. 406; 43 Digest (Repl.) 106, 960.

Palk v. Lord Clinton (1805), 12 Ves. 48; 33 E.R. 19; 35 Digest (Repl.) 411, 1064.

Stronge v. Hawkes (1853), 4 De G.M. & G. 186; 43 E.R. 478, L.J.J.; 35 Digest (Repl.) 357, 616.

Wilkinson v. Candlish (1850), 5 Exch. 91; 19 L.J.Ex. 166; 155 E.R. 39; 35 Digest (Repl.) 682, 3578.

C *Mayhew v. Crickett* (1818), 2 Swan. 185; 1 Wils. Ch. 418; 36 E.R. 585, L.C.; 26 Digest (Repl.) 208, 1598.

Harper v. Faulder (1819), 4 Madd. 129; 56 E.R. 656; 35 Digest (Repl.) 540, 2198.

Appeal by the defendants against an order of STUART, V.-C., on a petition by the plaintiff, Mrs. Wheatley, against the defendants, Mr. and Mrs. Bastow, their trustees and others, for an order that they be declared to be bound by the statements in a former petition of 1846, as to payment of £500 and for an account of what was due on the mortgage having regard to that declaration and for re-assignment of the shares on payment of what was found due. After the commencement of the suit the plaintiff, Mrs. Wheatley, died and the suit was prosecuted by her husband as her administrator. At the hearing on Feb. 22 and 23, 1855, STUART, V.-C., refused the relief asked for and held that the defendants had lost all right to resort to the plaintiff's share by reason of the neglect of the trustees in not obtaining a stop order of their assignment and that a surety had a right to have notice of any assignment of the debt for which he was liable.

Under the will of John Lloyd, the plaintiff, Mrs. Wheatley, then Hester Barratt and her brother Thomas and sister Ann Barratt were entitled in equal shares to a

F fund of £4,000 in consols, subject to the life interest of their mother Mrs. Barratt. In the action of *Morrison v. Jefferies* the fund was paid into court to an account, "The annuity account of [Mrs. Barratt] and her children." In February, 1841, Thomas Barratt borrowed £1,000 from the defendant Bastow and by a mortgage dated Feb. 23, 1841, Thomas Barratt and the plaintiff, then Hester Barratt, assigned their respective third shares, subject to their mother's interest to secure the loan and the deed declared that the plaintiff only joined as security for Thomas Barratt. Thomas Barratt, the elder, and John Collins, a solicitor, covenanted as sureties for Thomas Barratt, the younger, for the payment of principal and interest. On Mar. 5, 1841, the defendant, Bastow, obtained a stop order on the shares comprised in his mortgage. On Feb. 23, 1846, the defendant Bastow in contemplation of his marriage assigned the £1,000 secured by the mortgage deed of Feb. 23, 1841, to**H** trustees on trust for himself and wife and their children. No fresh stop order was ever obtained by the trustees nor was any notice of the assignment given to the plaintiff or her husband whom she married in June, 1846.

In 1846 a petition was presented by Thomas Barratt and his sister Ann Barratt which stated the trusts of the £4,000 fund under the will of the testator in that cause and the decree, in so far as it related to that sum. The petition then set

I forth the mortgage deed of Feb. 23, 1841, in such a way as not to show that the £1,000 was lent to Thomas Barratt alone nor that the plaintiff was only surety, but also to make it appear that Thomas Barratt and the plaintiff were equally liable; and it further stated that Thomas Barratt had paid the defendant Bastow £500 in part discharge of the £1,000 loan. The petition then set out a deed of Nov. 18, 1846, by which the mother Mrs. Barratt purported to assign to Thomas Barratt and his sister Ann Barratt her life interest in the £4,000 fund so far as regarded their shares; and it prayed that two thirds of the fund might be sold out and the proceeds paid to the petitioners in equal shares. John Collins, a

solicitor, who had been a party to the mortgage deed of Feb. 23, 1841, prepared the petition and instructed counsel to appear on behalf of Bastow and the trustees of the marriage settlement and also on behalf of the plaintiff and her husband and to consent. On Dec. 18, 1846, an order was made as asked and the two thirds of the fund were sold out and the proceeds disposed of. John Collins was a partner in the firm of solicitors who had been employed by the plaintiff Bastow as his solicitor in various matters and acted as solicitor of the trustees of the settlement in matters of the trusteeship, but neither John Collins nor his firm had any authority to act for them in this petition nor did they know that this petition had been presented until after the order on it had been made. The consent brief on behalf of the plaintiff and her husband was also given without authority. The statement in the petition that Thomas Barratt had repaid £500 was also false and in fact no part of the £1,000 had been repaid.

The defendants appealed against the order of STUART, V.-C., made on Feb. 23, 1855.

Malins, Q.C., and *Goldsmid* for the plaintiff.

Rolt, Q.C., and *Speed* for the defendants.

KNIGHT-BRUCE, L.J.—The question we have to determine in the cause is whether the share of the plaintiff in the fund in court, in the suit of *Morrison v. Jefferies*, is discharged either wholly or in part from the debt of Thomas Barratt, to secure which it was by way of suretyship assigned by the deed of Feb. 23, 1841, in the pleadings mentioned; that is, whether it has been so discharged by the conduct of some or one of the defendants. The plaintiffs, in support of the affirmative of this proposition, allege in the first place, that although the creditor William Bastow upon his marriage assigned the debt to trustees, no stop order was obtained by the trustees, and no notice of the assignment was given to Mrs. Wheatley or the other parties. They allege, in the second place, that if the debt is not wholly discharged, it is affected as to £500 by the petition and order of Dec. 18, 1846, and the consequent abstraction and application of Thomas Barratt's share of the fund. Of these points, one at least has appeared to me to be not clear from difficulty; but, upon consideration, my opinion is that upon both points the plaintiff's case fails.

It appears that Mrs. Wheatley charged her share in this fund by way of suretyship for Thomas Barratt, whose share remained primarily liable. If, therefore, upon the evidence it was shown that Mr. Bastow and the three trustees to whom the share was assigned, or any one of these four gentlemen, had participated in, or been connected with, or associated in the application of Dec. 18, 1846, the plaintiff would probably be right. But the evidence shows no such thing. It shows that Mr. Bastow and the trustees were strangers to that application. It is true that the order purports to have been made upon the appearance of Mr. Bastow. But this was the unauthorised and highly improper act of Mr. Collins, a solicitor, who permitted himself to instruct counsel to appear for Mr. Bastow. Doubtless there are some cases in which it is not competent for a client to assert that his solicitor has acted in a particular matter without his authority, whatever hardship may follow. But that reasoning has no application here. Mrs. Wheatley was married to her present husband in 1846, and both he and she were ignorant of the order, and of the whole transaction of the petition, and as much strangers to it as Mr. Bastow, although it purports to be made on their appearance. This was also the more than irregular act of Mr. Collins, and was altogether void, so far as it affected the Wheatleys or Mr. Bastow; and it makes in my opinion no difference that Mr. Collins was the solicitor of Mr. Bastow, as to whom Mr. Collins's conduct was as wrongful as if they had never seen each other. Nor can the plaintiff take any benefit by the payment of the £500, or by the fraudulent petition and proceedings. If jewels, belonging some of them to Mr. Barratt and some to Mrs. Wheatley, had been pledged to Mr. Bastow for Mr. Barratt's debt, and his portion of the property had been stolen from Mr. Bastow's possession, could it have been

A said that Mrs. Wheatley was entitled to have her jewels restored to her without payment of the debt?

It is said, however, that Mr. Bastow and his trustees acted negligently or fraudulently in not obtaining a stop order, or informing Mr. and Mrs. Wheatley of the assignment. To this argument I do not accede. The subject of the assignment was a debt, a thing not capable of being assigned at law, and which, when it has been assigned, as only it can be, in equity, the debtor not having notice of the assignment, may still pay to the assignor, and therefore cannot generally complain of want of notice of the assignment. If the plaintiff had paid to Mr. Bastow that which was secured upon her share, such a payment would have entitled her to have her share restored to her. As an authority for this proposition, it is unnecessary to refer to *Matthews v. Wallwyn* (1). It is not material to the present question, whether the trustees are liable to their cestuis que trust for a breach of trust on account of no notice having been given of the assignment. That circumstance cannot operate to discharge the surety. It is argued that if a stop order had been obtained, the fraud effected by means of the petition could not have been committed. Of course this is a matter of conjecture; but it appears to me probable that the stop order would not have been allowed to stand in the way. At all events, it was D no breach of duty to Mrs. Wheatley to dispense with the stop order. I think, therefore, the only order which can be properly made will be one for redemption or dismissal. But we cannot thus part with the case as it concerns Mr. Collins; as to whom all I have said has been founded upon evidence taken between others, though partly given by himself. Before it can be considered as substantiated against him personally, he must have an opportunity of adducing evidence himself. E We think it our duty to take the course followed by LORD ROSSLYNN in *Dungey v. Angove* (2), and to order Mr. Collins to show cause why his name should not be struck off the Rolls. The proceeding will be prosecuted by the solicitor to the suitors' fund.

TURNER, L.J.—The short point to be decided is, whether, when a creditor F having a security from his debtor and from a surety, assigns the debt, he loses the security of the surety, unless he informs him of his assignment. **STUART, V.-C.**, has held that he did so, on the ground that the surety had a right to be informed who his creditor from time to time might be. This is a new point, resting on the relation of the three parties, the principal, surety and creditor. No doubt the surety has a right to have the benefit of all securities held by the creditor, and if G they are lost by the creditor, the surety is discharged. But when the debt is assigned, the obligations of the creditor attached upon his assignee, and the surety is not injured. It was said that he had a right to know who was the assignee. But the surety might pay the debt to the original creditor if he had not notice of the assignment, and such payment would be good against the assignee. If the securities are not given up to him, the surety will then have a right to apply for H relief to this court. If such notice was held necessary, serious impediments would be thrown in the way of assignments by creditors. Upon these grounds I hold the plaintiff's fund is not discharged.

Upon the other points I agree that no decree can be made for the plaintiff upon the bill. The plaintiff's case is founded upon two reasons. First, it was said that the plaintiff's fund ought not to be liable for the improper disposition of a I portion of the security by the act of the court; and that the plaintiff, as it was expressed, was not a guarantee for the Lord Chancellor. Secondly, it was contended, that the defendant was bound by the act of Collins, his solicitor, and *Duke of Beaufort v. Neeld* (3) was cited in support of this contention. As to the first point, the plaintiff's fund is a security for a deficiency, from whatever source it may arise. With respect to the second point, it appears that Collins had no authority for making the statements in the petition, nor for his acts relating to it. Neither Mr. Bastow, therefore, nor those claiming under him, are bound by the acts of Collins. In *Duke of Beaufort v. Neeld* (3) the agent for the duke was a

general agent; but that is not the case here. With respect to the order to be made, if the plaintiff desires it, an account might be directed of what was due upon the security of the plaintiff's fund, and there might be a decree for payment or foreclosure. Otherwise, the bill must be dismissed. In either case the plaintiff must pay the costs of the suit, and there will be no costs of the appeal. I agree with KNIGHT-BRUCE, L.J., as to the course to be taken with reference to the solicitor.

Order accordingly.

HOGGE v. BURGESS

[COURT OF EXCHEQUER (Martin, Watson and Channell, BB.), May 1, 1858]

[Reported 3 H. & N. 293; 27 L.J.Ex. 318; 31 L.T.O.S. 119;
4 Jur.N.S. 668; 6 W.R. 504; 157 E.R. 482]

Arbitration—Setting aside award—Error on law—Not appearing on face—Error appearing on other document—Mistake as to accounts.

On a reference to an arbitrator the defendant set up the Statute of Limitations as a defence to the plaintiff's claim for the balance of an account. The arbitrator held that the account was a running account to which the statute did not apply. On an application to set aside the award or refer it back on the ground that it was erroneous in law and fact,

Held: there was no ground for setting aside the award or for referring it back to the arbitrator.

Per WATSON, B.: If an arbitrator professes to decide upon the law and he mistakes it, the court will set aside the award although the arbitrator's reasons do not appear upon the face of the award, but only on some other paper delivered therewith. To that extent the law has gone, but it has refused to go any further.

Notes. Sections 3 to 17 (the arbitration provisions) of the Common Law Procedure Act, 1854, were repealed by s. 26 and Sched. 2 of the Arbitration Act, 1889: and the Arbitration Acts, 1889 to 1934, were consolidated without amendment by the Arbitration Act, 1950; see now s. 11, s. 22 and s. 23 of that Act (29 HALSBURY'S STATUTES (2nd Edn.) 99, 107, 108). Procedure in the High Court regarding arbitration proceedings is regulated by R.S.C. (Revision) 1962, Ord. 88 (ANNUAL PRACTICE (1965) 1999/14). Limitation of action for an account is provided by s. 2 (2) of the Limitation of Actions Act, 1939 (13 HALSBURY'S STATUTES (2nd Edn.) 1160).

Referred to: *Racecourse Betting Control Board v. Secretary for Air*, [1944] 1 All E.R. 60; *R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1951] 1 All E.R. 268.

As to power of court to set aside an arbitration award on the ground of misconduct, see 2 HALSBURY'S LAWS (3rd Edn.) 57; and for cases see 2 DIGEST (Repl.) 657 et seq.

Cases referred to:

- (1) *Kent v. Elstob* (1802), 3 East, 18; 102 E.R. 502; 2 Digest (Repl.) 650, 1714.
- (2) *Re Hall and Hinds* (1841), 2 Man. & G. 847; 3 Scott, N.R. 250; Drinkwater, 214; 10 L.J.C.P. 210; 133 E.R. 987; 2 Digest (Repl.) 653, 1734.

- A (3) *Phillips (Phillip) v. Evans* (1843), 12 M. & W. 309; 13 L.J.Ex. 80; 2 L.T.O.S. 171; 152 E.R. 1216; sub nom. *Phillips v. Edwards*, 1 Dow. & L. 463; 2 Digest (Repl.) 653, 1730.

Also referred to in argument:

Brown v. Hellaby (1857), 1 H. & N. 729; 156 E.R. 1394; 2 Digest (Repl.) 637, 1596.

- B Rule Nisi obtained by the defendant to set aside or to refer back an arbitration award of the judge of the county court of Bedfordshire, as arbitrator, on a compulsory reference under s. 3 of the Common Law Procedure Act, 1854, made under an order of MARTIN, B., in an action to recover £92 11s. 7d., the balance of an account for beer supplied by the plaintiff to the defendant. The defendant set up the Statute of Limitations and the plaintiff relied on the account being a running account. The arbitrator held that the account was a running account and that the Statute of Limitations did not apply and his award was duly made a rule of court. The defendant obtained a rule nisi to set aside the award on the ground that the arbitrator had decided the matter of account contrary to law and fact, or that the matter be referred back to the arbitrator.

- D *H. Lloyd* for the plaintiff, showed cause against the rule.
Cooke for the defendant, supported the rule.

MARTIN, B.—It is expressly provided, by s. 7 of the Common Law Procedure Act, 1854, that the proceedings on any compulsory reference under the Act, as to enforcing or setting aside, etc., shall be the same as under any reference before the Act. By the old rule the decision of the arbitrator, both in law and fact, was conclusive; but that was broken into by a decision in the Court of King's Bench in *Kent v. Elstob* (1), and, on another occasion, by the Court of Common Pleas in *Re Hall and Hinds* (2). The latter case was brought before this court in *Phillips v. Evans* (3), and in that case PARKE, B., concludes his judgment by saying (12 M. & W. at p. 312):

- F “Although we may possibly do some injustice in particular cases, I think it better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open the door to inquire into the merits, or we shall have to do so in almost every case.”

ALDERSON, B., says (*ibid.* at p. 313):

- G “The door to inconvenience has been a little opened by the case in the Common Pleas, but I am not disposed to open it further.”

Such, then, was the clear old rule, and we have now to deal with an Act of Parliament which, under certain circumstances, makes these sort of references compulsory.

- H The clause for sending back awards to the arbitrator is of modern invention; it was introduced by Mr. Vaughan Richards, and is known as his clause. By s. 3 of the Common Law Procedure Act, 1854, the court or a judge may, in country causes, refer certain matters in dispute, which are matters of account, to a county court judge, and he is the proper and competent person to decide. Then comes s. 7, which says that the proceedings upon any such arbitration

- I “shall be conducted in like manner, and subject to the same rules and enactments, as to the enforcing or setting aside the award, and otherwise as upon a reference made by consent under a rule of court or judge's order.”

That is an express enactment that the position of the arbitrator and of the court shall be the same as in cases of reference by consent, and the court has no more power than in such cases. Then counsel for the defendant says that s. 8 alters that. Let us see what that section is; it provides:

“In any case where reference shall be made to arbitration as aforesaid, the court or a judge shall have power at any time, and from time to time, to remit

the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms as to costs and otherwise as to the said court or judge may seem proper." A

It seems to me that that is nothing more than saying that Mr. Richards' clause shall apply to all cases under this Act of Parliament, and that awards under these compulsory clauses stand on the same footing as other awards. If that were not so, the evil to arise from increased litigation would infinitely exceed all others. B

WATSON, B.—I am of the same opinion. I think the law under this Act is perfectly clear. *Kent v. Elstob* (1) decided that if an arbitrator profess to decide upon the law, and he mistake it, the court will set aside the award, although the arbitrator's reasons do not appear upon the face of the award, but only upon another paper delivered therewith. To that extent the law has gone; it was attempted to carry it further in *Phillips v. Evans* (3), but the court refused, and discharged the rule. Then the only other question is, Is there any difference between awards under this Act and awards by consent of the parties? It is clear, looking to the several sections, that awards under these compulsory clauses are to be governed by the ordinary rules; and to my mind it is not doubtful that we have only power to refer an award back in cases in which we have power to set it aside. C D

CHANNELL, B.—I also think the rule should be discharged. It was obtained on the ground that there was a difference between references under these compulsory clauses and by consent; but I think it clear for the purposes of this case that there is no such distinction. *Re Hall and Hinds* (2) is not an authority in this case; the ground of that decision was misconduct. I was counsel in that case, and I know that the Common Pleas proceeded on that ground. E

Rule discharged.

HARE v. BURGESS

[VICE-CHANCELLOR'S COURT (Page-Wood, V.-C.), November 11, 12, 1857]

[Reported 4 K. & J. 45; 27 L.J.Ch. 86; 30 L.T.O.S. 255; 22 J.P. 84;
3 Jur.N.S. 1294; 6 W.R. 144; 70 E.R. 19]

*Landlord and Tenant—Covenant—Perpetual renewal—Presumption against—
Rebuttal—Covenant to renew—Insertion in new lease.*

There is a presumption against construing a covenant in a lease so as to amount to a covenant for perpetual renewal, but, if there are in the lease expressions indicative of such an intention on the part of the lessor, the court will give effect to that intention. H

A reversioner, who is an assignee by purchase from the original lessor of the reversion with notice that a covenant for perpetual renewal would be required of him, is bound to perform such a covenant, as the perpetual obligation affects the land and the person for the time being entitled to the reversion. I

Notes. The conversion of perpetually renewable leases into long terms, i.e., two thousand years, is now effected by s. 145, Sched. 15 of the Law of Property Act, 1922 (13 HALSBURY'S STATUTES (2nd Edn.) 871, 874).

Considered: *Swinburne v. Milburn* (1884), 9 App. Cas. 844. Followed: *Wynn v. Conway Corpn.*, [1914-15] All E.R.Rep. 199. Considered: *Re Greenwood's Agreement*, *Parkus v. Greenwood*, [1950] 1 All E.R. 436. Referred to: *London and South Western Rail. Co. v. Gomm* (1882), 20 Ch.D. 562.

- A** As to covenant for perpetual renewal of lease, see 23 HALSBURY'S LAWS (3rd Edn.) 627; and for cases see 31 DIGEST (Repl.) 80.

Cases referred to :

- (1) *Copper Mining Co. v. Beach* (1823), 13 Beav. 478; 1 L.J.O.S.Ch. 84; 51 E.R. 184; 31 Digest (Repl.) 81, 2341.
- B** (2) *Rochford v. Hackman* (1852), 9 Hare, 475; 21 L.J.Ch. 511; 19 L.T.O.S. 5; 16 Jur. 212; 68 E.R. 597; 44 Digest 548, 3657.

Also referred to in argument :

- Baynham v. Guy's Hospital* (1796), 3 Ves. 295; 30 E.R. 1019; 31 Digest (Repl.) 80, 2328.
- C** *Sadlier v. Biggs* (1853), 4 H.L.Cas. 435; 22 L.T.O.S. 69; 10 E.R. 531, H.L.; 31 Digest (Repl.) 80, 2338.
- Atkinson v. Pillsworth* (1787), 1 Ridg. Parl. Rep. 449; Vern. & Scr. 157; 31 Digest (Repl.) 80, *796.
- Moore v. Foley* (1801), 6 Ves. 232; 31 E.R. 1027; 31 Digest (Repl.) 80, 2329.
- Keppell v. Bailey* (1834), 2 My. & K. 517, Coop. temp. Brough 298; 39 E.R. 1042, L.C.; 31 Digest (Repl.) 240, 3746.
- D** *Browne v. Tighe* (1834), 8 Bli.N.S. 272; 2 Cl. & Fin. 396; 5 E.R. 944, H.L.; 31 Digest (Repl.) 81, 2342.
- Iggulden v. May* (1806), 7 East, 237; affirmed (1807), 2 Bos. & P.N.R. 449; 127 E.R. 703, Ex. Ch.; previous proceedings (1804), 9 Ves. 325, L.C.; 31 Digest (Repl.) 78, 2316.

- E** **Action** for specific performance of a covenant for renewal contained in an original lease. The plaintiff, the original lessee, having obtained a decree against the defendant, the assignee of the reversion by purchase from the original lessor, it was referred to chambers for the lease to be drawn up. The matter was now adjourned into court to determine the form of the covenant for renewal in the new lease,
- F** having regard to the construction of the covenant for renewal in the original lease; and whether an assignee of the reversion of the premises could be compelled to enter into any covenant which would have the effect of binding him personally.

- By a deed dated July 14, 1836, Paul Methuen (afterwards Lord Methuen) leased to the plaintiff some land at Bedminster, in Somersetshire, during the natural lives of Charles Bowles Hare, Robert Leonard, and Thomas Harris, and the survivors
- G** and survivor of them, at a yearly rent of £67 2s. 6d., payable quarterly. The lease contained a covenant on the part of the lessor, that in case the plaintiff should, upon the decease of either of them, C. B. Hare, R. Leonard and T. Harris, be desirous of taking a further or renewed lease of the leased premises for another life, and should, within the space of twelve calendar months, give notice in writing of such desire unto the said Paul Methuen, or the person or persons for the time
- H** being entitled to the reversion, and should nominate any person in the room or stead of the person who should have so departed this life, he, Paul Methuen, or the person or persons for the time being entitled as aforesaid, should and would, at the request and at the costs and charges of the plaintiff, and on the surrender of that lease (such surrender to be at the like costs and charges) and payment of the sum of £134 5s. by way of fine or premium for such renewal, forthwith duly
- I** make and execute unto the plaintiff a new and further lease of all and singular the premises thereinbefore demised, for and during the natural life of the person so to be nominated, and the lives of each of them, C. B. Hare, R. Leonard and T. Harris, as should be then living, and of the survivors and survivor of them, at and under the same yearly rent, and with and subject to such and the same covenants, provisions and agreements, including "this present covenant," as were therein contained. C. B. Hare, one of the lives named in the lease, died on Aug. 3, 1855, and on Mar. 4, 1856, the plaintiff served on the defendant, who had purchased the reversion of the premises, a notice of the death, and of his wish to take a renewed

lease, according to the terms of the covenant for renewal contained in the original lease. He had nominated a new life in the place of that which had dropped. A

Cairns, Q.C., and *Wilkins* for the plaintiff.

Dart for a mortgagee in the same interest as the plaintiff.

Batten for the defendant.

PAGE-WOOD, V.-C.—Two questions were raised: first, whether the covenant B in the original lease amounted in effect to a covenant for perpetual renewal; and if it did, then, secondly, whether, under the circumstances of this case, the defendant could be required to enter into an express covenant for renewal; or whether the court would not hold, as in *Copper Mining Co. v. Beach* (1), that a new demise reciting the original covenant would be a sufficient performance of that covenant.

As regards the first and main question, I must hold, that the covenant in the C original lease is in effect a covenant for perpetual renewal. Counsel for the defendant argued, that this question must never depend upon mere inference; that, in the absence of words indisputably pointing to a perpetual renewal—words so strong that it is impossible to adopt any other construction—the court, although it may find in the instrument words apparently pointing to perpetual renewal, will not adopt that construction, if any other can by possibility be put upon the terms of D the covenant. To that view I cannot accede.

It seems to me, that the true rule of construction in a case like this, is that referred to by *TURNER, V.-C.*, in *Rochford v. Hackman* (2), where he says that some effect must if possible be given to all the words of an instrument, and if the court sees no effect which can be given to certain words, unless they be construed in a particular manner, then, whatever mere presumption may stand in E the way, it will construe them in that manner. The court is not at liberty to do violence to the words of the instrument, in order to carry into effect what is merely a presumption. So, in a case like the present, giving full weight to the argument, that there is a presumption against construing a covenant so as to amount to a covenant for perpetual renewal—that prima facie a lessor shall not be taken to have intended to enter into such a covenant, still there may be in the F instrument expressions indicative of such an intention; and, if there be, the court will not force the construction, but will give effect to what appears to have been the lessor's intention.

In the present case, the covenant is that in case the plaintiff shall, upon the decease of either of the three original lives, be desirous of taking a renewed lease of the demised premises for another life, and shall, within twelve months after such G decease, give the requisite notice, and shall nominate any person in the room of the deceased, the person entitled for the time being to the reversion shall execute a new and further lease of the premises for the life of the person so to be nominated, and the lives of such of the three first-named persons as shall be then living, and of the survivors and survivor of them, at the same rent, and with and subject to such and the same covenants, provisoes, and agreements, "including this present H covenant," as are contained in the original lease.

There is a further covenant that, if within the twelve months after the decease of any one of the three original cestuis que vie, and before any renewed lease or leases shall have been granted by virtue of the former covenant, any other or others of the three shall die, it shall be lawful for the plaintiff, his heirs or assigns, to insert another life or lives in the lease so to be granted as aforesaid in the room I of the life or lives which shall so drop, upon making certain payments, it being the intention of the parties that the plaintiff shall not be obliged, provided he renew within the period appointed, to incur the expense of a further or additional lease or leases in respect of the second and third lives dying as aforesaid. Suppose the event for which the further covenant provides to take place—suppose all the three original lives to drop within the twelve months, and before any renewed lease has been granted—to carry out the construction for which the defendant contends there ought to be an express proviso, that, in the lease to be granted in that event, the

A covenants for renewal shall not be included; for it would be absurd to suppose that there is to be a renewed lease for the lives of three persons, all of whom will be dead at the time of its execution.

It was argued that the words "including this present covenant," would be satisfied by inserting in the first renewed lease a covenant to renew on the dropping of either of the two surviving lives. But that is not a natural construction. Such a covenant would be applicable to only two lives, whereas the original covenant is applicable to all the three. The true construction is clearly this—that, on the death of any of the three, the plaintiff is entitled to a new lease for three lives, with a like covenant for renewal, *mutatis mutandis*, that is, writing in such covenant the name of the new life instead of that of the deceased. Looking to the history of leases of this description, it becomes still more clear that this is the true construction. The struggle has always been this. The court has felt, that, where the covenant has been merely in general terms, however large—where, for instance, it has been a covenant to grant a renewed lease "under the like rents, covenants, and conditions as were contained in the original lease," or "with all the covenants and conditions contained in the original lease"—to construe that as amounting to a covenant for perpetual renewal would be a surprise on the lessor. It, therefore, refused to imply, upon a covenant so worded, an intention on the part of the lessor that it should operate as a covenant for perpetual renewal.

That being the rule of the court in construing a covenant so generally worded, conveyancers have taken this course. Finding that the courts would not imply such an intention, they have said: "We will express it." The course they have taken in order to express it has been, to add to the general words which the courts have held as necessary to imply such an intention, the words "including this present covenant." That this has been the history of the law in these cases, is clear from the able work (JARMAN'S PRECEDENTS IN CONVEYANCING) to which counsel for a mortgagee referred me as illustrative of the practice of conveyancers, which, in reference to such a question, may properly be taken into consideration. Counsel for the defendant says, that if the parties to the original lease really contemplated a perpetual renewal, they would have made their intention clearer, by some such words as these: "in case in this or any future lease any life should drop, a new lease shall be granted including this present covenant." Such words might have had that effect, but it appears to me that they were not necessary to express what was intended.

With regard to the second question, it was argued, that even if the plaintiff were entitled to a perpetual renewal, the court would not compel the insertion in the lease which is now to be granted of an express covenant for renewal, upon the ground that the insertion of such a covenant would have the effect of fastening an obligation upon every person who may hereafter become entitled as an assign to the reversion of this property for all time, and be binding upon the assets of every such person indefinitely; and *Copper Mining Co. v. Beach* (1) was cited as an authority to show, that a new demise reciting the original covenant would be a sufficient specific performance. But, after much consideration, I am unable to see any principle upon which to hold that in the present case an express covenant for renewal ought not to be inserted. The notion of its being objectionable on the ground of tending to a perpetuity is out of the question. The moment any assign of the reversion grants a renewed lease, his duty is discharged, and his assets, therefore, are free from any liability. As to *Copper Mining Co. v. Beach* (1), all that was there decided was, that, under a decree for specific performance, the courts will not compel parties, who are trustees, to enter into covenants into which, under ordinary circumstances, trustees would not be called upon to enter. But that rule has no application to a case where, as here, the person in whom the reversion is vested is entitled to the beneficial interest; in such a case, the court will act in respect of a covenant like the present in the same manner as it acts in the case of ordinary covenants for title under a decree for specific performance. The defendant in this case having the beneficial interest in the reversion, and having

purchased with notice that a covenant for perpetual renewal would be required of him, the court will require the insertion of such a covenant in the lease in question.

Order accordingly.

WATERS AND ANOTHER *v.* MONARCH FIRE AND LIFE ASSURANCE CO.

[COURT OF QUEEN'S BENCH (Lord Campbell, C.J., Wightman and Crompton, JJ.), January 19, 1856]

[Reported 5 E. & B. 870; 25 L.J.Q.B. 102; 26 L.T.O.S. 217;
2 Jur.N.S. 375; 4 W.R. 245; 119 E.R. 705]

Insurance—Fire—Bailee—Warehouseman with whom goods deposited for third parties—Recovery of full value—Excess recovered beyond his interest to be held in trust for owners.

Under a floating policy of fire insurance "on goods, the property of the assured or held by him in trust or on commission," a warehouseman may recover the full value of goods destroyed by fire which were deposited by third parties, although those parties gave no orders to insure the goods and were unaware of their insurance. He is not limited to the amount of his charges for warehousing, landing, and cartage, for which he has a lien on the goods, but any excess recovered beyond the amount of his own interest must be held in trust for the owners.

Notes. Under s. 4 of the Life Assurance Act, 1774, insurances on goods and merchandise are excluded from that Act (13 HALSBURY'S STATUTES (2nd Edn.) 8).

Followed: *London and North Western Rail. Co. v. Glyn* (1859), E. & E. 652. Distinguished: *Seagrave v. Union Marine Insurance Co.* (1866), L.R. 1 C.P. 305; *North British Insurance Co. v. Moffatt* (1871), L.R. 7 C.P. 25; *Martineau v. Kitching* (1872), 41 L.J.Q.B. 227. Applied: *Ebsworth v. Alliance Marine Insurance Co.* (1873), L.R. 8 C.P. 596; *Williams v. Baltic Insurance Association of London, Ltd.*, [1924] All E.R.Rep. 368. Considered: *Lake v. Simmons* (1926), 95 L.J.K.B. 586; *Portavon Cinema Co. v. Price and Century Insurance Co.*, [1939] 4 All E.R. 601; *Maurice v. Goldbrough Mort & Co.*, [1939] 3 All E.R. 63; *John Rigby (Haulage), Ltd. v. Reliance Marine Insurance Co.*, [1956] 3 All E.R. 1. Distinguished: *Re King, Robinson v. Gray*, [1963] 1 All E.R. 781. Referred to: *Vandepitte v. Preferred Accident Insurance Corp'n. of New York*, [1932] All E.R.Rep. 527; *Prudential Staff Union v. Hall*, [1947] K.B. 685; *Pyrene Co. v. Scindia Steam Navigation Co.*, [1954] 2 All E.R. 158.

As to what constitutes an insurable interest, see 22 HALSBURY'S LAWS (3rd Edn.) 310 et seq.; and for cases see 29 DIGEST (Repl.) 452 et seq.

Case referred to:

- (1) *Marks v. Hamilton* (1852), 7 Exch. 323; 21 L.J.Ex. 109; 18 L.T.O.S. 260; 16 Jur. 152; 155 E.R. 970; 29 Digest (Repl.) 453, 3306.

Also referred to in argument:

- Dalby v. India and London Life Assurance Co.* (1854), 15 C.B. 365; 3 C.L.R. 61; 24 L.J.C.P. 2; 24 L.T.O.S. 182; 18 Jur. 1024; 3 W.R. 116; 139 E.R. 465, Ex. Ch.; 29 Digest (Repl.) 367, 2807.

- Routh v. Thompson* (1811), 13 East, 274; 104 E.R. 375; 29 Digest (Repl.) 110, 556.

- A *Hagedorn v. Oliverson* (1814), 2 M. & S. 485; 105 E.R. 461; 29 Digest (Repl.) 110, 557.
Sidaways v. Todd (1818), 2 Stark. 400; 3 Digest (Repl.) 112, 329.
Tierney v. Wood (1854), 19 Beav. 330; 23 L.J.Ch. 895; 23 L.T.O.S. 266; 2 W.R. 577; 52 E.R. 377; 43 Digest 557, 79.

B **Special Case** stated for the opinion of the court in an action on two policies of fire insurance, effected by the plaintiffs with the defendants, to recover the value of flour and other goods destroyed by fire on Feb. 16, 1855, and which had been deposited by third parties in the plaintiffs' warehouse near Blackfriars.

C The plaintiffs were corn factors and merchants, and also warehousemen, and had effected two fire policies, commonly known as floating policies, with the defendants. In the first policy the assurance was described to be "on goods in trust or on commission." And in the second, "on flour, the property of the assured, or held by them in trust or on commission." The goods, the value of which was sought to be recovered, were deposited in the plaintiffs' warehouse by third persons, in the way of their trade as warehousemen, and such persons had not authorised the plaintiffs to insure the goods, and the fact of insurance was communicated to one of such persons only, who appeared to approve of it when so mentioned to him.
D Two of the parties had insured their own goods elsewhere. The flour was destroyed by the fire on Feb. 16, 1855, and at that time the plaintiffs had a lien on the goods to the extent of his charges for warehousing, and landing and cartage. The amount of such charges was paid into court by the defendants.

E At the trial, before LORD CAMPBELL, C.J., at the Guildhall in 1855, a verdict was found for the plaintiffs subject to the opinion of the court as to the plaintiffs' right to recover under the circumstances and, if so, for what sum, the court to be entitled to draw inferences of fact. The plaintiffs maintained that the amount recoverable was not limited to the amount of their charges for which they had a lien on the goods but extended to the whole amount of the loss. The defendants contended that the plaintiffs had no insurable interest in the goods deposited.

F *Mellish* and *Bovill* for the plaintiffs.
Lush and *Barnard* for the defendants.

LORD CAMPBELL, C.J.—I consider that it is clear that this action is maintainable. Looking to the words in the policies, were these goods included in the policies? I am of opinion that they were. In the first policy the assurance is on
G "goods in trust or on commission," and in the second policy "on flour, the property of the assured, or held by them in trust, or on commission." The words "in trust" here mean goods with which the assured were entrusted; not goods of which they might be trustees in the legal technical language, i.e., of holding property on equitable trusts, but as descriptive of goods entrusted to him, landed at his wharf, and deposited in his hands. There is no doubt but that it was intended that these
H goods should be covered by the policies. Is there anything illegal in such an insurance? There is nothing illegal at common law, as was determined by the recent decision of *Marks v. Hamilton* (1). And it is allowed that there is no statute which renders such an insurance illegal. It is, therefore, a valid insurance. It would be extremely inconvenient if such an insurance were not allowed, although the plaintiffs had no order from the owner of the goods to insure, and the plaintiffs
I never told the owner that they had insured. It would be extremely inconvenient if a floating policy of insurance could not be kept up, which the plaintiffs might apply to the benefit of those whose goods they were entrusted with, and which, as far as I can see, causes no injury to commerce or the interests of society.

Then the question arises, To what extent do the policies go? I am of opinion that they extend to the whole corpus of the goods. If it is a valid contract, the contract is to pay or make good all such damage or loss as shall happen by fire to the property mentioned in the policies—not the mere particular interest which the plaintiffs might have in the property, but the whole value of the property. The

plaintiffs will be entitled to take sufficient to cover their own interest in the goods, and may be regarded as trustees of the remainder for those parties who have the ulterior interest in the property. There are authorities to show* that the owners of the property although they had given no orders to insure, or had the fact of an assurance of their property communicated to them, may at any time ratify the insurance. The plaintiffs are now entitled to recover the full amount which they have claimed.

WIGHTMAN, J.—These goods were, beyond all reasonable doubt, held by the plaintiffs in trust. They were deposited in their warehouse; they had a right to charge in respect thereof, and they were liable to account to the owners for them. I, therefore, think they fall within the words of the policies. If so, to what extent can the plaintiffs recover? It seems to me, unless the policies are illegal except to the extent of their own interest in the goods, that the plaintiffs are entitled to recover their full value. That the case is not within the Life Assurance Act, 1774, is allowed, nor is the contract illegal at common law. The plaintiffs may, therefore, recover the total amount of their loss, for it is not a mere contract of indemnity to the extent of the plaintiffs' own loss.

CROMPTON, J.—I cannot doubt but the policies apply to a case of this kind. The goods were entrusted to the plaintiffs in the way of their trade, and they were interested in the whole of the goods. They might have recovered the whole of the goods in trover; in an indictment for felony they would be described as their goods. Then I think the plaintiffs might recover the whole value of the goods, and the surplus beyond their own beneficial interest would go to the parties to whom the plaintiffs are accountable for the goods.

Judgment for plaintiffs.

R. v. MILE END OLD TOWN (CHURCHWARDENS AND OVERSEERS)

[COURT OF QUEEN'S BENCH (Lord Denman, C.J., Patteson, Wightman and Erle, JJ.), April 21, 24, June 26, 1847]

[Reported 10 Q.B. 208; 2 New Mag. Cas. 240; 3 New Sess. Cas. 13;
16 L.J.M.C. 184; 9 L.T.O.S. 312; 11 J.P. 505; 11 Jur. 988;
116 E.R. 80]

Rates—Assessment—Profits basis—Ascertainment of rateable value—Apparatus for supply of water situated in several parishes.

The works of a water company extended over several parishes, and consisted of two portions, the first being the service pipes which delivered the water to the consumers, which was directly productive of rateable value, and the second being the works bringing the water to the service pipes which indirectly conduced to such production.

Held: the rateable value ought to be apportioned among the several parishes in the following manner: (i) as to the second portion, the rateable value of the land with all the buildings and fixtures thereon should be deducted from the total rateable value and distributed among the parishes in which the parts of that portion were situated; (ii) the residue of the rateable value should be apportioned among the parishes in which the service pipes were situated in the ratio of the net profits in each parish.

- A Notes.** Applied: *R. v. Hammersmith Bridge Co.* (1849), 15 Q.B. 369; *Liverpool Corpn. v. West Derby Overseers* (1856), 6 E. & B. 704; *R. v. West Middlesex Waterworks* (1859), 1 E. & E. 716; *Sheffield United Gas Light Co. v. Sheffield Overseers* (1863), 4 B. & S. 135. Doubted: *Kent Water Works Co. v. Woolwich Union* (1871), Ryde Rat. App. (1871-85), 69. Applied: *R. v. South Staffordshire Waterworks Co.* (1885), 16 Q.B.D. 359. Considered: *Metropolitan Water Board v. London City Union Assessment Committee* (1909), 73 J.P. 142. Applied: *Kingston Union Assessment Committee v. Metropolitan Water Board*, [1926] All E.R. Rep. 1; *Metropolitan Electric Supply Co. v. Buckingham County Valuation Committee*, [1939] 1 All E.R. 36. Referred to: *R. v. Longwood* (1849), 13 Q.B. 116; *R. v. London, Brighton and South Coast Rail. Co.*, *R. v. South Eastern Rail. Co.* (1851), 15 Q.B. 313; *R. v. Longwood* (1852), 17 Q.B. 871; *Newmarket Rail. Co. v. St. Andrew's the Less, Cambridge* (1854), 3 E. & B. 94; *North Staffordshire Rail. Co. v. Rushton Spencer Overseers* (1860), 7 Jur.N.S. 363; *R. v. Eastern Counties Rail. Co.* (1863), 4 B. & S. 58; *New River Co. v. Hertford Assessment Committee* (1901), 70 L.J.K.B. 740; *Metropolitan Water Board v. Chertsey Union*, [1916] 1 A.C. 337; *Barking Borough Rating Authority v. Central Electricity Board*, [1940] 3 All E.R. 477; *Metropolitan Water Board v. Hertford Corpn.*, *Hertford Corpn. v. Metropolitan Water Board*, [1953] 1 All E.R. 1047; *Clayton v. British Transport Commission*, [1955] 2 All E.R. 274.

As to valuation of public utilities, see 32 HALSBURY'S LAWS (3rd Edn.) 86 et seq.; and for cases see 38 DIGEST (Repl.) 650 et seq.

Cases referred to:

- E** (1) *R. v. London and South Western Rail. Co.* (1842), 1 Q.B. 558; 2 Ry. & Can. Cas. 629; 2 Gal. & Dav. 49; 11 L.J.M.C. 93; 6 J.P. 393; 6 Jur. 686; 113 E.R. 1246; 38 Digest (Repl.) 643, 1028.
 (2) *R. v. Grand Junction Rail. Co.* (1844), 4 Q.B. 18; 4 Ry. & Can. Cas. 1; 1 Dav. & Mer. 237; 1 New Mag. Cas. 29; 1 New Sess. Cas. 203; 13 L.J.M.C. 94; 3 L.T.O.S. 123; 8 J.P. 358; 8 Jur. 508; 114 E.R. 804; 38 Digest (Repl.) 642, 1019.
- F** (3) *R. v. Cambridge Gas Light Co.* (1838), 8 Ad. & El. 73; 3 Nev. & P.K.B. 262; 1 Will. Woll. & H. 273; 7 L.J.M.C. 50; 2 Jur. 742; 112 E.R. 763; 38 Digest (Repl.) 659, 1123.
 (4) *R. v. New River Co.* (1813), 1 M. & S. 503; 1 Bott. 222; 105 E.R. 188; 38 Digest (Repl.) 653, 1091.
- G** (5) *R. v. Kingswinford (Inhabitants)* (1827), 7 B. & C. 236; 1 Man. & Ry.M.C. 43; 1 Man. & Ry.K.B. 20; 108 E.R. 711; sub nom. *R. v. Dudley Canal Navigation Co.*, 6 L.J.O.S.M.C. 3; 38 Digest (Repl.) 664, 1156.
 (6) *R. v. Woking (Inhabitants)* (1835), 4 Ad. & El. 40; 1 Har. & W. 539; 5 Nev. & M.K.B. 395; 3 Nev. & M.M.C. 295; 5 L.J.M.C. 17; 111 E.R. 702; 38 Digest (Repl.) 665, 1158.

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Case Stated for the opinion of the Court of Queen's Bench.

A poor rate was made by the officers of the hamlet of Mile End Old Town, assessing the East London Water Works at the net annual sum of £1,473 in respect of their mains, pipes and other works fixed in the ground for conveying water. The company appealed to a special sessions, where the magistrates decided that the annual value of the company's occupation in the hamlet was £900 and reduced the rate to that sum. On appeal to the sessions, that decision was affirmed, subject to the opinion of this court on a Case. The Case was referred to a barrister to decide the amount at which the company should be rated, with liberty to state any points for the decision of this court. He decided and certified that the company should be rated on the net estimated rental or rateable value of £1,473.

Hill and Clarkson for the parish.

Sir Fitzroy Kelly, Bodkin and Hodges for the company.

June 26, 1847. **LORD DENMAN, C.J.**, delivered the following judgment of the court.—This was an appeal against a rate, the rateable subject being the apparatus for the supply of water situated in twenty parochial districts, and the rateable value of that, viz., £30,800, being the residue of the gross receipts after making all the deductions to which the company are entitled, has been correctly ascertained by the award. The principle for dividing that sum among those districts is the matter to be decided, the company contending that the division should be according to the amount of fixed capital in each district. But the rule of law laid down by Act of Parliament for ascertaining the rateable value of any subject refers to an estimate of the rent which it may yield. The outlay of capital may furnish no such criterion, since it may have been injudiciously expended, and what was costly may have become worthless by subsequent changes. As our opinion is against the company on the objection relied on in argument in their behalf, it follows that the rate should be affirmed. But, as the award suggests different methods of apportioning the rateable value, and so arriving at the same rate, it would be convenient if we also stated our view of the methods for applying the above rule of law to such rateable subjects as the present.

The first step in the apportioning has been in effect to divide the whole apparatus constituting the rateable subject into two portions, of which one is directly productive of rateable value, being the service pipes which deliver the water to the consumers; the other indirectly conduces to such production, being the residue of the works bringing the water to the service pipes. The second portion has been first rated in the ordinary way by valuing the land with all the buildings and fixtures thereon, and the amount of the rate so ascertained has been deducted from the rateable value, and distributed to the district in which the parts of this portion are situated. An analogous course appears to have been adopted for railways in *R. v. London and South Western Rail. Co.* (1), and *R. v. Grand Junction Rail. Co.* (2); and for gas companies in *R. v. Cambridge Gas Light Co.* (3). Also the spring which indirectly conduced to the ultimate profit by the water-rate was held rateable in a parish where it was situated, in *R. v. New River Co.* (4), the quantum of such rate being left to the sessions. As this course was acquiesced in by both parties in the three latest cases, we may assume that it may be applied without practical difficulty, and we see no objection to it.

The remaining step has been to apportion the residue of the rateable value among the districts in which the direct productive portion of the works is situated, in the ratio either of net profits or of gross receipts, or of the quantity of mains and pipes, and of the land occupied by them in each district, and each ratio in the present case gives the same result. If they differed it would be necessary to elect between them, and that ratio should be preferred which would best show the rent to be expected, if the part of the works situated within the district was let separately. It is clear that the net profits in each parish would be the best criterion for such rent, and they would, therefore, give the proper ratio. It is also clear that the ratio of the gross receipts or earnings of the several districts to each other will be the same as the ratio of net profits in those districts to each other in all cases where the total of the expense is taken to be common to the whole apparatus, and is deducted from the total of the receipts in the progress of ascertaining the rateable value; for in such case the net profits in each district would be ascertained by distributing the expense among the several districts, and it would be distributed in the ratio of the gross receipts in each; and, if a proportionate deduction should be made from the gross receipts of each, the ratio of the remainder to each other would be the same as the ratio of the net profits to the gross receipts. As any attempt to ascertain the net profit of each district in any other way would lead to minute and inconvenient inquiries in practice, the ratio of gross receipts should be adopted, as being an index of the net profits when the rateable value is ascertained in the way stated in the Case.

- A We think that an apportionment in this sense, according to the gross receipts, is in accordance with the decisions which have apportioned the sum of rateable value on a railway or canal, according to the length of the line in each parish: *R. v. Kingswinford (Inhabitants)* (5) and *R. v. Woking (Inhabitants)* (6), where the profit arose from transit, and the line of canal or railway was directly productive of the profit, and the reservoirs, warehouses, stations, etc., indirectly conducive to such production. Each portion of the line earns an aliquot portion of the profit, and, if equal portions of one line, carrying at one rate could be conceived to be let separately, no one portion would be let at a higher rate than the other, and the apportionment of a sum of rateable value according to the length of the line in each parish is according to the rent to be expected on that part of the line. In the case of water companies, where the profit arises from the delivery of water from a given place, the previous transit being immaterial to the consumer, the service pipes immediately produce the profits, and the agency by which the water reaches those pipes indirectly conduces to such production. If the service pipes in each parish could be let separately, the water being assumed to be sold at the same price throughout, the criterion of the rent would be found in the gross receipts which would depend on the number, the diameter and the level of the service pipes in each parish, and the apportionment according to the gross receipts in each district would be according to the rent to be expected from that part of the rateable subject situate in each district. This apportionment is not at variance with the grounds of the judgment in *R. v. Cambridge Gas Light Co.* (3). There, the court decided that the parishes in which the profits are not received are not entitled to all the amount produced by the rate, but that the parishes on which the parts of the apparatus indirectly conducing to produce profits are situate are entitled to a proportion; and the court also declared that the principle on which the sum of rateable value on the rates of all the parishes should be apportioned is the same as that which was to be applied to canals, and the principle is the same here. By the method adopted in this case, the rateability of the portion of the apparatus indirectly conducing to produce profit is provided for, and the residue of the sum of the whole rateable value is apportioned to those parts of the apparatus directly producing profit, in analogy to the rateable proportion for canals and railways.
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We have thus endeavoured to show that the rule for ascertaining the value for separate rating ought to be applied, as far as practicable, to apportioning among several districts a sum of rateable value arising partly in each.

Order of quarter sessions quashed; original rate confirmed.

KEATS v. KEATS AND MONTEZUMA

[COURT FOR DIVORCE AND MATRIMONIAL CAUSES (Lord Chelmsford, L.C., Wightman, J., and Cresswell, J.O.), February 1, 4, 5, 1859]

[Reported 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321;
5 Jur.N.S. 176; 7 W.R. 377; 164 E.R. 754]

Divorce—Condonation—Need for reinstatement of guilty party—Conjugal cohabitation.

Divorce—Costs—Wife's costs—Liability of husband—Wife failing in suit—No application for security.

Condonation means a blotting out of the matrimonial offence imputed, so as to restore the offending party to the same position as that which he or she occupied before the offence was committed. Words, however strong, can at the highest only be regarded as imperfect forgiveness, and, unless followed up by something which amounts to a reconciliation and a reinstatement of the guilty party in the condition he or she was in before the transgression, it must remain incomplete. There can be no condonation which is not followed by conjugal cohabitation.

A husband is not liable for his wife's costs where she has brought her case to a hearing and has failed and has not applied for security of costs before the hearing.

Notes. Approved: *Bernstein v. Bernstein*, [1891-4] All E.R.Rep. 706. Considered: *Cramp v. Cramp and Freeman*, [1920] All E.R.Rep. 164. Applied: *Crocker v. Crocker*, [1920] All E.R.Rep. 134. Considered: *Germany v. Germany*, [1938] 3 All E.R. 64. Applied: *Fearn v. Fearn*, [1948] 1 All E.R. 459. Referred to: *Latham v. Latham and Gethin* (1861), 30 L.J.P.M. & A. 43; *Whitmore v. Whitmore* (1866), L.R. 1 P. & D. 96; *Smith v. Smith* (1882), 7 P.D. 84; *Hall v. Hall* (1891), 60 L.J.P. 73; *Russell v. Russell*, [1892] P. 152; *Waudby v. Waudby and Bowland* (1901), 84 L.T. 571; *Sneyd v. Sneyd and Burgess*, [1926] P. 27; *Mason v. Mason and Cottrell*, [1933] All E.R.Rep. 859; *Jones v. Evans*, [1945] 1 All E.R. 19; *Hockaday v. Goodenough*, [1945] 2 All E.R. 335; *Wilmot v. Wilmot and Martin*, [1948] 2 All E.R. 123; *Mackrell v. Mackrell*, [1948] 2 All E.R. 858; *Cook v. Cook*, [1949] 1 All E.R. 384.

As to condonation, see 12 HALSBURY'S LAWS (3rd Edn.) 302 et seq.; and for cases see 27 DIGEST (Repl.) 396 et seq. As to a wife's costs, see 12 HALSBURY'S LAWS (3rd Edn.) 358 et seq.; and for cases see 27 DIGEST (Repl.) 564 et seq.

Cases referred to:

- (1) *Beeby v. Beeby* (1799), 1 Hag. Ecc. 789; 1 Hag. Con. 142, n.; 162 E.R. 755; 27 Digest (Repl.) 399, 3280.
- (2) *Campbell v. Campbell* (1857), Dea. & Sw. 285; 29 L.T.O.S. 150; 3 Jur.N.S. 845; 5 W.R. 519; 164 E.R. 578; 27 Digest (Repl.) 516, 4598.
- (3) *Evans v. Evans and Robinson* (1859), 1 Sw. & Tr. 328; 28 L.J.P. & M. 136; 32 L.T.O.S. 244; 23 J.P. 407; 5 Jur.N.S. 606; 7 W.R. 181; 164 E.R. 751; 27 Digest (Repl.) 569, 5246.

Rule Nisi for a new trial on a verdict for the husband on his petition for dissolution of marriage on the grounds of the wife's adultery. The wife had denied adultery and pleaded condonation.

Phinn, Q.C. (*Addams, Q.C.*, and *H. S. Giffard* with him), for the husband, showed cause against the rule.

Phillimore, Q.C. (*H. Thring* with him), for the wife, supported the rule.

LORD CHELMSFORD, L.C.—In this case an application is made to the court for a new trial on two grounds: first, that CRESSWELL, J.O., misdirected the jury as to the law of condonation; secondly, that, even if there were no misdirection,

A the verdict of the jury was contrary to the evidence in finding that there was no condonation.

The first question is undoubtedly one of very great and general importance, as the court is called on to decide whether a definition of condonation, which the learned judge had for the first time to give, is or is not correct, and whether it is to be adopted as the principle on which all similar cases are for the future to be decided. It is admitted that there is nothing to be found in the reports in the ecclesiastical courts in explanation of this term, the reason of which was clearly explained by the Judge Ordinary. The judges of the ecclesiastical courts were judges both of the law and of the facts, and, when any question of condonation arose before them, the law was never argued, because it was supposed to be well known and in the breast of the judge; the argument, therefore, turned on whether the facts proved amounted to condonation. This word is one which has long become peculiar to the ecclesiastical courts, and, like many other words which are familiar to us by daily use, was believed to be thoroughly understood till the necessity arose for defining it. The legislature having directed that, in cases of this description, questions of fact should be argued by a jury, it became necessary for the learned judge to explain to them in this case what amounted in law to condonation. This he did by stating that it meant "a blotting out of the offence imputed, so as to restore the offending party to the same position which he or she occupied before the offence was committed." Everyone who heard this clear enunciation of the meaning of the term would know that the learned judge, by the words "blotting out the offence," could not be understood as speaking literally, because the offence having been committed could not actually have been blotted out, but must have been received in the sense of its being no more remembered against the offending party. We have the highest sanction for this form of expression, "I am He that blotteth out thy transgressions, and will not remember thy sins." That, of course, is not a promise of the obliteration of things past, which is impossible; but it means that I will so act towards you as if the transgression had not taken place, and the sin shall be no more imputed to you. The second part of the proposition, however, as stated by the learned judge, explains as well as restricts the first part. It must be such a blotting out of the offence as restores the wife to her former position. This is contended to be incorrect, because it excludes a condonation by words only; for it is said that there are two sorts of condonation—one express or by words only, the other implied, as by taking back a delinquent wife and cohabiting with her. On the other hand, the distinction in the law of condonation is denied, and it is asserted that no condonation by words only, however strong, will be sufficient, unless they are followed by sexual intercourse.

I think that it is unnecessary to resort to the Roman classics for the interpretation of the term condonation, or to SANCHEZ for his definitions and distinctions. Words in the course of time often depart very widely from their original meaning, and a foreign author, however learned, may be entitled to deference, but cannot be regarded as an authority by the court. The description of condonation by LORD STOWELL in *Beeby v. Beeby* (1), that it is a "forgiveness legally releasing the injury," is that which is principally relied on by the counsel for the wife, and it has been insisted that it proves that words alone are sufficient to amount to condonation. In the course of the argument it was even mentioned that if the husband, with knowledge of the adultery, were to say, "I forgive you, but will never see you again," the forgiveness is complete by the first words, which are not susceptible of any qualification. But surely such a proposition is not reasonable, and, if it were admitted, it would lead to every species of artifice or influence to extort from the injured party the healing words which are to be of such powerful and uncontrollable efficacy. The strong and sudden impulse of recollected affection, the importunity of friends, or the surprise of weakness, each of these might produce a hasty expression of forgiveness which, when once uttered, would be irrevocable. How naturally, too, compassion for a guilty creature, associated with the remembrance of former days of happiness, would find vent in such an expression. Those

who felt that perpetual separation must be the inevitable consequence of the unpardonable fault, might still anxiously desire to lighten the load of despair by some kind words of consolation and peace. This is not the forgiveness which amounts to condonation, but rather which declares it to be impossible. If I might be permitted to borrow an illustration from poetry [CRABBE'S TALES OF THE HALL, b. 12], the distinction between forgiveness and reconciliation is nowhere more strikingly shown than by a poet who, more than most other men, has sounded the depths of human feeling and who supposes the question put to the husband of an adulteress, "Her did you freely from your soul forgive?" to which he replies:

"Sure as I hope before my Judge to live,
 Sure as the Saviour died upon the tree
 For all who sin—for that dear wretch and me—
 Whom never more on earth will I forsake or see."

But following out the idea conveyed by LORD STOWELL's language in *Beeby v. Beeby* (1) that condonation is a good plea in bar, as it is not fit that a man should sue for a debt which he has released, counsel for the wife argued that it must be wrong to say that the forgiveness must be such "as to restore her to her former position," because the debt which the wife has incurred is the liability to be sued for a divorce, and, if the husband gives up his right to proceed against her, her offence is condoned, although her former position is not restored. There is no greater fallacy than that of carrying analogy too far, and supposing that, because there is resemblance between two things in one point, they therefore correspond in every respect. In this instance, the injury which a wife has committed by her infidelity is compared to a debt, for the purpose of illustration; it is something which the person to whom it is owed has the right to release. But the condition in which an unfaithful wife stands to her husband is rather that of a person who has incurred a penalty; she has exposed herself to a proceeding to dissolve the tie of marriage, and she has lost her right to insist on cohabitation. The release of the husband's right to proceed for a divorce does not reach the whole of the penalty incurred and, therefore, cannot be complete forgiveness, because it falls short of restoring her to her former position. It is true that forgiveness (as was argued) is an act of the mind, but it can only be manifested by words or by outward acts. The acts which prove forgiveness may be so strong and unequivocal, as by taking home an offending wife and cohabiting with her, that they may conclusively establish condonation, but words, however strong, can at the highest only be regarded as imperfect forgiveness and, unless followed up by something which amounts to a reconciliation and a reinstatement of the wife in the condition she was in before she transgressed, it must remain incomplete.

It has been argued that nothing less than renewed sexual intercourse will be sufficient to establish condonation. It is obvious, without adducing instances to illustrate my meaning, that in some cases that may be a test wholly inapplicable; but I am willing to adopt an expression which was happily used by WIGHTMAN, J., in the course of the argument, and to say that, in my judgment, there can be no condonation which is not followed by "conjugal cohabitation." This is clearly the opinion of DR. LUSHINGTON in *Campbell v. Campbell* (2). To say that condonation requires conjugal cohabitation or connubial intercourse leaves the nature of the cohabitation or intercourse to be adapted to the varying condition and circumstances of different parties. This will also justify the language of the learned Judge Ordinary that the forgiveness must be shown by a restoration of the wife to her former position. This does not mean that the cohabitation is to be renewed with all the circumstances which surrounded her former life; to accomplish this is beyond the power of the husband. She may live with him as a wife, but live as a degraded wife. The degree or extent to which all her former privileges may be restored to her does not enter into the question; by her infidelity she has forfeited all her title to be regarded as a wife. Condonation is a pardon which is not necessarily absolute, but which may be accompanied with conditions. I see no reason at all to differ

A with the Judge Ordinary in the way in which he has stated the law of condonation to the jury; but, with him, I think that the forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation, and that this must be shown by the reinstatement of the wife in her former position which renders proof of conjugal cohabitation, or the restitution of conjugal rights, necessary.

B Secondly, it is, however, said that, even if the definition of the learned judge is correct, yet the verdict is contrary to the evidence. I have great difficulty in understanding how, if the first point of misdirection fails, the other can possibly succeed, because, if condonation requires all the circumstances stated in order to render it available as a defence, it can hardly be contended that the proof given approaches at all near what is necessary. Even if the more favourable proposition "that the act of pardon may be done by word of mouth," is accepted, still the evidence falls
C short even of this. There is nothing which shows anything more than an inclination, or it may be an intention, to condone. The husband was anxious to avoid publicity; he desired an amicable arrangement. The wife's family availed themselves of this disposition to endeavour to draw him on to a reconciliation, but they never succeeded; and it would be occupying time most unnecessarily to show that the evidence fully justified the verdict which was pronounced.

D **WIGHTMAN, J.**, concurred.

Rule discharged.

[On the question of the wife's costs, the court said that an application should have been made before the cause was heard. The foundation of the rule of the ecclesiastical court was that the wife should be enabled to bring her case to a hearing and defend herself, and so, up to any time previous to the hearing, the husband was generally liable to have the wife's costs taxed against him, and the court had so far followed the rule, as in *Evans v. Evans and Robinson* (3), but if the wife had brought her case to a hearing, howsoever, and failed, the husband had never then been made liable to her costs.]

F

G

DELANEY v. FOX

[COURT OF COMMON PLEAS (Sir Alexander Cockburn, C.J., Cresswell, Williams and Willes, JJ.), June 11, 1857]

H

[Reported 2 C.B.N.S. 768; 26 L.J.C.P. 248; 29 L.T.O.S. 212;
21 J.P. 710; 140 E.R. 618]

Estoppel—Landlord and tenant—Denial of landlord's title—Application to action for trespass.

I The rule that a tenant is estopped from denying his landlord's title is not confined to ejection. It extends, e.g., to an action for trespass.

Watson v. Lane (1) (1856), 11 Exch. 769, distinguished.

Quære whether eviction by title paramount must be an actual and not merely a constructive eviction.

Notes. Referred to: *Accidental Death Insurance Co. v. Mackenzie* (1861), 5 L.T. 20; *Underhay v. Read* (1887), 58 L.T. 457.

As to estoppel as between landlord and tenant, see 15 HALSBURY'S LAWS (3rd Edn.) 247 et seq.; and for cases see 30 DIGEST (Repl.) 367 et seq.

Cases referred to :

- (1) *Watson v. Lane* (1856), 11 Exch. 769; 25 L.J.Ex. 101; 26 L.T.O.S. 260; 4 W.R. 293; 156 E.R. 1042; 30 Digest (Repl.) 368, 87.
- (2) *Poole Corpn. v. Whitt* (1846), 15 M. & W. 571; 16 L.J.Ex. 229; 7 L.T.O.S. 232; 10 J.P. 742; 153 E.R. 976; 31 Digest (Repl.) 277, 4112.
- (3) *Doe d. Higginbotham v. Barton* (1840), 11 Ad. & El. 807; 3 Per. & Dav. 194; 9 L.J.Q.B. 57; 4 Jur. 432; 113 E.R. 432; 30 Digest (Repl.) 378, 213.

Also referred to in argument :

Moss v. Gallimore (1779), 1 Doug.K.B. 279; 99 E.R. 182; 35 Digest (Repl.) 369, 706.

Rule Nisi obtained by the defendant to enter a verdict in an action of trespass for, inter alia, turning the plaintiff out of her dwelling-house. Plea, liberum tenementum.

At the trial before MARTIN, B., the defendant gave prima facie evidence of his title to the house, and the plaintiff then showed that, at the time when she was let into possession by the defendant, he had really no title but was a disseisor. The real owner, a Mrs. Knowles, then insisted on the rent being paid to her and distrained for rent on the tenant of the cellar of the house, and threatened to do the same to the plaintiff, who thereupon paid her rent. It was objected for the defendant that the plaintiff was estopped from denying his title, but a verdict was entered for the plaintiff on the count in question, leave being reserved to the defendant to move to enter the verdict for him. A rule nisi was accordingly obtained by the defendant.

Cleasby showed cause against the rule.

Manisty and *Brett* supported the rule.

SIR ALEXANDER COCKBURN, C.J.—This rule must be made absolute. I am of opinion that the plaintiff was estopped from denying the title of the defendant under whom she had obtained possession of the premises as landlord, and that on the common law principle that a person who obtains possession from another is estopped from denying the title of the person from whom it was obtained. A distinction has been attempted on the ground that this is not an action of ejectment, but trespass, to which only liberum tenementum was pleaded, and what fell from POLLOCK, C.B., in *Watson v. Lane* (1) was relied on; but that turns him out, and then he brings an action of trespass. Then, as in the one case, if he had brought ejectment against the tenant the tenant would have been estopped from denying his landlord's title, so he is in the other, and there is no difference if he does so immediately on the termination of the tenancy or some time after. On the other hand, it is true that the tenant may show that the title has expired, among other ways, by eviction, either actual or in point of law; and it is said, on the authority of *Poole Corpn. v. Whitt* (2), that there may be a constructive eviction. It is not necessary to determine that question, though I may say that it would be much to the detriment of landlords if that doctrine were to prevail. Here, however, there has not been even a constructive eviction; there was a threat of expulsion. Language must be considered with reference to the facts of *Watson v. Lane* (1). It was an action neither of ejectment nor trespass but on a covenant to deliver up fixtures at the end of the term. The court took a distinction between estoppel as to the right to the land, and on a covenant to deliver up the fixtures, and with reference to that distinction POLLOCK, C.B., said that it was only in an action of ejectment that it could be set up; but he was evidently meaning to distinguish between an action for the recovery of the land and an action for not delivering up certain chattels. Here there is no distinction between ejectment and trespass. The tenant having held over wrongfully the landlord enters, by Mrs. Knowles it is true, and she broke open a cellar which formed no part of this tenement; but what is more striking, these proceedings have been brought, not by the plaintiff, but by Mrs.

A Knowles, and the attorney is found by her. Therefore, there is nothing which could amount to a constructive eviction, even if, as at present advised I am not, we were of opinion that there could be one.

B **CRESSWELL, J.**—I am of the same opinion. In the first place, evidence was given to sustain the plea of liberum tenementum. The defendant proved that he had let to the plaintiff, and that prima facie showed a seisin in fee; and, unless that is determined or altered in some way, it must be presumed to continue.

As to the eviction, I entirely concur that the consent to pay rent to Mrs. Knowles did not establish an eviction, and I fully concur in doubting whether a constructive eviction can be established. *Watson v. Lane* (1) was no decision on this point.

C **WILLIAMS, J.**—I am of the same opinion. It is fully established by a long series of cases that a tenant shall not be permitted, as against a landlord who has let him into possession, to dispute that landlord's title, so long at least as that possession continues; but it may be shown that it has expired. *Doe d. Higginbotham v. Barton* (3) was certainly decided as an instance of that doctrine, but whether it is so may be doubted. As to the eviction, the rule is that where a party by title paramount has entered, and then restored possession to the tenant, the question may be raised because there the possession is not the same. As to the point raised of a constructive possession, it is unnecessary to give any opinion.

E **WILLES, J.**—I am of the same opinion. The defendant prima facie proved his plea, which has not been displaced if there be an estoppel, as there is. Then it is said that this estoppel ceased with the re-entry; but it continues as long as the tenant remains in possession. Then it is said that there is an exception where the tenant has been evicted by title paramount, and that that is the case here, that there was a constructive eviction; but that is not proved here, and if it had been proved, I doubt whether it would have been sufficient.

Rule absolute.

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G

REID AND ANOTHER v. FAIRBANKS AND OTHERS

[COURT OF COMMON PLEAS (Jervis, C.J., Cresswell, Maule and Talfourd, JJ.), June 8, 1853]

H

Reported 13 C.B. 692; 22 L.J.C.P. 206; 1 C.L.R. 787;
21 L.T.O.S. 166; 17 Jur. 918; 138 E.R. 1371]

Sale of Goods—Passing of property—Unascertained goods—Contract for building of ship—Sale before ship completed.

I

The plaintiffs contracted with R., a shipbuilder in Nova Scotia, for the building of a ship. R. was already indebted to the plaintiffs, but from time to time they made advances to him to assist in the building of the ship and furnished him with marine supplies. In June, 1848, R. sent the plaintiffs, as a security for past and future advances, a bill of sale by which he granted, bargained, sold, assigned, etc., to the plaintiffs the ship in course of construction, together with the masts and fittings which might belong to her when completed. The words of the habendum were "to have and to hold the said ship or vessel . . . to [the plaintiffs], their executors [etc.] to their absolute use and benefit and behoof for ever when the said ship or vessel shall be complete and finished, in as full, ample, and perfect a manner as if the said ship or vessel were ready

for sea, and ready to be delivered to [the plaintiffs] at the time of executing these presents." In January, 1849, R. registered the ship in the plaintiffs' name, and in a builder's certificate stated them to be the owners. In March, 1849, he induced the comptroller of customs in Nova Scotia to cancel the registration and to grant him a new certificate in his own name as owner. He then executed an assignment of the ship to the defendants, who completed her and sent her to Liverpool with a cargo of their own. On the defendants' refusal to deliver the ship to the plaintiffs they brought an action in trover against the defendants to recover the value of the ship and compensation in damages by reason of the loss of the freight on the voyage.

Held: the bill of sale was executed for the security of the plaintiffs; if it were to operate as a future sale, it would be no security, and, therefore, it must be construed to operate as a present sale: accordingly, by it the property in the ship passed to the plaintiffs; that right was not affected by the habendum, and, therefore, the defendants were liable in trover.

Conversion—Damages—Contract for building ship—Property passing before completion—Sale by builder to third person.

The parties having agreed that the amount of the damages should be assessed by an average stater, the court suggested, and the parties assented, that the proper principle on which to estimate the damages would be the value of the ship and all her stores, etc., when the defendants took possession of her, and that, as a mode of ascertaining that value, the arbitrator should consider what would have been the value of the ship at Nova Scotia if she had been completed by R. according to his contract with the plaintiffs, and deduct therefrom the money that would necessarily have been laid out by R. after that date in order to complete her according to the contract.

Notes. For transfer of property as between seller and buyer, see now the Sale of Goods Act, 1893, ss. 16-20 (22 HALSBURY'S STATUTES (2nd Edn.) 995 et seq.).

Considered: *Chinery v. Viall* (1860), 5 H. & N. 288; *Peruvian Guano Co. v. Dreyfus* (1887), [1892] A.C. 170, n. Referred to: *Wood v. Bell* (1856), 2 Jur.N.S. 664; *Bell, etc. v. Bank of London* (1858), 28 L.J.Ex. 116; *Jones v. Williams* (1859), 4 H. & N. 706.

As to property in unascertained goods, see 34 HALSBURY'S LAWS (3rd Edn.) 61 et seq.; and for cases see 39 DIGEST (Repl.) 613 et seq. As to the measure of damages in trover, see 38 HALSBURY'S LAWS (3rd Edn.) 791 et seq.; and for cases see 43 DIGEST 519 et seq.

Cases referred to in argument:

Woods v. Russell (1822), 5 B. & Ald. 942; 1 Dow. & Ry.K.B. 587; 106 E.R. 1436; 39 Digest (Repl.) 613, 1262.

Laidler v. Burlinson (1837), 2 M. & W. 602; Murp. & H. 109; 6 L.J.Ex. 160; 39 Digest (Repl.) 614, 1271.

Mucklow v. Mangles (1808), 1 Taunt. 318; 127 E.R. 856; 39 Digest (Repl.) 612, 1251.

Acraman v. Morrice (1849), 8 C.B. 449; 19 L.J.C.P. 57; 14 L.T.O.S. 292; 14 Jur. 69; 137 E.R. 584; 39 Digest (Repl.) 619, 1320.

Clarke v. Spence (1836), 4 Ad. & El. 448; 1 Har. & W. 760; 6 Nev. & M.K.B. 399; 5 L.J.K.B. 161; 111 E.R. 855; 39 Digest (Repl.) 615, 1282.

Greening v. Wilkinson (1825), 1 C. & P. 625; 171 E.R. 1344, N.P.; 43 Digest, 521, 587.

Action of trover to recover the value of a ship, stores, etc., and a compensation in damages by reason of the loss of the freight on a certain voyage. The defendants pleaded not guilty and a traverse of the plaintiffs' property.

At the trial, a verdict was taken by consent for the plaintiffs, subject to the opinion of the court on the following Special Case. The plaintiffs were merchants, established at Glasgow under the name of Stewart & Co.; the defendants were

A merchants, established at Halifax, in Nova Scotia, under the name of Fairbanks and Allison. Alexander Russell was a shipbuilder, living at Pictou, in Nova Scotia. They were all British subjects. Since 1845 the plaintiffs had had dealings with, and made advances to, Russell, who had built and consigned to the plaintiffs at Glasgow, as his agents, several ships for sale. In 1847, Russell was indebted on the balance to the plaintiffs, and he offered to build a vessel of which the
B plaintiffs were to be half-owners. They consented to this, and he commenced building the ship and received advances from them to assist him in doing so. They also furnished him with rigging, anchors, etc. In consequence of complaints made by them of the state of the account between them and him, he sent them a bill of sale of the ship, dated June 20, 1848, as a security. The bill of sale, after reciting that the plaintiffs had made some advances to Russell and had agreed to
C make such further advances as he should require to complete the vessel, witnessed that, for and in consideration of the premises, and of 5s., and for the security and repayment of all such sum or sums of money as the plaintiffs had already advanced or might thereafter advance to aid and assist Russell to complete and finish the vessel, Russell granted, bargained, sold, assigned, etc., to the plaintiffs a certain ship or vessel then in course of progress of building by him to be of the burthen
D of 900 tons, or thereabouts, her length of keel being 117 feet, breadth of beam 35 feet, and depth of hold 20 feet, and all and singular the masts, sails, etc., and fittings of every description whatever, which might belong to or appertain to the ship or vessel when completed and ready for sea, together with one long-boat, etc., and also 600 tons of timber, then in his possession, to build, finish and complete the ship or vessel, to have and to hold the ship or vessel, with the appurtenances, together
E with the boats and timber and the other goods and chattels, to the plaintiffs, to their absolute use and benefit and behoof for ever, when the ship or vessel should be complete and finished, in as full, ample, and perfect a manner as if the ship or vessel were ready for sea, and ready to be delivered to the plaintiffs at the time of executing those presents. Russell also covenanted with the plaintiffs that, when and so soon as the ship should be sufficiently advanced to be measured, and her
F burthen ascertained, he would cause her to be registered and an endorsement made on the certificate of registry, as by law required, in the name and for the sole use and benefit of the plaintiffs, and that he had good title, etc. On June 20, 1848, the ship had her stern and stern-frame made and bolted to the keel, the floor timbers were fastened to the keel, and some of her planks were fastened. There was afterwards an agreement between the parties, by which Russell agreed to complete the
G vessel by May 1, and the plaintiffs agreed to accept bills to a certain amount. On Mar. 29, 1849, the plaintiffs had accepted bills to the amount of £1,145. In December, 1848, Russell delivered to the comptroller of customs at Pictou a builder's certificate describing the vessel, and stating that he built the vessel for the plaintiffs. On Jan. 30, 1849, Russell made a declaration and deposited it with the comptroller, in which he described himself as agent for the plaintiffs and stated
H them to be the sole owners of her. On the same day, the comptroller granted to Russell a certificate in accordance with the declaration, stating the plaintiffs to be the owners. That certificate was not sealed, it not being customary in Nova Scotia to seal such certificates. The certificate was retained by Russell. All the documents were registered in the custom-house books. On Mar. 29, 1849, Russell prevailed on the comptroller of customs to cancel the document dated Jan. 30, 1849,
I and delivered to him a builder's certificate stating that he built the vessel for himself and that he was sole owner. The comptroller granted to Russell a certificate of registry, stating him to be the owner. On the same day, Russell, as owner, executed an instrument by which he assigned the vessel, rigging, stores, etc., to the defendants as a security for the sum of £5,000; and on the same day the defendants took possession of her, being then in a very advanced state. She was afterwards completed by the defendants, at a cost which it was agreed should be referred to Mr. Richards of London, average stater, to ascertain. On July 17, 1849, she was launched and loaded with a cargo by the defendants. On Oct. 1, she was sold

absolutely by Russell to the defendants by a deed recorded in the custom-house books at Pictou; and afterwards the comptroller of customs issued to the defendants, as owners, a certificate of British registry. The ship was sent by the defendants with a cargo to Liverpool, and the plaintiffs then demanded the ship from the defendants. They refused to deliver her up to them, and this action was brought. The court were to be at liberty to draw such inferences as a jury might properly draw. A

The questions for the opinion of the court were whether the plaintiffs were entitled to recover in the action, and if they were, to what extent, and on what principle the damages were to be ascertained. Their decision and the principle on which the damages were to be ascertained was to be embodied in a rule of court referring the amount of damages according to such decision and principle to Mr. Richards. If the court should be of opinion that the plaintiffs were not entitled to recover, the verdict for the plaintiffs was to be set aside and a verdict entered for the defendants. Either party was to be at liberty to turn the Case into a special verdict, in which the inferences drawn by the court were to be treated as facts found by the jury. B

Sir Fitzroy Kelly (*Barstow* with him) for the plaintiffs.

Bramwell, *Q.C.*, for the defendants. C

JERVIS, C.J.—We all think that the proper principle on which to estimate the damages in this case will be the value of the ship and all her stores, etc., on Mar. 29, 1849, the time when Russell ceased to work on her on the plaintiffs' account and when the defendants took possession of her; and that, as a mode of ascertaining such value the arbitrator should consider what would have been the value of the ship at Pictou, if she had been completed by Russell according to his contract with the plaintiffs, and deduct therefrom the money that would necessarily have been laid out by Russell after Mar. 29, 1849, in order to complete her according to the contract. D

That principle of computing the damages having been assented to by counsel on both sides and Mar. 29, 1849, having been fixed as the date of the conversion, the court proceeded to pronounce judgment. E

JERVIS, C.J.—I am of opinion that the plaintiffs are entitled to judgment. The matter turns on the construction which is to be put on the bill of sale. There are, unquestionably, cases where a contract such as this would vest the property at once in the purchaser; on the other hand, it is equally clear that there may be cases where the contract would take effect as a transfer of the property only when the chattel is completed. I think that this contract comes under the first head, for, although some words in the instrument, such as "when the said ship or vessel shall be finished," might have such a construction as to show a contract under the second head, yet the whole instrument being looked at shows that the other is the true meaning. It was executed for the security of the plaintiffs and, if it were to operate as a future sale, it would be no security; whereas, if it operates as a present sale, it is a security. I think that, to carry out the obvious intention, we must construe it as a present sale. It is, therefore, unnecessary to consider the question of the Registration Acts. If there had been no contract, I think it very likely that the certificate might be construed as showing ownership. The damages will be ascertained as agreed on. F

MAULE, J.—This instrument is to be looked at according to the existing circumstances of the parties. It is clear that the instrument was intended to give the plaintiffs a security; unless property in something passed, it gave no security. That shows, therefore, that it was the intention of the parties that the property in the vessel should pass; but it appears to me that the parties meant even to pass a great deal more than they were capable of passing, namely, what might never be in existence, a thing which we find constantly attempted. If they made an effort to do that, it is very unlikely that these words were not intended to pass anything G

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A which they might pass. As to the habendum, that is directed to the ship when completed and has not the effect intended, but that does not restrain the operative words so as not to pass the ship as it then existed.

CRESSWELL and TALFOURD, JJ., concurred.

Judgment for plaintiffs.

BROWN v. SYMONS AND ANOTHER

[COURT OF COMMON PLEAS (Erle, C.J., Willes, Byles and Keating, JJ.), April 23, 1860]

[Reported 8 C.B.N.S. 208; 29 L.J.C.P. 251; 2 L.T. 323;
6 Jur.N.S. 1079; 8 W.R. 460; 141 E.R. 1145]

Master and Servant—Contract of service—Termination—Contract for twelve months certain “and to continue from time to time until three months’ notice in writing be given”—Determination at end of twelve months.

The plaintiff was employed by the defendants as a commercial traveller under a written agreement which stipulated that the agreement was to be binding between the parties “for twelve months certain from the date hereof and to continue from time to time until three months’ notice in writing be given by either party to determine the same.” After the agreement had been in force for nine months the defendants gave the plaintiff three months’ notice to determine his employment at the expiration of twelve months from the date of the agreement. In an action for wrongful dismissal the plaintiff contended that the agreement was not determinable at the expiration of the first year.

Held: the agreement was for one year certain and did not bind the parties for longer, and therefore, the defendants were entitled to give three months’ notice expiring at the end of the first year of employment.

Notes. Followed: *Uostigan v. Gray Bovier Engines* (1925), 41 T.L.R. 372. Referred to: *Gardner v. Ingram*, [1886–90] All E.R.Rep. 258; *Associated London Properties, Ltd. v. Sheridan*, [1946] 1 All E.R. 20; *British Iron and Steel Corp., Ltd. v. Halpern*, [1946] 1 All E.R. 408.

As to notice to servant to terminate employment, see 25 HALSBURY’S LAWS (3rd Edn.) 489–491; and for cases see 34 DIGEST (Repl.) 55 et seq.

Case referred to:

(1) *Thompson v. Maberly* (1811), 2 Camp. 573, N.P.; 31 Digest (Repl.) 485, 6113.

Also referred to in argument:

Grey v. Pearson (1857), 6 H.L.Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67; 3 Jur.N.S. 823; 5 W.R. 454; 10 E.R. 1216, H.L.; 17 Digest (Repl.) 274, 794.

Demurrer in an action for wrongful dismissal.

The declaration stated that in consideration that the plaintiff would enter into the service of the defendants as their country traveller, in their trade or business of wine merchants, and would continue therein for one year certain, and would further continue therein from time to time, until three months’ notice in writing should be given by the plaintiff or by the defendants to determine such service, and would make three journeys during the year to such parts as they might direct, and would attend entirely to their business, and not take any other commission, the defendants

agreed to employ him in the capacity aforesaid, and to pay him a yearly salary of A
 £150, payable quarterly, and also an allowance of £1 1s. per day during the time
 he should be on his journeys, and to continue him in such service for such the
 period, and on the terms aforesaid; and during the continuance of the employment
 from time to time to direct and allow the plaintiff to make three journeys in each
 year. The plaintiff entered into the service of the defendants in the capacity and
 on the terms aforesaid, and continued therein until the expiration of one year; and B
 although the plaintiff was ready and willing to make the three journeys in each
 year, and to continue in the service of the defendants, and although all conditions
 precedent had been fulfilled to entitle the plaintiff to have the agreement performed
 by the defendants, and to continue in their service, and to make the journeys, and
 to maintain this action in respect of the breaches hereinafter alleged; yet the defen- C
 dants did not, although requested by the plaintiff so to do, direct or allow him to
 make the journeys during the year of his service as their country traveller, and
 wrongfully dismissed the plaintiff from their employment, whereby the plaintiff had
 been deprived of the allowance, salary, and profits, which he otherwise would have
 received for his journeys and service, and had also lost and been deprived of
 valuable commercial connection in the United Kingdom.

The defendants pleaded by their fourth plea, that as to the allegation that the de- D
 fendants wrongfully dismissed the plaintiff from their employment, the agreement in
 writing, was as follows :

“Memorandum of agreement entered into this 11th day of January, 1858,
 between Frederick Symons and John Fairgray Sharpin, wine merchants, trad-
 ing under the firm of Symons, Sharpin & Co., at No. 5, Lawrence Pountney E
 Lane, in the city of London (for themselves and the survivor of them), of the
 one part, and Robert Brown, of No. 5, St. Paul's Churchyard, in the said city
 of London, commercial traveller, of the other part. The said Robert Brown
 engages to serve the parties of the first part as their representative or country
 traveller in their trade or business of wine merchants aforesaid, in all such parts
 of the United Kingdom as they may from time to time determine upon for the
 purpose of soliciting orders and collecting in accounts, at the yearly salary of F
 £150 sterling, payable quarterly, and also an allowance of £1 1s. per diem during
 the time he is upon his journey, he being allowed any reasonable extra expenses
 he may be put to by entertaining any of the customers when transacting busi-
 ness, and settling accounts, etc.; he also engages to remit all moneys received
 by him by the first post, or second post as time and circumstances will permit, G
 and send a statement of all moneys received by him, and remitted home, keep-
 ing only a balance of odd moneys in hand that cannot conveniently be remitted
 by letter. He also undertakes to make three journeys during the year to such
 parts as they the said parties of the first part may direct, and will attend
 entirely to their business, and not take any other commission. The said parties
 of the first part hereby agree to the aforesaid terms, and engage to pay the said H
 yearly salary and other allowances, and such other increased sum for salary as
 they may deem the said Robert Brown to be entitled to receive.

“This agreement to be binding between the said parties for twelve months
 certain from the date hereof, and to continue from time to time until three
 months' notice in writing be given by either party to determine the same.”

The defendants stated that they, the defendants, gave to the plaintiff three months' I
 notice in writing of their desire to determine the employment of the plaintiff at the
 expiration of twelve months from the date of the agreement, and at the expiration
 of such notice his employment was determined accordingly. Demurrer and joinder
 in demurrer. One matter of law intended to be argued was, that the agreement
 set out in the plea was not determinable at the expiration of the first year.

Day for the plaintiff.—The plaintiff was entitled to three months' notice from the
 expiration of the twelve months certain. It is an agreement for a year certain, and

A a further term, and the three months' notice applies to such additional term after the expiration of one year.

Serjeant Hayes for the defendant.

B **ERLE, C.J.**—I am of opinion that the construction the court should put on the agreement is in favour of the defendant. It seems to me that the agreement was that the plaintiff should serve the defendant for a term of twelve months certain, and as it stands it does not bind the parties for a longer time.

WILLES and **BYLES, JJ.**, concurred.

C **KEATING, J.**—I have some doubts owing to the words "and to continue," but after *Thompson v. Maberly* (1), I do not feel that my doubts are sufficiently strong to make me differ from the rest of the court.

Judgment for defendant.

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CORK AND BANDON RAIL. CO. v. GOODE

E [COURT OF COMMON PLEAS (Jervis, C.J., Maule, Cresswell and Talfourd, JJ.), May 31, 1853]

[Reported 13 C.B. 826; 1 C.L.R. 345; 22 L.J.C.P. 198; 21 L.T.O.S. 141; 17 Jur. 555; 1 W.R. 410; 138 E.R. 1427]

Company—Calls—Action for calls—Period of limitation.

F An action for calls by a company against a shareholder is an action founded on a statute, and, therefore, an action on a specialty, and the proper period of limitation for the bringing of such an action was twenty years under the Civil Procedure Act, 1833 [now Limitation Act, 1939, s. 2 (3)], and not six years as prescribed by the Limitation Act, 1623 [see s. 2 (1) of Act of 1939].

G **Notes.** The Limitation Act, 1623, and the Civil Procedure Act, 1833, ss. 3-7, were superseded by the Limitation Act, 1939. By s. 2 (3) of the latter, a call is not statute-barred until 12 years have expired after it became due.

H Followed: *Shepherd v. Hills* (1855), 11 Exch. 55. Considered: *Re Royal Bank of Australia, Robinson's Executors Case* (1856), 6 De G.M. & G. 572. Distinguished: *Thomson v. Lord Clanmorris*, [1900-3] All E.R.Rep. 804; *Aylott v. West Ham Corpn.*, *Sisson v. Same* (1926), 95 L.J.Ch. 533. Considered: *Gutzell v. Reeve*, [1935] All E.R.Rep. 117; *Pratt v. Cook, Son & Co. (St. Paul's), Ltd.*, [1938] 1 All E.R. 555. Referred to: *Re Manchester and Milford Rail. Co., Ex parte Cambrian Rail. Co.* (1896), 45 W.R. 331; *Dennerley v. Prestwich U.D.C.*, [1929] All E.R.Rep. 647; *Royal Trust Co. v. A.-G. for Alberta* (1929), 46 T.L.R. 25; *Leivers v. Barber, Walker & Co.*, [1943] 1 All E.R. 386.

I As to recovery of calls on shareholders, see 6 HALSBURY'S LAWS (3rd Edn.) 230; and for cases see 10 DIGEST (Repl.) 1226 et seq.

Cases referred to in argument:

Agricultural Cattle Insurance Co. v. Fitzgerald (1851), 16 Q.B. 432; 20 L.J.Q.B. 244; 16 L.T.O.S. 407; 15 Jur. 489; 117 E.R. 944; 12 Digest (Repl.) 413, 3209.

South Staffordshire Rail. Co. v. Burnside (1851), 5 Exch. 129; 6 Ry. & Can. Cas. 611; 20 L.J.Ex. 120; 16 L.T.O.S. 415; 155 E.R. 56; 4 Digest (Repl.) 331, 3010.

- Birkenhead, Lancashire and Cheshire Junction Rail. Co. v. Pilcher* (1850), 5 A
Exch. 24; 6 Ry. & Can. Cas. 564; 19 L.J.Ex. 207; 14 L.T.O.S. 507; 14 Jur.
297; 155 E.R. 11; 10 Digest (Repl.) 1205, 8426.
- Talory v. Jackson* (1638), Cro. Car. 513; 79 E.R. 1043; 32 Digest (Repl.) 377, 71.
- Jones v. Pope* (1666), 1 Sid. 305; 1 Wms. Saund. 37; 2 Keb. 93; 1 Lev. 191;
82 E.R. 1122; 41 Digest 100, 458.
- Tobacco Pipe Makers' Co. v. Loder* (1851), 16 Q.B. 765; 20 L.J.Q.B. 414; 18 B
L.T.O.S. 34; 15 J.P. 723; 15 Jur. 1194; 117 E.R. 1074; 13 Digest (Repl.)
251, 783.
- Great North of England Rail. Co. v. Biddulph* (1840), 7 M. & W. 243; 2 Ry. &
Can. Cas. 401; H. & W. 30; 10 L.J.Ex. 17; 5 Jur. 221; 151 E.R. 756; 10
Digest (Repl.) 1223, 8576.
- Sheffield, Ashton-under-Lyne and Manchester Rail. Co. v. Woodcock* (1841), 7 C
M. & W. 574; 2 Ry. & Can. Cas. 522; 11 L.J.Ex. 26; 151 E.R. 894; 10 Digest
(Repl.) 1223, 8575.
- Rann v. Green* (1776), 2 Cowp. 474.
- Peck v. Wood* (1793), 5 Term Rep. 130.
- Seward v. Baker* (1787), 1 Term Rep. 616; 99 E.R. 1283; 33 Digest (Repl.) 470,
230. D

Demurrer in an action of debt for calls on railway shares.

The declaration stated that the defendant was the holder of thirty shares in the
Cork and Bandon Rail. Co., and was indebted to the company in the sum of £825,
in respect of nine calls, that is to say, seven calls of £2 10s. each, and two calls
of £5 each, on each of the said shares; whereby an action had accrued to the com- E
pany, by virtue of the Companies Clauses (Consolidation) Act, 1845, and the Cork
and Bandon Railway Act, 1845; but the defendant had not paid the same, or any
part thereof. The company also claimed interest on the debt and money found to
be due from the defendant to the company on an account stated between them.
The company claimed £1,500.

The defendant's second plea, was that the action was on contracts without F
specialty, and that the alleged causes of action did not accrue within six years
before this suit under the provisions of the Limitation Act, 1623. To this plea
the plaintiffs demurred on the ground that the Statute of Limitations referred to
by the second plea, and therein pleaded, was not pleadable to the causes of action
declared on.

Beasley (with him *Serjeant Byles*) for the company.—The action is brought on G
a specialty, and, therefore, the limitation is, the twenty years provided by the
Civil Procedure Act, 1833, s. 3, and not the six years provided by the Limitation
Act, 1623, s. 2. The Companies Clauses (Consolidation) Act, 1845, shows that the
liability of the defendant in this action is the creature of the statute. Here, the
defendant would not have been suable in this form for not paying calls, but for
the statute. [MAULE, J.—You say that the facts stated here do not show any II
contract, except for the statute?] Exactly so. The defendant becomes bound by
the statutory contract—a record of the highest nature: and a duty is imposed on
him by the statute, for the breach of which the special form of remedy is given.
The liability is created by, and altogether founded on, the statute. That an action
on a statute is an action on a specialty, is clear from BACON'S ABRIDGMENT, Limita-
tion of Actions (D. 3), and COMYNS' DIGEST, Temps. (G. 15). The company does I
not admit the allegation in the plea that the action is on contracts without specialty,
inasmuch as the court can see that it is an action founded on the statute.

Udall for the defendant.—The plea is good. The liability to pay calls is a
liability on a contract without specialty. An action upon a statute is a totally
different thing. [MAULE, J.—Where is the shareholder's undertaking to pay calls
but for the statute?] It must be conceded that there is none. [MAULE, J.—Then
he undertakes by the statute. Is an action brought upon that undertaking, an action
on a contract without specialty?] It is submitted that it is. Unless this contract

A is governed by the Limitation Act, 1623, s. 3, there is no limitation at all applicable to the case; for, the Civil Procedure Act, 1833, s. 3, which speaks of "debt upon any bond or other specialty," must be confined to specialties ejusdem generis, or to specialties of an inferior sort.

B **JERVIS, C.J.**—I am of opinion that the second plea in this case is no answer to the action, and that the company is entitled to judgment.

C This is an action of debt: it professes to be an action on the Companies Clauses (Consolidation) Act, 1845, and the Cork and Bandon Railway Act, 1845, and is in the form given by s. 26 of the former act. I think it is an action on statute. There are various modes of becoming a holder of shares pointed out by the statute: some members of the company are liable to pay calls, others are not. But for the Act of Parliament, no action could be brought by the company against one of its own members. This, therefore, is an action brought in respect of a liability created by statute and, therefore, is an action founded on the statute, and the plea which relies on the six years' limitation is no answer to it: consequently the company must have judgment.

D **MAULE, J.**—I also am of opinion that this is a bad plea. It states that the action is on contracts without specialty, and that the alleged causes of action did not, nor did any or either of them, accrue within six years before this suit. When we look at the declaration, we find that the action is brought on two statutes—the Companies Clauses (Consolidation) Act, 1845, and the Cork and Bandon Railway Act, 1845. It is manifest, on reading the declaration, that it is a declaration in debt on these two statutes. A declaration in debt on a statute, is a declaration on a specialty; and it is not the less so because the facts which bring the defendant within the liability, are facts outside the statute: that must constantly arise in actions for liabilities arising out of statutes.

F That appearing to be so, the allegation in the plea, that the action is on contracts without specialty, is a false allegation of a matter of law. There may, undoubtedly, be cases where a statute enables an action to be brought, which nevertheless is not an action on the act of parliament. The question is, however, whether that state of things exists here. It manifestly appears that this is an action of debt, and on the statute and, therefore, an action on a specialty.

G Whether assumpsit or case would lie, leaves altogether untouched the question whether this plea is an answer to this action. The case seems to me to be abundantly clear. The proper limitation is that prescribed by the Civil Procedure Act, 1833, s. 3, viz., twenty years: an action on statute is an action on a specialty, and is clearly comprehended within the words of that section: "debt upon any bond or other specialty," although a bond is the plainest and simplest kind of specialty, and a statute the highest. On the whole, I concur with the Lord Chief Justice in thinking that the company is entitled to the judgment of the court.

H **CRESSWELL, J.**—I am entirely of the same opinion. This is plainly an action on a statutory liability to pay the calls: and the defendant is not at liberty to tell us that it is an action on contracts without specialty.

I **TALFOURD, J.**—I am of the same opinion. The relation between the shareholders and the company is the creation of the Act of Parliament. The action is in terms founded on the Act, and consequently an action on a specialty within the Civil Procedure Act, 1833.

Judgment for plaintiffs.

BOWDITCH v. BALCHIN

[COURT OF EXCHEQUER (Pollock, C.B., Alderson, Rolfe and Platt, BB.), May 31, 1850]

[Reported 5 Exch. 378; 4 New Mag. Cas. 118; 19 L.J.Ex. 337;
15 L.T.O.S. 232; 14 J.P. 449; 155 E.R. 165]

Arrest—Arrest without warrant—Suspicion of commission of misdemeanour.

A police constable of the city of London has no power, under the City of London Police Act, 1839, to take a person into custody without a warrant merely on suspicion that he has committed a misdemeanour.

Notes. Considered: *Barnard v. Gorman*, [1941] 3 All E.R. 45. Referred to: *Ledwith v. Roberts*, [1936] 3 All E.R. 570.

As to statutory powers of arrest of constables, see 10 HALSBURY'S LAWS (3rd Edn.) 349 et seq.; and for cases see 14 DIGEST (Repl.) 202 et seq.

Demurrer in an action for trespass for assaulting the plaintiff, and conveying him to a police-station, and there detaining him without reasonable or probable cause.

As to assaulting the plaintiff, and conveying him to the police-station, the defendant pleaded that, before the time when the alleged assault took place, the defendant was a constable of the police of the city of London, appointed under City of London Police Act, 1839, and that, at the time when the alleged assault took place, he was acting as such constable within the city; and that just before the committing of the supposed trespasses, and while he was acting as such constable within the city, one John Miller, in the presence and hearing of the plaintiff, stated and represented to the defendant, then acting as such constable of the police force as aforesaid, that the plaintiff had committed perjury, by wilfully and corruptly making a false affidavit in a judicial proceeding before one of the Queen's justices, and that John Miller then and there charged the plaintiff with the commission of the offence, and then and there required the defendant to take the plaintiff into custody on the charge. That because the plaintiff, on being asked by the defendant if his name was Bowditch, replied that it was not, and that he should not tell what his name was, the defendant then had good cause to, and did suspect, the plaintiff of having committed the offence, and, as such constable of the police, took the plaintiff into custody. That because there was no justice of the peace for the city then sitting, before whom the plaintiff could be taken on the charge, the defendant caused the plaintiff to go to the police-station for the district of the city within which the plaintiff was so taken into custody, and delivered him to the constable in charge. Demurrer, and joinder.

J. Brown for the plaintiff.—The substantial question raised by this demurrer is whether a police constable of the city of London can take a person into custody on suspicion of perjury. That depends on the City of London Police Act, 1839, "for regulating the police in the city of London." Section 9 confers on police constables appointed under that Act all the powers which any constables possess by the common or statute law. At common law a constable has no power to arrest a person without warrant, on suspicion of having committed a misdemeanour. Section 8, on which this plea is framed, empowers

"any man belonging to the said police force to take into custody, without warrant, all loose, idle, and disorderly persons, whom he shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed or intending to commit any felony, misdemeanour, or breach of the peace, and all persons whom he shall find between sunset and the hour of eight in the forenoon lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves."

The words "loose, idle, and disorderly persons," override and control the words

A "whom he shall have good cause to suspect of having committed, etc., any misdemeanour." But the plea contains no averment that the plaintiff was a loose, idle, or disorderly person. Section 35 enumerates the offences for which a police constable may take a person into custody without warrant.

B *Hugh Hill* for the defendant.—Although, according to strict grammatical construction, the words, "loose, idle, and disorderly persons," might override the subsequent part of the clause, yet the plain intention of the legislature was, that whenever a constable had good cause to suspect any person of having committed, or intending to commit, any felony, misdemeanour, or breach of the peace, he should be justified in taking such person into custody without warrant. [ALDERSON, B.—If the legislature had so intended, they would have inserted the words, "and all other persons." POLLOCK, C.B.—Suppose a person refused to serve some public office, or had committed any breach of duty imposed by statute, would a police constable be justified in taking him into custody without a warrant? In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.]

D PER CURIAM.—We cannot, in construing a statute involving the liberty of the subject, go beyond the strict and natural construction of the words used by the legislature. The words pointed out by counsel for the plaintiff clearly govern and override the whole section. No policeman can claim under this section the right of apprehending a man without a warrant, simply because he has good cause to suspect him to be guilty of misdemeanour. If it were not so, there would be no protection for anyone against apprehension on the most groundless suspicion. The plea is, therefore, bad, and our judgment must be for the plaintiff.

Judgment for plaintiff.

F

R. v. RILEY

G [COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Pollock, C.B., Parke, B., Williams, Talfourd and Crompton, JJ.), January 22, 1853]

[Reported Dears.C.C. 149; 22 L.J.M.C. 48; 20 L.T.O.S. 228;
17 J.P. 69; 17 Jur. 189; 6 Cox, C.C. 89]

Larceny—Mistake—Original taking by mistake—Original taking a trespass—Felonious appropriation on discovery of mistake.

H The defendant, the owner of a flock of black-faced lambs, when collecting his lambs from a field where they had been pastured, by mistake also took a white-faced lamb from the flock of another farmer. When selling his lambs the defendant realised the mistake, but nevertheless sold the white-faced lamb together with his own lambs.

I **Held:** although the original taking was not a felony, there being no intention then of appropriation, it was a trespass, and in consequence an unlawful taking that continued up to the time of the fraudulent appropriation when the felony of larceny was committed, and, therefore, the defendant was rightly convicted of larceny.

Notes. Followed: *Ruse v. Read*, [1949] 1 All E.R. 398. Applied: *R. v. Matthews*, [1950] 1 All E.R. 137. Considered: *R. v. Thomas* (1953), 37 Cr. App. Rep. 169. Referred to: *R. v. Ashwell* (1885), 16 Q.B.D. 190.

As to larceny where the original taking was by mistake, see 10 HALSBURY'S LAWS (3rd Edn.) 766; and for cases see 15 DIGEST (Repl.) 1049 et seq.

Cases referred to :

- (1) *R. v. Thristle* (1849), 2 Car. & Kir. 842; 1 Den. 502; T. & M. 204; 3 New Sess. Cas. 702; 19 L.J.M.C. 66; 14 L.T.O.S. 296; 13 J.P. 747; 13 Jur. 1035; 3 Cox, C.C. 573, C.C.R.; 15 Digest (Repl.) 1057, 10,410.
- (2) *R. v. Thurborn* (1849), 1 Den. 387; 2 Car. & Kir. 831; T. & M. 67; 18 L.J.M.C. 140; 13 J.P. 459; 13 Jur. 499; sub nom. *R. v. Wood*, 4 New Mag. Cas. 27; 3 New Sess. Cas. 581; 13 L.T.O.S. 548; 3 Cox, C.C. 453, C.C.R.; 15 Digest (Repl.) 1049, 10,332.
- (3) *R. v. Leigh* (1800), 1 Leach, 411, n., C.C.R.; 2 East, P.C. 694; 15 Digest (Repl.) 1056, 10,406.

Also referred to in argument :

- R. v. Preston* (1851), 2 Den. 353; T. & M. 641; 21 L.J.M.C. 41; 18 L.T.O.S. 145; 15 J.P. 802; 16 Jur. 109; 5 Cox, C.C. 390, C.C.R.; 15 Digest (Repl.) 1050, 10,337.

Appeal from conviction for larceny at Durham Quarter Sessions.

At the Durham quarter sessions on Oct. 18, 1852, the prisoner, Charles Riley, was indicted for having on Oct. 5, 1852, stolen a lamb, the property of John Burnside. The prisoner pleaded Not Guilty. At the trial it was proved that on Friday, Oct. 1, 1852, John Burnside, the prosecutor, put ten white-faced lambs into a field occupied by John Clarke, situated near to the town of Darlington. On Monday, Oct. 4, the prisoner went with a flock of twenty-nine black-faced lambs to John Clarke, and asked if he might put them into Clarke's field for a night's keep, and upon Clarke agreeing to allow him to do so for one penny per head, the prisoner put his twenty-nine lambs into the same field with the prosecutor's lambs.

At half-past seven o'clock in the morning of Tuesday, Oct. 5, the prosecutor went to Clarke's field, and in counting his lambs he missed one. The prisoner's lambs had also gone from the field. Between eight and nine o'clock in the morning of the same day, the prisoner came to the farm of John Calvert, at Middleton St. George, six miles east from Darlington, and asked him to buy twenty-nine lambs. Calvert agreed to do so, and to give 8s. a-piece for them. Calvert then proceeded to count the lambs, and informed the prisoner that there were thirty instead of twenty-nine in the flock, and pointed out to him a white-faced lamb, upon which the prisoner said, "If you object to take thirty, I will draw one." Calvert, however, bought the thirty lambs; and paid the prisoner £12 for them.

One of the lambs sold to Calvert was identified by the prosecutor as his property, and as the lamb missed by him from Clarke's field. It was a half-bred white-faced lamb, marked with the letter "T," and similar to the other nine of the prosecutor's lambs. The twenty-nine lambs belonging to the prisoner were black-faced lambs. In the afternoon of Oct. 5 the prisoner stated to two of the witnesses that he had never put his lambs into Clarke's field, and had sold them on the previous afternoon, for £11 12s., to a person on the Barnard Castle Road, which leads west from Darlington.

There was evidence in the case to show that the prisoner must have taken the lambs from Clarke's field early in the morning, which was thick and rainy.

It was argued by counsel on behalf of the prisoner in his address to the jury that the facts showed that the original taking from Clarke's Field was by mistake; and if the jury were of that opinion, then, as the original taking was not done *animo furandi*, the subsequent appropriation would not make it a larceny, and the prisoner must be acquitted.

The Chairman, in summing-up, told the jury that, though they might be of opinion that the prisoner did not know that the lamb was in his flock until it was pointed out to him by Calvert, he should rule that in point of law the taking occurred when it was so pointed out to the prisoner and sold by him to Calvert, and not at the time of leaving the field. The jury returned the following verdict: The jury say that at the time of leaving the field the prisoner did not know that

A the lamb was in his flock, and that he was guilty of felony at the time it was pointed out to him.

The prisoner was then sentenced to six months' hard labour in the house of correction at Durham; and being unable to find bail, was thereupon committed to prison until the opinion of this court could be taken upon the question whether he was properly convicted of larceny.

B *Liddell* for the prisoner.

Grey for the Crown was not called on to argue.

POLLOCK, C.B.—We are all of opinion that the conviction is right. The case is distinguishable from those cited. *R. v. Thistle* (1) decides only that if a man once gets into a rightful possession, he cannot, by a subsequent fraudulent appropriation, convert it into felony. So in *R. v. Thurborn* (2), in the elaborate judgment delivered by my brother **PARKE**, the same rule is laid down. It is there said that the mere taking up of a lost chattel is no appropriation of it; and no doubt a man may take up a lost chattel, and carry it home, with the proper object of endeavouring to find the owner; and then, afterwards, if he yields to the temptation of appropriating it to his own use, he is not guilty of felony. In *R. v. Leigh* (3) also the original taking was rightful; but here the original taking was wrongful. I am not desirous of calling in aid the technicality of a continuing trespass; and I think this case may be decided upon the ground either that there was no taking at all by the prisoner in the first instance, or a wrongful taking; and in either case, as soon as he appropriates the property, the evidence of felony is complete.

E **PARKE, B.**—I think that this case may be disposed of on a short ground. The original taking was not lawful, but a trespass, upon which an action in that form might have been founded; but it was not felony, because there was no intention to appropriate. There was, however, a continuing trespass up to the time of appropriation, and at that time, therefore, the felony was committed. Where goods are carried from one county to another they may be laid as taken in the second county; **F** and the difference between this and *R. v. Leigh* (3), as well as the others cited, is that the original taking was no trespass.

WILLIAMS, J., TALFOURD, J., and CROMPTON, J., concurred.

Conviction affirmed.

HICKIE AND ANOTHER v. RODOCANACHI

[COURT OF EXCHEQUER (Pollock, C.B., Martin, Bramwell and Channell, BB.),
May 4, 11, 1859]

[Reported 4 H. & N. 455; 28 L.J.Ex. 273; 33 L.T.O.S. 150;
5 Jur.N.S. 550; 7 W.R. 545; 157 E.R. 917]

Shipping—Freight—Abandonment of ship—Voyage completed by substituted ship—Right of underwriters to benefit of freight earned by substituted ship.

The plaintiffs chartered their ship for a voyage to carry troops to Calcutta. By the terms of the charterparty a portion of the freight was payable only on the completion of the voyage. The vessel sailed, and when 700 miles beyond Mauritius took fire, and was compelled to make back for Mauritius, which she reached having sustained great damage. She was insured by a marine policy in the common form. On notice of the loss, the plaintiffs abandoned, and the abandonment was accepted. The captain freighted another ship in which the troops were taken to Calcutta, and freight was earned and received by the plaintiffs. In an action on the policy to determine whether the freight so earned passed to the defendant as underwriter,

Held: the substituted ship was not the ship of the underwriters; the captain, in hiring her, was acting solely for his employers, the former owners; and, therefore, the underwriters were not entitled to the benefit of the freight earned by the substituted ship.

Notes. Considered: *De Cuandra v. Swann* (1864), 16 C.B.N.S. 772; *Sea Insurance v. Hadden* (1884), 13 Q.B.D. 706; *A.-G. v. Glen Line and Liverpool and London War Risks Insurance Association* (1929), 34 Com. Cas. 309. Referred to: *Petros M. Nomikos, Ltd. v. Robertson*, [1938] 3 All E.R. 249.

As to constructive total loss, see 22 HALSBURY'S LAWS (3rd Edn.) 149 et seq.; and for cases see 29 DIGEST (Repl.) 328 et seq.

Case referred to:

- (1) *Stewart v. Greenock Marine Insurance Co.* (1848), 2 H.L.Cas. 159; 9 E.R. 1052; sub nom. *The Laurel*, *Stewart v. Greenock Marine Insurance Co.*, 2 L.T. 809, H.L.; 29 Digest (Repl.) 336, 2556.

Also referred to in argument:

Sharp v. Gladstone (1805), 7 East, 24; 3 Smith, K.B. 39; 103 E.R. 10; 29 Digest (Repl.) 335, 2553.

Thompson v. Rowcroft (1803), 4 East, 34; 102 E.R. 742; 29 Digest (Repl.) 335, 2552.

M'Carthy v. Abel (1804), 5 East, 388; 1 Smith, K.B. 524; 102 E.R. 1118; 29 Digest (Repl.) 242, 1826.

Scottish Marine Insurance Co. v. Turner (1853), 4 H.L.Cas. 312, n.; 21 L.T.O.S. 10; 17 Jur. 631; 1 W.R. 537; 1 Macq. 334; 10 E.R. 483, H.L.; 29 Digest (Repl.) 243, 1827.

Barclay v. Stirling (1816), 5 M. & S. 6; 105 E.R. 954; 29 Digest (Repl.) 336, 2554.

Case v. Davidson (1816), 5 M. & S. 79; affirmed sub nom. *Davidson v. Case* (1820), 2 Brod. & Bing. 379; 8 Price, 542; 5 Moore, C.P. 116; 129 E.R. 1013; 29 Digest (Repl.) 336, 2555.

Special Case stated for the opinion of the court in an action brought on a policy of marine insurance against the defendant for £100, as underwriter, the question being whether the benefit of the freight earned by a substituted ship, passed to the underwriters of a first ship insured and abandoned by the assured.

An agreement was entered into between the master of a ship called the *Sarah Sands* and the East India Co. to convey troops from Portsmouth to Calcutta at

A the rate of £40 for each soldier and passenger conveyed, and half that sum for children, one-third of the whole sum to be paid within fourteen days after the ship had finally sailed from Portsmouth, and the remaining two-thirds to be paid after the disembarkation of the troops at Calcutta. If the ship did not arrive at its destination within seventy days after sailing from Portsmouth (unless detained by the perils of the sea), the East India Co. were to be entitled to deduct £30 for each day between the seventieth day and the day of arrival. Before the agreement was made, Walton & Son, as agents for the shipowner, insured the vessel and machinery for £15,000, and the plaintiffs, the shipowners, effected the policy, on which the present action was brought. Walton & Son also effected two policies on the chartered freight to India. On Aug. 16, 1857, the ship took on board 14 officers and 355 men, with 5 women and 5 children, the military authorities refusing to send more on board, although the vessel was fitted to carry 504 passengers, and on that day the ship sailed. Walton & Son then rendered to the East India Co. two accounts, by which they claimed £6,733 6s. 8d., being one-third of the sum for 504 troops, and £980, being two-thirds payable on behalf of the officers; the company disputed the amounts and endorsed on the first £4,733 6s. 8d., deducting for 149 men short of the complement the ship ought to have carried; and after deducting £60 for six days' demurrage, they tendered the balance to the plaintiffs, the shipowners, which sum they accepted under protest.

On Nov. 11, when the vessel was about 700 miles to the N.W. of Mauritius, she took fire, and the captain, with the greatest difficulty and danger, succeeded in getting her back to Mauritius, where the troops were disembarked. It was found, on an attempt to repair the damage, that it would cost more money to do so than the ship was worth, and the captain drew up a notice of the abandonment of her, and forwarded it to the plaintiffs, who accepted it. On Feb. 17, 1858, the plaintiffs gave notice of abandonment to the underwriters who declined accepting it, but ultimately some of them, including the defendant, did accept it. The captain then chartered a ship called the *Clarendon*, and forwarded the troops on to Calcutta, paying for freight £6,197 8s. 4d., which sum was paid by the East India Co. to the owners of that vessel, and the amount deducted from the payments they had to make. After the troops had arrived in India the agents of the assured made a claim on freight, and after certain deductions the claim was paid and forwarded by a bill at four months. The question for the opinion of the court was whether the underwriters were entitled to any benefit of the freight earned by the substituted vessel.

G *Bovill, Q.C.* (with him *F. M. White*), for the plaintiffs.
Blackburn (with him *Wilde, Q.C.*) for the defendant.

Cur. adv. vult.

H May 11, 1859. **BRAMWELL, B.**, delivered the judgment of the court.—The plaintiffs were the owners of a ship, the *Sarah Sands*, which they chartered for a voyage to carry troops to Calcutta. By the charterparty a portion of the freight was payable only on the completion of the voyage, so that the plaintiffs' right to it depended on that event. The vessel sailed, and, when 700 miles beyond Mauritius, took fire, and was compelled to desist from the completion of the voyage and make for Mauritius, which she reached, having sustained great damage. She was insured by a marine policy in the common form. On notice of the loss the I insured abandoned, and the abandonment was accepted; the captain freighted another ship; the troops were forwarded to Calcutta; the freight earned and received by the insured. This action is brought on the policy, and the question is whether the underwriters are entitled to the benefit of the freight so earned?

The case was very ably argued on both sides before us; the defendant claimed the benefit as a matter of principle as well as of authority. He said that a contract of insurance was one of indemnity; that the insurer was in the nature of a surety, and entitled to the benefit of all the security the insurance possessed. But, in truth, this argument tells against him. The common insurance on a ship is in no

way concerned with the freight in course of being earned; it is an insurance on the absolute value, not on that of the vessel's adventitious advantages. If any question of the value of the ship arose, the insured could not include the freight as an item in the calculation, any more than he could in respect of winning a wager which he had made, that she would arrive at her port of destination. It is the goods, not the ship, which are increased in value by the arrival of the ship, or rather their arrival; and if they arrive the freight is earned. But the matter needs no argument. It is enough to refer to the practice of separate insurance on freight. If then the loss of freight is a part of the loss on the loss of the ship, consequently the insurer of the ship ought to have no benefit from the accruing of the freight unless he helps to earn it. This argument, therefore, fails.

Counsel for the defendant cited cases to show—and indeed it was admitted—that there are cases in which the underwriter on a ship does get a benefit from the freight earned. In all those cases, however, the freight was earned by the insured ship, and the underwriters had the benefit thereof, on the ground that, by the abandonment, the property in the insured ship vested in the underwriters from the time of the loss, and consequently it was their ship that earned the freight; and the principle which entitled the purchaser of a ship to freight which it earned after the purchase was applied, the underwriter being treated as such purchaser. Whether this is a just or equitable rule, whether that which prevails in America is not more fair, or whether even that might not be improved on, it is unnecessary to consider. The mercantile community may alter it by their contracts if they think fit; it exists, and is the law, but does not govern this case, being founded solely on the ownership by the underwriters of the abandoned ship.

With one exception, all the authorities give this as the reason, in terms which negative the claim made by the defendant in this case. It is needless to refer to them; but there is one expression of opinion the other way, to which every respect is due. In *Stewart v. Greenock Marine Insurance Co.* (1), LORD COTTENHAM said the case is the same as if the ship had ceased to exist as such on July 27, and the cargo had been brought home and delivered by other means. That inevitably assumes the case of freight earned; but the goods being carried on in a fresh ship after the loss of that insurance, the underwriters in the latter are entitled to the freight earned. It is to be observed, however, that that was not the matter to be determined, nor even that on which the speaker's mind was engaged. All LORD COTTENHAM was establishing was, that the loss was a loss during the voyage, as much as though it had occurred fifteen days before the vessel reached the docks. It seems to us, therefore, that the argument and authorities failed to establish the defendant's claim.

Not only that, but we think it can be shown on principle the claim is ill-founded. Where the insured ship finishes the voyage, it is the ship of the underwriter, and those who make use of it may not altogether unreasonably be held to do so for the benefit of its then owners; but where another ship finishes the voyage, it is not the underwriters', and there is no reason why those who hire it should be supposed to be acting for the benefit of the underwriter, but rather for their own employers, the former owners. Here the captain, when he hired the new vessel, was not the underwriters' captain, nor their agent, nor under the duty to them he was under to his former owners. Take the case put in the argument; suppose the plaintiff and the defendant had been at Mauritius, and each had claimed to bring the troops for his own benefit, who would have been entitled to do so? Undoubtedly the plaintiffs. Then take the other case, of there being a breach of duty to the charterers in not forwarding the troops, who would have been liable? The plaintiffs, not the defendant. Again, suppose the hire and cost of the new ship exceeded the freight earned, who would be liable for it? The plaintiffs, not the defendant. Or suppose the case of the owner of goods arriving at Mauritius, and insisting on the goods being there delivered to him, in which case he must pay the whole freight, surely the owners would be entitled to it.

On these grounds we are satisfied the captain, in such a case as the present,

A acts for the owner of the ship, and not for the underwriters, and that they are not entitled to any benefit from the freight acquired. The underwriters may, indeed, be entitled to advantages attached to the ship, but not to those arising from contracts, the fulfilment of which can be and is detached from the ship.

Judgment for plaintiffs.

B

C

HART v. WINDSOR

[COURT OF EXCHEQUER (Parke, Alderson, Gurney and Rolfe, BB.), February 10, 17, 1844]

[Reported 12 M. & W. 68; 13 L.J.Ex. 129; 2 L.T.O.S. 440;
8 J.P. 233; 8 Jur. 150; 152 E.R. 1114]

D

Landlord and Tenant—Liability of landlord—Unfurnished house—Fitness for habitation—No implied warranty.

There is no implied warranty in a lease of an unfurnished house that it is reasonably fit for habitation.

E

Notes. A definition of the statutory standard of fitness required on inspection by the local authority is provided by s. 4 of the Housing Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 322).

Considered: *Surplice v. Farnsworth* (1844), 7 Man. & G. 576; *Mostyn v. West Mostyn Coal and Iron Co.* (1876), 1 C.P.D. 145; *Baynes v. Lloyd*, [1895] 2 Q.B. 610; *Jones v. Lavington*, [1903] 1 K.B. 253; *Cruse v. Mount*, [1932] All E.R.Rep. 781. Followed: *Edler v. Auerbach*, [1949] 2 All E.R. 692. Considered: *Miller v. Emcer Products, Ltd.*, [1956] 1 All E.R. 237. Applied: *Sleafer v. Lambeth Metropolitan Borough Council*, [1959] 3 All E.R. 378. Referred to: *Searle v. Laverick* (1874), L.R. 9 Q.B. 122; *Wilson v. Finch Hatton* (1877), 2 Ex.D. 336; *Manchester Bonded Warehouse Co., Ltd. v. Carr*, [1874–80] All E.R.Rep. 563; *Westropp v. Elligott* (1884), 9 App. Cas. 815; *Sarson v. Roberts* (1895), 73 L.T. 174; *Budd-Scott v. Daniell*, [1902] 2 K.B. 351; *Markham v. Paget*, [1908] 1 Ch. 697; *Bottomley v. Bannister*, [1931] All E.R.Rep. 99.

G

As to no warranty of fitness for habitation on letting an unfurnished house, see 23 HALSBURY'S LAWS (3rd Edn.) 554; and for cases see 31 DIGEST (Repl.) 133.

Cases referred to:

H

(1) *Monk v. Cooper* (1727), 2 Ld. Raym. 1477; 2 Stra. 763; 92 E.R. 460; 31 Digest (Repl.) 279, 4139.

(2) *Belfour v. Weston* (1786), 1 Term Rep. 310; 99 E.R. 1112; 31 Digest (Repl.) 280, 4141.

(3) *Pindar v. Ainsley and Rutter* (1767), cited in 1 Term Rep. 312; 99 E.R. 1113; 31 Digest (Repl.) 278, 4118.

I

(4) *Richards le Taverner's Case* (1544), 1 Dyer, 55 b.

(5) *Paradine v. Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 31 Digest (Repl.) 278, 4124.

(6) *Carter v. Cummins* (1665), cited in 1 Cas. in Ch. at p. 84; 22 E.R. 706, L.C.; 31 Digest (Repl.) 281, 4155.

(7) *Brown v. Edgington* (1841), 2 Man. & G. 279; Drinkwater, 106; 2 Scott, N.R. 496; 10 L.J.C.P. 66; 5 J.P. 276; 133 E.R. 751; 39 Digest (Repl.) 579, 1031.

(8) *Shepherd v. Pybus* (1842), 3 Man. & G. 868; 4 Scott, N.R. 434; 11 L.J.C.P. 101; 133 E.R. 1390; 39 Digest (Repl.) 539, 752.

- (9) *Smith v. Marrable* (1843), 11 M. & W. 5; Car. & M. 479; 12 L.J.Ex. 223; 7 Jur. 70; 152 E.R. 693; 31 Digest (Repl.) 195, 3266. A
- (10) *Edwards v. Hetherington (or Etherington)* (1825), 7 Dow. & Ry.K.B. 117; Ry. & M. 268; 31 Digest (Repl.) 194, 3254.
- (11) *Collins v. Barrow* (1831), 1 Mood. & R. 112, N.P.; 31 Digest (Repl.) 194, 3256.
- (12) *Salisbury v. Marshall* (1829), 4 C. & P. 65, N.P.; 31 Digest (Repl.) 194, 3255. B
- (13) *Sutton v. Temple* (1843), 12 M. & W. 52; 13 L.J.Ex. 17; 2 L.T.O.S. 150; 7 Jur. 1065; 152 E.R. 1108; 31 Digest (Repl.) 194, 3252.

Also referred to in argument:

- Bridge v. Wain* (1816), 1 Stark. 504; 171 E.R. 543, N.P.; 39 Digest (Repl.) 591, 1111.
- Shepherd v. Kain* (1821), 5 B. & Ald. 240; 106 E.R. 1180; 39 Digest (Repl.) 532, 686. C
- Izon v. Gorton* (1839), 5 Bing.N.C. 501; 2 Arn. 39; 7 Scott, 537; 8 L.J.C.P. 272; 3 Jur. 653; 132 E.R. 1193; 31 Digest (Repl.) 279, 4135.
- Burdett v. Withers* (1837), 7 Ad. & El. 136; Will. Woll. & Dav. 444; 2 Nev. & P.K.B. 122; 6 L.J.K.B. 219; 1 Jur. 514; 112 E.R. 422; 31 Digest (Repl.) 357, 4878. D
- Mantz v. Goring* (1838), 4 Bing.N.C. 451; 132 E.R. 861; sub nom. *Young v. Mantz*, 1 Arn. 198; 6 Scott, 277; 7 L.J.C.P. 204; 31 Digest (Repl.) 358, 4891.
- Stanley v. Towgood* (1836), 3 Bing.N.C. 4; 2 Hodg. 132; 3 Scott, 313; 6 L.J.C.P. 129; 132 E.R. 310; 31 Digest (Repl.) 358, 4887.
- Coe v. Clay* (1829), 5 Bing. 440; 3 Moo. & P. 57; 7 L.J.O.S.C.P. 162; 130 E.R. 1131; 31 Digest (Repl.) 132, 2699. E
- Baker v. Holtzaffell* (1811), 4 Taunt. 45; 128 E.R. 244; 31 Digest (Repl.) 279, 4132.
- Neale v. Mackenzie* (1836), 1 M. & W. 747; 2 Gale, 174; 6 L.J.Ex. Eq. 263; 150 E.R. 635, Ex. Ch.; 31 Digest (Repl.) 289, 4241.
- Naish v. Tatlock* (1794), 2 Hy. Bl. 319; 126 E.R. 573; 5 Digest (Repl.) 1021, 8258. F
- Harrison v. Lord North* (1667), 1 Cas. in Ch. 83; 22 E.R. 706, L.C.; 31 Digest (Repl.) 275, 4087.
- Arden v. Pullen* (1842), 10 M. & W. 321; 11 L.J.Ex. 359; 152 E.R. 492; 31 Digest (Repl.) 343, 4744.
- Maleverer v. Spinke* (1538), 1 Dyer, 35a.
- Chanter v. Hopkins* (1838), 4 M. & W. 399; 1 Horn & H. 377; 8 L.J.Ex. 14; 3 Jur. 58; 150 E.R. 1484; 39 Digest (Repl.) 550, 818. G
- Holder v. Taylor* (1614), Hob. 12; 80 E.R. 163; 31 Digest (Repl.) 146, 2853.
- Barr v. Gibson* (1838), 3 M. & W. 390; 1 Horn & H. 70; 7 L.J.Ex. 124; 150 E.R. 1196; 39 Digest (Repl.) 530, 667.

Rule Nisi obtained by the plaintiff to set aside the verdict for the defendant on the second plea and enter judgment for him on that issue, in an action by the plaintiff, landlord, against the defendant, tenant, for recovery of rent. The defendant pleaded, by his second plea, that the house was in fact unfit for habitation and that there was an implied warranty as to fitness. H

The plaintiff claimed for one quarter's rent on an agreement, dated June 23, 1843, by which the defendant agreed to take an unfurnished house and garden for three years, and to pay a certain annual rent at the usual quarterly days of payment, and to preserve the house in good and tenantable repair, and to deliver it up in such good and tenantable repair at the expiration of the term of three years. I

The defendant pleaded, secondly, that the house was demised to him for the purpose of inhabiting in for and during the term, and that at the time of his entering in, and from thence onwards, the house was not in a reasonably fit and proper state for habitation or dwelling in, and the defendant could have no benefit therefrom on account of the house being infested, swarmed, and overrun with

A noxious, stinking, and nasty insects called "bugs," and that, in consequence of the house being so infested, the defendant, as soon as he discovered it, left the house, and gave notice to the plaintiff. It was submitted that the plea disclosed the fact that the house was let for the purpose of habitation, and that there was a condition or warranty implied at the time of letting, that the house was reasonably fit for the habitation of man.

B At the trial before ROLFE, B., the facts alleged in the second plea having been proved, the jury found a verdict for the defendant on that issue. The plaintiff subsequently obtained a rule nisi to set aside the verdict and enter judgment in his favour.

Watson and Humfrey for the defendant, showed cause against the rule.

C *Addison* for the plaintiff, supported the rule.

Cur. adv. vult.

Feb. 17, 1844. **PARKE, B.**, delivered the following judgment of the court.— This was a case very fully and ably argued on Feb. 10 upon showing cause against a rule for judgment non obstante veredicto. The declaration is not for use and occupation, but on an agreement in the nature of a lease. [His LORDSHIP read the declaration and the second plea.] The question is whether the plea contains substantially a good answer to the plaintiff's claim for a quarter's rent, becoming due after the defendant quitted.

On the part of the plaintiff, it was insisted that it did not, for several reasons; the principal one being, that where there is an actual demise of the unfurnished fabric of a specific messuage for a term, there is no contract implied by law on the part of the lessor, that the messuage was at the time of the demise, or should be at the commencement of the term, in a reasonably fit and proper state and condition for habitation (that is, so far as concerned the fabric), though it was demised and let for the purpose of immediate habitation. As we are all of opinion in favour of the plaintiff upon this objection, it is unnecessary to observe upon the others in detail; but it may not be useless to remark, that two of them are very important, and have not been satisfactorily answered; viz., that if such a contract is implied by law, it would be no defence, where the tenant has actually occupied; his remedy would be by a cross action; and to constitute a valid defence on the ground of the breach of this contract, the law must give also a right to abandon the lease upon the breach of it; that is, to make a defence, the law must imply, not merely a contract, but a condition that the lease should be void if the house was unfit for occupation.

The cases cited from BROOKE'S ABRIDGMENT, "Dette," 18 and 72, are decisive, that where the lessor is bound by the custom of London, or by covenant, to repair, and does not, the tenant cannot quit. The other objection, which we think right to notice, is, that in this case the house and some garden ground are both demised; and to make the plea good, it must be held, that, if a messuage be taken for habitation, and land for occupation, by the same lease, there is such an implied contract for the fitness of the house for habitation, as that its breach would authorise the tenant to give up both. Whether, if there were such a contract or condition implied by law, generally, it would be implied in this case, where the defendant agrees to preserve in tenantable condition, is a question on which it is quite unnecessary to enter.

I The point to be considered, then, is, whether the law implies any contract as to the condition of the property demised, where there is a lease of a certain ascertained subject, being real property, and that lease is made for a particular object. The question relates to a case of actual demise of a specific tenement, and we have not to inquire what the obligations of a party would be under an executory agreement, to procure a lease of some house for the habitation of another; nor whether the defendant would not be exonerated on the ground of fraud in the plaintiff, if the plaintiff knew of the defect in the house himself, and that the defendant would

not have taken the house if he knew it; nor have we to consider whether the defendant would be responsible, if at the time of the demise there was no house at all—he may be, by reason of the implied contract for title to a house, not the land merely: which imports that the subject of the contract exists. The simple question is, What is the implied obligation on the part of the landlord to his tenant, under a lease of a house for years? A

Considering this case without reference to the modern authorities, which are said to be at variance, it is clear that from the word “demise,” in a lease under seal, the law implies a covenant, in a lease not under seal, a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term, and the word “let,” or any equivalent words which constitute a lease, have, no doubt, the same effect, but not more: SHEPPARD'S TOUCHSTONE, pp. 165-167, and 272. There is no authority for saying that these words imply a contract for any particular state of the property at the time of the demise; and there are many, which clearly show that there is no implied contract that the property shall continue fit for the purpose for which it is demised, as the tenant can neither maintain an action, nor is he exonerated from the payment of rent, if the house demised is blown down, or destroyed by fire: *Monk v. Cooper* (1), *Belfour v. Weston* (2), and *Pindar v. Ainsley and Rutter* (3); or gained upon by the sea: *Richards le Taverner's Case* (4); or the occupation rendered impracticable by the king's enemies: *Paradine v. Jane* (5); or where a wharf demised was swept away by the Thames: *Carter v. Cummins* (6). In all these cases, the estate of the lessor continues, and that is all the lessor impliedly warrants. It appears, therefore, to us to be clear upon the old authorities, that there is no implied warranty on a lease of a house, or of land, that it is, or shall be, reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property. B
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But the defendant's counsel rely upon some modern decisions in support of the positions which they are to maintain. It is not necessary to refer to the cases on the implied warranty of chattels, further than to say that the rule of the common law, which prevails in general (Co. Litt. 102 a), that there is no implied warranty on the sale of specific goods, has had exceptions engrafted upon it, where the goods are ordered from a manufacturer, or tradesman, who impliedly engages to use a proper degree of skill and care in constructing or supplying them. Such are *Brown v. Edgington* (7), *Shepherd v. Pybus* (8), and others. These have no bearing on the present case. F

But the defendant chiefly rests his case upon the decision of *Smith v. Mar- rable* (9). My judgment in that case certainly proceeded upon the authority of two previous decisions, which, though they contained a novel doctrine, had not been questioned in Westminster Hall, and had received, to a certain degree, the sanction of TINDAL, C.J., in a subsequent case. Those cases were *Edwards v. Etherington* (10), before LORD TENTERDEN, and afterwards the Court of King's Bench; *Collins v. Barrow* (11); and the last, that before TINDAL, C.J., *Salisbury v. Marshall* (12). I thought they established the doctrine, not merely that there was an implied contract on the part of the lessor, that the house demised should be habitable, but an implied condition, that the lease should be void if it were not, and the tenant chose to quit. From the full discussion which those cases have now undergone, on the present argument, and that in the recent case of *Sutton v. Temple* (13), I feel satisfied they cannot be supported, if the reports of them are correct; and we all concur in opinion that they are not law—an opinion strongly intimated in *Sutton v. Temple* (13), in which this court decided that there was no implied warranty of condition or fitness for a particular purpose on a lease of aftermath. G
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We are under no necessity of deciding in the present case, whether that of *Smith v. Marrable* (9) be law or not. It is distinguishable from the present case on the ground on which it was put by LORD ABINGER, both on the argument of the case itself, but more fully in that of *Sutton v. Temple* (13); for it was the case of a demise of a ready-furnished house for a temporary residence at a watering-

A place. It was not a lease of real estate merely. That case certainly cannot be supported on the ground on which I rested my judgment.

B We are all of opinion, for these reasons, that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. The principles of the common law do not warrant such a position; and though, in the case of a dwelling-house taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes—for building upon, or for cultivation; and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties in every case to protect their interests themselves, by proper stipulations, and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning.

C *Rule absolute.*

DOE d. EARL OF EGREMONT v. COURTENAY

E [COURT OF QUEEN'S BENCH (Lord Denman, C.J., Williams, Coleridge and Paterson, JJ.), April 27, 30, 1846, February 26, 1848]

[Reported 11 Q.B. 702; 17 L.J.Q.B. 151; 11 L.T.O.S. 25;
12 Jur. 454; 116 E.R. 636]

Landlord and Tenant—Lease—Surrender—Grant of new lease—Grant not valid execution of power.

F In 1775 a tenant in fee demised premises to the defendant's grandfather for ninety-nine years depending on certain lives. By his will he devised the premises to his son for life, with remainders over and a power to the tenant for life to grant leases. After the testator's death and during the term of the lease the son granted the lessee a new lease of the premises which was pur-
G ported to be granted in consideration of the surrendering up to the lessor by the lessee, at or before the delivery of the lease, of the lease of 1775, "which surrender is hereby made and accepted accordingly." The new lease was not a valid execution of the power, and one of the lives mentioned in the lease of 1775 was still existing.

H **Held:** the new lease did not pass an interest according to the contract, and therefore, the acceptance of it, even with the express words, did not effect an absolute surrender; accordingly, the surrender was inoperative and the lease of 1775 remained in force.

Dictum of LORD MANSFIELD in *Wilson v. Sewell* (1) (1766), 4 Burr. at p. 1980, and in *Davison d. Bromley v. Stanley* (2) (1768), 4 Burr. at p. 2213, applied.

I **Notes.** Applied: *Noble v. Ward* (1867), L.R. 2 Exch. 135. Considered: *Zick v. London United Tramways*, [1908] 2 K.B. 126. Followed: *Canterbury Corp'n. v. Cooper* (1909), 100 L.T. 597. Distinguished: *Rhyl U.D.C. v. Rhyl Amusements, Ltd.*, [1959] 1 All E.R. 257. Referred to: *Doe d. Biddulph v. Poole* (1848), 11 Q.B. 713; *Knight v. Williams*, [1901] 1 Ch. 256; *Morris v. Baron*, [1918] A.C. 1; *Barclays Bank, Ltd. v. Stasek*, [1956] 3 All E.R. 439.

As to surrender of lease by operation of law, see 23 HALSBURY'S LAWS (3rd Edn.) 683 et seq.; and for cases see 31 DIGEST (Repl.) 569 et seq.

Cases referred to :

- (1) *Wilson v. Sewell* (1766), 1 Wm. Bl. 617; 4 Burr. 1975; 96 E.R. 359; 31 Digest (Repl.) 576, 6962.
- (2) *Davison d. Bromley v. Stanley* (1768), 4 Burr. 2210; 98 E.R. 152; 31 Digest (Repl.) 576, 6963.
- (3) *Doe d. Earl of Egremont v. Forwood* (1842), 3 Q.B. 627; 11 L.J.Q.B. 321; 114 E.R. 647; 31 Digest (Repl.) 500, 6252.
- (4) *Roe d. Earl of Berkeley v. Archbishop of York* (1805), 6 East, 86; 102 E.R. 1219; sub nom. *Doe d. Earl of Berkeley v. Archbishop of York*, 2 Smith, K.B. 166; 31 Digest (Repl.) 567, 6882.
- (5) *Farmer d. Earl v. Rogers* (1755), 2 Wils. 26; Bull.N.P. 111; 95 E.R. 666, N.P.; 31 Digest (Repl.) 567, 6886.
- (6) *Doe d. Bishop of Rochester v. Bridges* (1831), 1 B. & Ad. 847; 9 L.J.O.S.K.B. 113; 109 E.R. 1001; 31 Digest (Repl.) 569, 6897.
- (7) *Doe d. Biddulph v. Poole* (1848), 11 Q.B. 713; 17 L.J.Q.B. 143; 11 L.T.O.S. 25; 12 Jur. 450; 116 E.R. 641; 31 Digest (Repl.) 576, 6966.

Rule Nisi obtained by the defendant to enter a nonsuit in an action of ejectment for messuages and land in Devonshire, tried by COLERIDGE, J., and a jury.

On September 29, 1775, the Earl of Egremont, being seised in fee of certain premises, demised them to the defendant's grandfather for ninety-nine years, determinable on the death of the grandfather and of one Betty Hill. By his will, executed in 1761, the Earl of Egremont, who died in 1763, devised the premises to his second son, Percy Charles Wyndham, and his assigns for life, remainder to his first and other sons respectively in tail male, remainder to the testator's other sons successively for life with remainder on each life estate to the first and other sons of the tenant for life successively in tail male. The will contained a power to each tenant for life to grant leases under certain restrictions. In 1785, Percy Charles Wyndham demised the premises to the defendant's grandfather for ninety-nine years from the expiration of the former term, if the defendant should so long live. In 1812, Percy Charles Wyndham demised the premises to the defendant for ninety-nine years after the expiration or determination of the term created in 1785, if two named children of the defendant, or either of them, should so long live. This last lease purported to be granted in consideration of the surrendering up to the lessor by the lessee, at or before the delivery of the lease, the lease of 1755 which was now determinable on the death of Betty Hill "which surrender is hereby made and accepted accordingly," and in consideration of £240. Percy Charles Wyndham died in 1833, and the plaintiff's lessor succeeded him as tenant in tail male under the will. The 1785 and 1812 leases were not valid execution of the power and in an action of ejectment, the lessor of the plaintiff contended that the 1755 lease, having been surrendered, was no bar to his claim, though it did not appear that one of the lives on which that lease had depended (Betty Hill) might not still exist (the defendant's grandfather died before the action was brought). At the trial COLERIDGE, J., directed a verdict for the plaintiff, but reserved leave to move for a nonsuit. A rule nisi was accordingly obtained by the defendant.

Crowder, Q.C., M. Smith and Phinn for the defendant, showed cause against the rule.

Serjeant Kinglake and Merivale for the plaintiff, supported the rule.

Cur. adv. vult.

Feb. 26, 1848. **COLERIDGE, J.**, delivered the following judgment of the court.—This case was tried before me at the Devon Assizes and, as it is admitted, the lease under which the defendant had supposed himself to be in possession could not be sustained with reference to the power under which alone it could have been valid, the verdict passed for the plaintiff. But two points were made on the trial, and on motion before us for a nonsuit, which are now to be considered. There were the

A counterparts of three leases produced, of the respective dates of 1755, 1785 and 1812; and the plaintiff's case was that the two latter were invalid, which was admitted, and that the last was granted in consideration of the surrender of the first, and operated as a surrender of it. This was necessary to his case, as one of the lives on which the lease of 1755 was granted was still in being, and that lease still in force unless so surrendered. But the defendant contended that the surrender

B having been made wholly in consideration of the grant of a new and valid lease, did not take effect because the new lease was invalid. Secondly, assuming that this point should be decided against him, he contended that he had become tenant from year to year, and that his tenancy had not been determined by any good notice to quit.

On the first point the counsel for the plaintiff contended that it had been already

C decided in their favour by this court, in *Doe d. Earl of Egremont v. Forwood* (3). It is remarkable that, in the judgment in that case, not a word is said on this point, and what is reported to have dropped from the judges in the course of the argument seems against the plaintiff; but as the judgment could not have passed for him unless the court thought that there had been a good surrender of a valid lease, it must be taken that they did so hold under the circumstances of that case.

D There the former lease was particularly described in the invalid one, which was said to be granted for the consideration of the surrender of such former one, adding "which is hereby surrendered accordingly"; and that the sum of £157 10s. was paid by the lessee to the lessor. This surrender was relied on by the counsel in that case as being an express surrender, and as taking it out of the principle of the decision in *Roe d. Earl of Berkeley v. Archbishop of York* (4), and bringing

E it within that of *Farmer d. Earl v. Rogers* (5). That case, however, turned on no distinction between an express and an implied surrender, but on whether the note in writing there relied on was a sufficient surrender to satisfy the Statute of Frauds. Nor is there anything in the judgment that was given in *Doe d. Bishop of Rochester v. Bridges* (6), a case also referred to, which points to the importance of the distinction. The surrender there of the valid lease was by a deed poll executed

F a few days before the valid lease; and the consideration of such surrender was not stated to be the granting of a new lease; and, what is more important, the new lease, as the judgment remarks (1 B. & Ad. at p. 860) was in terms precisely conformable to the intent mentioned in the deed poll:

"The surrenderor obtained exactly the lease for which he bargained, and, therefore, it cannot be said that the new lease was a fraud or deception upon him; and if the surrender be deemed conditional [that is, on the granting

G a new lease as stipulated for], the condition has been complied with."

It was said on behalf of the defendant in the present case that the surrender in *Doe d. Earl of Egremont v. Forwood* (3) was taken to be express, and that in the present case it was only implied; that in that case it was found that, on the execution of

H the second, the first was, in fact, delivered up to the lessor, but that, in the present case, no such delivering up was proved. This difference, in fact, was relied on to distinguish the two cases, but it is not made out satisfactorily. In *Doe d. Earl of Egremont v. Forwood* (3), the ground for calling the surrender express was the introduction of the words "which is hereby surrendered accordingly"; in the present case were the words "which surrender is hereby made," which are equivalent

I words. On the words "hereby surrendered accordingly," in *Doe d. Earl of Egremont v. Forwood* (3), PATESON, J., is reported to have said (3 Q.B. at p. 639): "that is, on the supposition of a new lease being granted," referring to the consideration immediately before expressed. As to the delivery up of the old lease, the fact was not shown either way on the trial in the present case, nor was any point made of that on either side. But this fact can only be evidence of the intention, which was not needed in this case, but would not be in itself a surrender. In *Roe d. Earl of Berkeley v. Archbishop of York* (4), the fact existed together with cancellation, and yet the surrender was not held to be complete.

But then it was said that the whole doctrine which vacated the surrender of a prior lease, whether express or implied, where the consideration is a grant of a new lease, applied only to the case where such new lease was void, and not where it was merely voidable; that here, in fact, the second lease was not void, it was good as against the grantor, and might have been confirmed by each succeeding tenant for life to its expiry by the efflux of time. We have had occasion to consider this doctrine in another case of the same sort, and to examine the decisions at some length, and we need not now repeat that examination, contenting ourselves with saying the principal to be found laid down by LORD MANSFIELD in *Wilson v. Sewell* (1) (4 Burr. at p. 1980) and *Davison d. Bromley v. Stanley* (2) (4 Burr. at p. 2213) seems to us the true one; that, when a new lease does not pass an interest according to the contract, the acceptance of it will not operate as a surrender of the former lease; that, in the case of a surrender implied by law from the acceptance of a new lease, the condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and that in case the express surrender is so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such an instrument, in order to effectuate the intention of the parties, would make the surrender also conditional, to be void in case the grant should be void: see *Doe d. Biddulph v. Poole* (7). Tried by this principle, we are, on consideration, satisfied that the lease of 1755 was not a surrender, and that it was a good answer to the action. Our decision on this point makes it unnecessary to consider the validity of the notice to quit, and the rule for entering a nonsuit will be absolute.

Rule absolute.

THOMAS v. THOMAS

[COURT OF EXCHEQUER (Parke, Alderson, Rolfe and Platt, BB.), February 7, 15, 1850]

[Reported 5 Exch. 28; 1 L.M. & P. 229; 19 L.J.Ex. 175;
14 L.T.O.S. 467; 14 Jur. 180; 155 E.R. 13]

Tenant in Common—Claim against co-tenant—Share of rent—Money had and received—Action for account.

A tenant in common brought an action for money had and received against his co-tenant in respect of his share of the rent of the joint property which had been received by that co-tenant.

Held: a tenant in common could not bring an action for money had and received against his co-tenant; the remedy of the plaintiff lay in an action for an account.

Notes. As to the action for money had and received, see 8 HALSBURY'S LAWS (3rd Edn.) 235 et seq.; and for cases see 12 DIGEST (Repl.) 606 et seq.

Cases referred to:

- (1) *Martin v. Crompte* (1698), 1 Ld. Raym. 340; Comb. 474; 2 Salk. 444; 91 E.R. 1123, Ex. Ch.; 31 Digest (Repl.) 293, 4298.
- (2) *Midgley v. Lovelace* (1693), Carth. 289; Holt, K.B. 74; 12 Mod. Rep. 45; 90 E.R. 771; 31 Digest (Repl.) 832, 441.

Also referred to in argument:

Cottam v. Partridge (1842), 4 Man. & G. 271; 4 Scott, N.R. 819; 11 L.J.C.P. 161; 134 E.R. 111; 32 Digest (Repl.) 447, 688.

- A** *Sturton v. Richardson* (1844), 13 M. & W. 17; 2 Dow. & L. 182; 13 L.J.Ex. 281; 8 Jur. 476; 153 E.R. 7; sub nom. *Richardson v. Sturton*, 3 L.T.O.S. 164; 20 Digest (Repl.) 288, 303.
Wilkin v. Wilkin (1691), 1 Salk. 9; 91 E.R. 8; 1 Digest (Repl.) 509, 1447.
Tomkins v. Willshear (1814), 5 Taunt. 431.
Goodtitle v. Tombs (1770), 3 Wils. 118; 95 E.R. 965; 38 Digest (Repl.) 931, 1218.
- B** *Baxter v. Hozier* (1839), 5 Bing.N.C. 288; 7 Scott, 233; 8 L.J.C.P. 169; 132 E.R. 1115; 1 Digest (Repl.) 497, 1355.
Clarance v. Marshall (1834), 2 Cr. & M. 495; 4 Tyr. 147; 3 L.J.Ex. 142; 149 E.R. 856; 12 Digest (Repl.) 621, 4802.
Eason v. Henderson (1848), 12 Q.B. 986; 18 L.J.Q.B. 69; 13 Jur. 150; reversed sub nom. *Henderson v. Eason* (1851), 17 Q.B. 701; 21 L.J.Q.B. 82; 16 Jur. 518; 117 E.R. 1451, Ex. Ch.; 20 Digest (Repl.) 288, 304.
- C**

Rule Nisi obtained by the defendant to enter a nonsuit in an action of assumpsit for money had and received.

- At the trial, before ROLFE, B., at the Hertfordshire Summer Assizes, 1849, it appeared that the plaintiff and one Benjamin Thomas, the defendant's late husband, were entitled under the will of one Alice Thomas to certain premises as tenants in common which were let to a tenant from year to year, but that Benjamin Thomas, on the death of the testatrix, believing he was entitled to the whole of the premises, entered into sole possession, and for some time previously to his death in February, 1848, received the whole rent until the plaintiff, discovering that he was entitled to half the rent, brought the present action to recover five years' rent.
- E** For the defendant it was contended that the plaintiff ought to be nonsuited on the ground that this form of action would not lie by one tenant in common against his co-tenant. ROLFE, B., refused to nonsuit and gave judgment for the plaintiff leave being reserved to the defendant to move to enter a nonsuit. The defendant obtained a rule accordingly.

- F** *Whately, Q.C.*, and *Cook* for the plaintiff, showed cause against the rule.
Keating, Q.C., for the defendant, supported the rule.

Cur. adv. vult.

- Feb. 15, 1850. **PARKE, B.**, delivered the following judgment of the court.—The question reserved for the consideration of the court is whether an action for money had and received will belie one co-tenant in common against another. On the argument the authorities on this subject on both sides were cited; but, it appears to us clear, on consideration of the authorities which are to be found in Co. Litt. 200, b, that at common law one tenant in common cannot have an action for money had and received against the other; for in the passage in Co. Litt. are to be found the several cases in which one tenant in common may maintain an action against another, in which it was said, that if there be two tenants in common of a chattel, one cannot maintain an action against the other for the value, but must seek only to recover it from the other, unless the chattel be destroyed, and other proceedings of the same kind are put; and that no action of account will lie at common law, unless the plaintiff who brings it has constituted the other a bailiff or receiver of the money. That was obviated by the Administration of Justice Act, 1705, s. 27 [repealed by Law of Property (Amendment) Act, 1924] which gives
- I** power to one tenant in common to bring an action of account against the other, considering him as his bailiff or receiver. In an action of account by one tenant in common of a chattel, or in a case where he would not be absolutely responsible for the money received, the defendant would be able to show that the money had been lost without his default; whereas, in an action for money had and received, he would be liable to an action for the money. The Act of 1705, therefore, does not give anything more in an action of account than that the receiver would be entitled to all allowances. Not so in an action for money had and received.

It appears to us clear, therefore, that the action will not lie: *Martin v. Crompe*

(1) and *Midgley v. Lovelace* (2), where it is said that one tenant in common in reversion may sever in an action, if the other recover a moiety of the sum due; that is, if the rent be £20 and the other recover £10 he can only recover his moiety of the rent. The case of one tenant in common receiving the whole rent, is analogous to the case of one tenant in common taking the whole of a chattel into his possession. The law is clear on the point that an action of trespass or trover would lie in such case, and by analogy no action for money had and received would lie, but the only remedy is an action of account. Therefore, the rule must be made absolute.

Rule absolute.

SIMPSON v. LESTER

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), December 10, 1858]

[Reported 33 L.T.O.S. 6; 4 Jur.N.S. 1269]

Will—Apportionment—Exclusion of rule in Howe v. Earl of Dartmouth—Application leading to result contrary to intention of testator.

A testator by his will gave successive interests in his residuary estate and directed his trustees "to sell all or any part of my last-mentioned real and personal estate at their discretion . . ." At his death he possessed large mining interests, and in an action for the administration of his estate it was claimed on behalf of an infant remainderman that the mining property should be valued at the expiration of one year from the death of the testator, that interest on the value at 4 per cent. per annum should be paid to the tenants for life, and the remainder of the annual income invested for the benefit of those interested in remainder, according to the rule in *Howe v. Earl of Dartmouth*.

Held: where there was sufficient indication in a will that the operation of the rule in *Howe v. Earl of Dartmouth* would lead to a result contrary to the intention of the testator the rule would not be applied; in the present case the will showed such an indication; and, therefore, the trustees were not bound to convert immediately.

Notes. Referred to: *Gray v. Siger* (1880), 15 Ch.D. 74.

As to the rule in *Howe v. Earl of Dartmouth*, see 16 HALSBURY'S LAWS (3rd Edn.) 318 et seq.; and for cases see 44 DIGEST 201 et seq.

Case referred to:

(1) *Howe v. Earl of Dartmouth* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 44 Digest 197, 265.

Also referred to in argument:

Morgan v. Morgan (1851), 14 Beav. 72; 51 E.R. 214; 44 Digest 202, 316.

Thornton v. Ellis (1852), 15 Beav. 193; 16 Jur. 236.

Pickering v. Pickering (1839), 4 My. & Cr. 289; 8 L.J.Ch. 336; 3 Jur. 743; 41 E.R. 113, L.C.; 44 Digest 201, 302.

Bowden v. Bowden (1849), 17 Sim. 65; 60 E.R. 1052; 44 Digest 206, 349.

Action for the administration of the estate of a testator, James Brown Simpson.

The testator, by his will dated June 15, 1855, after making several specific devises of land, and bequests of legacies and annuities, bequeathed as follows:

A "I give, devise, and bequeath to my brother-in-law William Lester, my dear wife Hutton Simpson, my said clerk Joseph Brown, and my nephew William Carruthers of Lancaster, all other my real and personal estates whatsoever and wheresoever, including my mining property and shares in mines and minerals (subject, nevertheless, to the annuity and legacy hereinbefore bequeathed), in trust for my dear wife during her natural life, so long as she continues my widow, and after her decease or second marriage, in trust as to two-thirds of the annual income for my son James during his life, and after his decease in trust for his issue in tail general; and the remaining one-third to accumulate during the life of my said son for his younger children. And in default of issue of my said son, the whole to be in trust for my nephews and nieces absolutely in equal shares as tenants in common. And I hereby authorise and empower my said trustees to sell all or any part of my last-mentioned real and personal estate, at their discretion, and to invest the moneys arising therefrom in mortgage of real estates and railway shares or debentures."

D The testator died on June 16, 1855, possessed of mining property of large annual value, and of other property; and a suit was instituted for the administration of his estate. In that suit a claim was made on behalf of his infant son, that the mining property should be valued at the expiration of one year from the death of the testator, that interest on the value at the rate of £4 per cent. should be paid to the tenants for life, and the remainder of the annual proceeds invested for the benefit of those in remainder.

E *Glasse, Q.C.*, and *H. Humphreys* for the plaintiff, an infant, interested in remainder in the testator's estate.

Baily and Martindale for the tenant for life.

F **KINDERSLEY, V.-C.**—This is a very strong case for saying that the rule in *Howe v. Earl of Dartmouth* (1) is not to be followed in the present instance. The rule is purely artificial, and proceeds upon the footing that where the testator gives the residue of his estate to A. for life and after his death to another person, it is assumed he must mean that the identical corpus which is to be enjoyed by the tenant for life shall go untouched and undiminished to those in remainder. It is purely an artificial rule, and is often calculated to defeat what the testator would have wished; and slight circumstances will be sufficient to show that the rule is not to be put in force.

G H I The rule in *Howe v. Earl of Dartmouth* (1) is that where the court thinks that the testator meant the same identical corpus to be enjoyed by several persons in succession, he must have meant that intention to be effectuated, and if it could not be effectuated by other means, by an immediate sale and conversion. But here, so far from wishing an immediate sale, the testator says the trustees are themselves to exercise a discretion as to when the property is to be sold, or whether it is to be sold at all. That is inconsistent with the idea that there is to be a peremptory direction for a sale that the trustees cannot depart from, which was the case in *Howe v. Earl of Dartmouth* (1). Then we have this state of things: the testator has first given a specific part of his property to one person; then a certain part of his real property to his son; and then he says [His Honour read the will as above stated]. I think that I have much more in this case to prevent the conversion than there was in many of the other cases cited. I declare that the trustees are not bound to convert immediately.

BODENHAM v. HOSKINS

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), June 9, 10, 1852]

[Reported 21 L.J.Ch. 864; 19 L.T.O.S. 294; 16 Jur. 721]

Bank—Duty of bank—Duty to honour customer's cheques—Inquiry as to purpose and operation of account—Notice that account opened by customer as agent—Money drawn for customer's private purposes.

As between banker and customer the banker looks only to the customer in respect of the account opened in that customer's name. Whatever cheques the customer chooses to draw the banker must honour. He is not to inquire for what purpose the customer opened the account; he is not to inquire what the moneys are that are paid into that account; and he is not to inquire for what purpose moneys are drawn out of the account. But it is otherwise if the banker has notice that an account was opened by a customer as an agent for another person whose money is paid into the account, and that the customer is drawing on that account for his own private purposes.

Three accounts were opened by a customer with his bankers, one of which was called the "R. estate account." To the knowledge of the bankers this account was opened by the customer as the agent of the owner and as receiver of the rents of the estate. The bankers allowed the customer to draw cheques on the agency account to liquidate a balance due from the customer to the bankers on his own account. In an action by the owner of the estate to recover from the bankers the amount of those cheques,

Held: the bankers were liable to make good to the owner of the estate the sum allowed by them to be drawn from the "R. estate account" and placed to the credit of the customer's private account.

Notes. The decision in this case was affirmed by the Court of Appeal in Chancery (LORD CRANWORTH and KNIGHT-BRUCE, L.JJ.), 2 De G.M. & G. 903, without reasons being given.

Distinguished: *Re Gross, Ex parte Kingston* (1871), 6 Ch. App. 635, n. Considered: *Re Gross, Ex parte Adair* (1871), 24 L.T. 198. Explained and Distinguished: *Macbryde v. Eykyn* (1871), 24 L.T. 461. Distinguished: *Wilson v. Bury* (1880), 5 Q.B.D. 518. Considered and Applied: *Greenwell v. National Provincial Bank* (1883), Cab. & El. 56. Distinguished: *Martin v. Roche, Eyton & Co.* (1885), 34 W.R. 253; *Coleman v. Bucks and Oxon Union Bank*, [1897] 2 Ch. 243. Considered: *Bath v. Standard Land Co.*, [1911] 1 Ch. 618. Referred to: *Bailey v. Johnson* (1871), L.R. 6 Exch. 279; *Pearson v. Scott* (1878), 9 Ch.D. 198.

As to a banker's duty with relation to a customer's account, see 2 HALSBURY'S LAWS (3rd Edn.) 166 et seq.; and for cases see 3 DIGEST (Repl.) 192 et seq.

Cases referred to in argument:

M'Leod v. Drummond (1805), 14 Ves. 353; on appeal (1810), 17 Ves. 152; 34 E.R. 59, L.C.; 24 Digest (Repl.) 624, 6195.

Keane v. Roberts (1819), 4 Madd. 332; 56 E.R. 728; 3 Digest (Repl.) 200, 409.

Pannell v. Hurley (1845), 2 Coll. 241; 63 E.R. 716; 3 Digest (Repl.) 197, 392.

Wilson v. Moore (1834), 1 My. & K. 337; 39 E.R. 709, L.C.; 24 Digest (Repl.) 627, 6219.

A.-G. v. Wilson (1840), Cr. & Ph. 1; 10 L.J.Ch. 53; 4 Jur. 1174; 41 E.R. 389, L.C.; 13 Digest (Repl.) 339, 1444.

Wren v. Kirton (1805), 11 Ves. 377; 32 E.R. 1133, L.C.; 39 Digest (Repl.) 75, 863.

Foley v. Hill (1848), 2 H.L.Cas. 28; 9 E.R. 1002, H.L.; 3 Digest (Repl.) 177, 289.

A *Salway v. Salway* (1827), 4 Russ. 60; on appeal (1831), 2 Russ. & M. 215; 9 L.J.O.S.Ch. 152; 39 E.R. 376, L.C.; affirmed sub nom. *White v. Baugh* (1835), 9 Bli.N.S. 181; 3 Cl. & Fin. 44, H.L.; 39 Digest (Repl.) 75, 864.

B Bill filed by the owner of an estate called the Rotherwas estate, in the county of Hereford, against the defendants, bankers at Hereford, to charge them with a sum of £829 11s. 9d. improperly allowed by them to be drawn out of their hands by the receiver of that estate appointed by the plaintiff.

Bethell and *E. W. Collins* for the plaintiff.

Stuart and *W. Wright* for the defendants.

C **KINDERSLEY, V.-C.** The doubt that has from time to time crossed my mind in this case was chiefly whether the facts were stated in the pleadings with that degree of particularity as that I could say there had been a full opportunity for the defendants to meet those allegations of fact by the evidence which they might be able to adduce. Now that I have become more acquainted with what is contained in the pleadings, I feel myself in a condition, without waiting to look through the pleadings more in detail, to express my opinion in this case.

D I will first consider the case as between the plaintiff and Parkes—that is, what was the state of things as between the plaintiff and Parkes in the course of these transactions?—and then consider what was the relation of the defendants, the bankers, towards Parkes in the matter, and how far the plaintiff, upon that state of things, is entitled to the decree which he asks against the defendants. As between the plaintiff and Parkes, the matter seems to have stood thus. The plaintiff was the owner of the Rotherwas estate and considerable property in the neighbourhood of Hereford, and it seems that he had employed as his solicitor and agent and receiver a gentleman of the name of Blount. Mr. Blount being about to give up his employment, sold his business, or transferred it to Mr. Parkes, who had been previously a solicitor in London. It was arranged between Parkes and Blount that for six months Parkes should use the name of Blount, and, accordingly, **E** an account was opened by Parkes, with the concurrence of Blount, with these bankers, in the joint names of Blount and Parkes. It was intended that that should not continue longer than six months. When that account ceased—in short, when Parkes was to use his own name exclusively in the matter—or shortly after that period, he was employed by the plaintiff as his solicitor, succeeding Blount in that employment. Shortly after that period again (all within the period of a very few **G** months or even weeks), Parkes was employed by the plaintiff as his receiver and agent in respect of the Rotherwas estate, apparently in the same manner as Blount had been employed before. Parkes, on the putting an end to the joint account in the names of Blount and Parkes with the bankers, opened a private account of his own on June 23, 1846. When he came to be appointed the receiver of the rents and profits of the Rotherwas estate by the plaintiff, he very properly opened another **H** account with the bankers for the purpose of placing to the credit of that account with the bankers the sums which he might receive in respect of the rents and profits of the Rotherwas estate, and drawing from the account the sums which he might have to pay on account of the Rotherwas estate or to his employer, the plaintiff. As between the plaintiff and Parkes, that account, although unquestionably it was the account of Parkes and the bankers were to look to Parkes as the **I** only person entitled to draw upon the account, was opened by Parkes for the purpose of keeping in that form an account of the receipts and payments by Parkes as receiver in respect of the Rotherwas estate, Parkes very properly entitled the account as the “Rotherwas estate account,” which distinctly marked it, at all events as between him and the plaintiff, as being the account of the Rotherwas estate. How far it marked it as between Parkes and the bankers, I shall have occasion to refer to presently. With a third account, called the “general account,” which Parkes opened, the plaintiff had nothing to do.

Whatever balance might from time to time be standing to the credit of the

Rotherwas account, it is quite clear that, as between the plaintiff and Parkes, A
 Parkes would violate his duty if he applied any part of that balance to any purpose
 of his own—if, for example, he had drawn out that money and applied it to any
 purpose of his own, the bankers knowing nothing of the matter, still, as between
 Parkes and the plaintiff, it would be a gross breach of that duty which Parkes
 owed to the plaintiff, not to apply the moneys which should arise from the
 Rotherwas estate to any other purposes than the purposes of the plaintiff. B
 When, therefore, Parkes drew a cheque on July 9, 1847, for £829 and a frac-
 tion, which was then the balance standing to the credit of the Rotherwas
 account, in order that the amount of that cheque might go towards the liquidation
 of the separate account of his own on which he was debtor, without at present
 saying how far the bankers were affected by that, as between Parkes and the plain-
 tiff it was a breach of trust committed by Parkes as against the plaintiff. C
 It was a fraud, in fact, committed upon the plaintiff—a misappropriation by Parkes of
 that which was money belonging to the plaintiff for purposes of Parkes. That, I
 conceive, is beyond all question the condition of things, and, whether or not the
 bankers have made themselves liable, as far as Parkes is concerned, there was a
 great breach of duty. As the agent or receiver of Mr. Bodenham, the plaintiff, he
 clearly was in one sense a trustee for him—there was a fiduciary character created D
 between the plaintiff and Parkes. I do not know that it is very material whether
 what occurred be technically called a breach of trust on the part of Parkes, but at
 all events it was a breach of duty which Parkes owed to the plaintiff, standing
 towards him in a fiduciary character in respect of the moneys which, as receiver
 of the Rotherwas estate, he received in respect of the rents and profits.

I approach the question as to how far the bankers (the defendants) were in any E
 way participators in this misconduct of Parkes. Participators in the act they were,
 but it does not follow because they were so, they were participators in the fraud
 of Mr. Parkes. Let us see, therefore, what was the position of the bankers in the
 matter. I entirely agree with many of the observations that have been made by
 counsel for the defendants, that as between banker and customer, in a naked case
 of banker and customer, the banker looks only to the customer in respect of the F
 account opened in that customer's name. Whatever cheques that customer chooses
 to draw the banker is to honour. He is not to inquire for what purpose the cus-
 tomer opened the account; he is not to inquire what the moneys are that are paid
 into the account; and he is not to inquire for what purpose moneys are drawn out
 of the account. That is the plain general rule as between banker and customer.
 Let us see whether that naked state of circumstances existed in the present case. G
 The first transaction or circumstance that appears important to notice first in point
 of date appears to be the interview which, on June 10, 1846, took place between
 Parkes and Mr. Hamp (one of the partners), and Spozzi, a clerk or cashier of the
 bankers. It appears that at this time there was a considerable balance, I think
 somewhere about £1,200, to the credit of the joint account which I have mentioned
 had been opened in the names of Blount and Parkes, but the six months during H
 which Parkes was to keep that account open, that is, to use the name of Blount,
 were nearly expired, and Parkes represented to the bankers, that is, represented
 to Mr. Hamp and Mr. Spozzi, the cashier on that occasion, that he would have
 occasion to draw largely for purposes of his own, and wished to know whether they
 would honour his cheques, that is to say, allow him to overdraw the account which
 he had with them. One can easily conceive there would be some hesitation in I
 acceding to that proposal, and Mr. Hamp very fairly, I think, said: "Well, if we
 are to do this for you, you ought to be doing something for us, we should expect
 some sort of return of obligation," and, whether suggested originally by the bankers,
 or offered by Parkes, this at least took place. Parkes told the bankers that he
 would introduce to them the Rotherwas account.

Referring to the statement in the evidence of Parkes upon this part of the case,
 I find that he represents it thus. After stating what I have already adverted to,
 which is not precisely material to the present case, the particulars of that account

A opened in the names of Blount and Parkes, he states this that when that joint account was closed the balance standing to the credit of that account was transferred to the credit of his own account which he himself opened, and which I should observe was not opened until some days after this interview. It was on June 26, 1846, that the private account was opened, and the interview I have adverted to was on the 10th, just before the opening of the private account. He speaks of the
B separate account, and then goes on thus :

“The book produced and shown to me at this, the time of my examination, marked with the letters A.B., is the passbook, wherein such private or office account was kept by the said defendants, the bankers. Before the said joint account was closed, and on or about June 10, 1846, while there was a balance to the credit of the said joint account of £1,337 or thereabouts, I had an interview at the defendants’ banking-house, with the defendant Francis Hamp and Mr. Spozzi, the cashier of the bank, touching certain pecuniary engagements to persons in London which I was about to be called upon to meet. The six months during which I was entitled to use the name of the said Charles Blount had then nearly elapsed, and it was consequently in contemplation to close the said joint account, and open a separate account. The object of that interview was to obtain leave from the defendants, the bankers, to overdraw my account, from time to time, as might be necessary, to the extent of about £1,500 for the purpose chiefly of making certain payments in London, and also temporarily the expenses of my business in Hereford. On my making the application in question, the said Francis Hamp, in the presence of Mr. Spozzi, said that he and Nathaniel Morgan, ‘the two partners, would assent to it, and that they would communicate with the said K. Hoskins, who would no doubt also concur in it.’ [Those are the three partners of the bank.] In the course of the interview, the said Francis Hamp said to me : ‘I understand from Mr. Spozzi, that you intend to introduce the Rotherwas account; you ought to do something for us if we help you.’ ”

F I confess it does not appear to me that the use of the word “introduce” there, which occurs more than once, is important. It is evidently not the splitting of a pre-existing account into two, for the mere convenience of the individual keeping the account; it was a holding out to the bankers, or a conception on the part of the bankers, that there was held out to show the introduction to them, that is, the opening with them, of some account which would be for their benefit. Whether the benefit that they were to derive from that was the benefit merely of having an additional customer, an additional account on which there would be generally some balance, or whether they contemplated something beyond that, namely, that when allowing Parkes to overdraw his account they might appropriate the balance which might be to the credit of the Rotherwas account to protect themselves against loss, this, at all events appears to me to be clear in this transaction, that the question of the opening of the Rotherwas account was mooted as the introduction to them of
H some account which was to be for the benefit of the bankers. Parkes goes on to say :

“I said that I did intend to introduce that account when I became the plaintiff’s receiver, and the said Francis Hamp then asked me two or three questions as to the rental of the Rotherwas estate, and the balance that would probably be kept on the account. I told him that the rental was about £6,000 a year, and the balance I would keep as large as I could—that it would probably average about £1,000. He then said that he was satisfied. The arrangement then entered into between the said Francis Hamp, on behalf of the defendants, the bankers, and myself, was undoubtedly that I should be allowed to overdraw my separate account when the same was opened, if I would introduce to the bank the account of the rents of the Rotherwas estate, so soon as under my arrangements with Charles Blount I became the receiver thereof. I did certainly promise the said Francis Hamp, or lead him to understand, that on my

becoming such receiver I would open the last-mentioned account at the banking-house of the defendants."

There was no evidence given on the subject of this interview in any way contradicting this. The bankers knew this was a receivership account in respect of the rents and profits.

On Oct. 26, 1846, when the Rotherwas account was actually opened, another person intervened, who is examined as a witness, for the precise act of opening the account was not by Parkes himself going to the bankers, but by his sending Mr. Ward, his clerk. Mr. Ward states :

"I was directed by Mr. Parkes, in the month of October, 1846, to open an account with the house of Messrs. Hoskins & Co. of Hereford, bankers, which was then composed of Kedgwin Hoskins, Nathaniel Morgan, Francis Hamp (since deceased), and Joseph Morgan for him, Mr. Parkes, in the name of the Rotherwas estate account. I accordingly attended at the bank of Messrs. Hoskins & Co. in Hereford, on Oct. 26, 1846, opened the account, and paid to the credit of it the sum of £700. I stated to Mr. Spozzi, by Mr. Parkes's directions, that the account was to be opened under the title of the 'Rotherwas Estate Account,' that the cheques which he (Parkes) would draw upon it would be so endorsed as the money which would be paid into the account belonged to Mr. Bodenham [the plaintiff], and that he (Parkes) wished it to be kept separate from the other account which he had with the bank. The sum of £700, which I paid in to the credit of the account consisted of rents arising from the Rotherwas estate, which had been received by Mr. Parkes and belonged to the plaintiff, and was, to the best of my recollection, chiefly composed of country bank notes. Mr. Parkes had, at that time, another account with the bank, entitled 'Office Account,' which related to his business as a solicitor; and in the ensuing month of December he opened a third account."

Whatever doubt might exist on Parkes's evidence, here is Mr. Ward's evidence, showing that when the account was opened at the moment when the very first sum was paid in to the credit of that account, the bankers were distinctly informed of the reason why it was to be kept as a separate account, why the cheques were to be entitled with the words "the Rotherwas account," namely, because the moneys which had been paid in to that account belonged to Mr. Bodenham, the plaintiff. It appears to me beyond all question, therefore, that from the very commencement of that account the bankers knew that the moneys paid in to it were the moneys of Mr. Bodenham arising from the rents and profits of his Rotherwas estate, and that the account was kept by Parkes, not as an account of his own in relation to his own moneys, but in his character of receiver to Mr. Bodenham's Rotherwas estate.

Whether the bankers in their own minds, or even in their own books, if the fact had been so, treated the Rotherwas account as if it had been the private account of Mr. Parkes—whether they did so or not, the question is whether they had a right to do so—whether they had a right to say, knowing from the outset that the money placed to that account was Mr. Bodenham's money, and that any balance standing to the credit of that account at any time was Mr. Bodenham's balance, that they would make such an arrangement with Mr. Parkes that at any time they should be at liberty to appropriate the balance to the credit of that account towards the liquidation of the balance standing to the debit of the private account of Mr. Parkes. It appears to me that on every principle of equity they had no right to do so. It appears to me that it is not a question whether simply at the time when the cheque was drawn for the £829 on the estate account they had a right then to allow that cheque to be placed to the credit of the other account, the private account of Parkes, but whether they had a right ever to make an arrangement with Parkes to that effect, if the arrangement was made, or intended to be made, whether they had a right to say that the receiver should so deal with them as to make his principal's money at any time liable to be appropriated to discharge the private

A debt of the receiver to the bankers. I am quite satisfied that upon all principles of equity that could never be done. I do not think there is to be imputed to these gentlemen any design to do that which in their minds was dishonest or improper. I believe they had no such intention. All I think that I can impute to them is that they were not aware that according to the principles—the moral principles of a court of equity, and acted upon daily by a court of equity—a person who deals with another person who he knows to have in his hands, or under his control, moneys belonging to a third person, cannot deal with the individual holding those moneys for his own private benefit when the effect of that transaction is that that person commits a fraud on a third person. That Parkes was committing a fraud in appropriating to his own purposes the money of his employer, is beyond question. The bankers did not seem to be aware that they had no right, and that Parkes had no right, to enter into any arrangement the effect of which was to make the money (although Parkes was the only person who could draw on that particular account) liable for any deficiency that might exist upon the private account of Parkes.

I do not know that in the view which I take of this case, it is necessary to consider whether the bankers from time to time, in the course of the transactions, considered what were the circumstances. Some witnesses laboured very much to repeat that Bodenham, the plaintiff, never told them that these were his moneys; that he never told them that this was his account; that he never claimed to have any control over the account, and so on, but that is not the question. Again, it appears to me immaterial to consider whether the bankers treated the three accounts as the accounts of one single customer. It appears to me to be immaterial what view the bankers took between the time when the Rotherwas account was opened and July 9, 1847, when the balance of that account was transferred to the credit of Parkes's private account, because I find at the very opening of the account, nay, some months, three months at least, before the opening of that account, the bankers were well aware that that account was the account of Mr. Parkes, as receiver of the Rotherwas estate, that the moneys which were to be paid in to the credit of the account were the moneys of Mr. Bodenham, and that it was for these very reasons that that account was to be kept as a separate account, and so headed. I am constrained to arrive at the conclusion that the bankers, although I must exonerate them from any deliberate intention to commit a fraud, were not only parties to the simple fact of the transfer, but were parties to the fraud in question in this sense—that they were aware of the circumstances which made it a fraud in Parkes to make the transfer to his private account, and, being cognisant of that throughout, they concur in a transaction the effect of which was that for their own pecuniary benefit an act was done by Parkes which is a fraud upon the plaintiff. According to the plain principles of a court of equity such an act never can be sustained; a person cannot retain the benefit which he has derived from being a party to such an act, with such knowledge of the nature of the act.

I am, therefore, under the necessity of decreeing the repayment of the £829 11s. 9d. by the defendants, the bankers, to the plaintiff. With respect to the question of interest, it appears to me that I cannot give any higher interest than the interest which the bankers allowed upon the account. If there had been no interest allowed, it does not appear to me that I could give any interest at all, but considering that this was transferring to the detriment of Mr. Bodenham from an account which was yielding interest, a sum of money which, if it had still stood there, would be bearing interest, I think it ought to be with interest at the same rate at which the interest was allowed by the bankers.

Decree accordingly.

THOMPSON v. WHITMORE

[VICE-CHANCELLOR'S COURT (Page-Wood, V.-C.), November 16, 17, 19, 1860]

[Reported 1 John. & H. 268; 3 L.T. 845; 9 W.R. 297; 70 E.R. 748]

Mistake—Document—Rectification—Marriage settlement—Trusts not expressing intention of parties—Need to show mutual mistake of husband and wife.

A deed of marriage settlement will only be rectified on the ground of mistake where such mistake has been mutual on the part of both husband and wife. Proof of an intention on the part of only one party different from the trusts as declared in the settlement is not sufficient.

Mistake—Rectification—Right of volunteer under settlement to have error rectified.

A volunteer under a settlement declaring the trusts of property placed in the hands of trustees is entitled to file a bill stating that the trusts had erroneously declared the intention of the parties, and, on making out his case, to have the error rectified, even though the effect of the error would be to carry back the fund to the original settlor.

Notes. Referred to: *Hall-Dare v. Hall-Dare* (1885), 31 Ch.D. 251; *Weir v. Van Tromp* (1900), 16 T.L.R. 531.

As to rectification of an instrument in the case of mistake, see 26 HALSBURY'S LAWS (3rd Edn.) 914 et seq.; and for cases see 35 DIGEST (Repl.) 135 et seq.

Case referred to:

(1) *Duke of Bedford v. Marquess of Abercorn* (1836), 1 My. & Cr. 312; 5 L.J.Ch. 230; 40 E.R. 394, L.C.; 40 Digest (Repl.) 523, 341.

Also referred to in argument:

Ashhurst v. Mill, Mill v. Ashhurst (1848), 7 Hare, 502; 18 L.J.Ch. 129; 12 Jur. 1035; 68 E.R. 208, L.C.; 35 Digest (Repl.) 121, 197.

Barstow v. Kilvington (1800), 5 Ves. 593; 31 E.R. 755, L.C.; 40 Digest (Repl.) 581, 853.

Re Morse's Settlement (1855), 21 Beav. 174; 25 L.J.Ch. 192; 26 L.T.O.S. 163; 2 Jur.N.S. 6; 4 W.R. 148; 52 E.R. 825; 40 Digest (Repl.) 619, 1132.

Marquess of Breadalbane v. Marquess of Chandos (1837), 2 My. & Cr. 711; 7 L.J.Ch. 28; 40 E.R. 811, L.C.; 35 Digest (Repl.) 144, 352.

Action for the rectification of a marriage settlement dated April 23, 1838, alleging that the intention of the parties that the trusts thereby declared to take effect "in case there shall be no child of the [marriage] or being such, he or she or they shall all die under the age of twenty-one and unmarried in the lifetime of the [wife]" should take effect whether such deaths under twenty-one and unmarried should take place in her lifetime or not and the words restricting such trusts to the event of all such deaths happening in her lifetime were introduced into the settlement by mistake and contrary to the intention of the parties.

By deed dated April 23, 1838, a settlement in consideration of marriage was made between, the intended husband William H. Bainbrigg; the intended wife Maria M. Thompson, and three trustees; whereby securities etc., were settled on the wife for life and if the husband survived in trust to pay him an annuity of £100; and subject thereto and to the power of appointment thereafter contained in favour of the husband, in trust for all such children of the marriage as should attain twenty-one or marry; with power to the wife, if there should be any children of the marriage living at her death, to appoint to the husband the whole or part of the trust fund for such part of his life as there should be children of the marriage in being; and also a power of appointment by the wife in case she should survive the husband in favour of children by a future husband.

A "But in case there shall be no child of the marriage or being such, he, she, or they shall all die under the age of twenty-one and unmarried in the lifetime of the wife"

B then if the husband should die in her lifetime on trust for the wife absolutely; but if the husband should survive the wife then subject to the aforementioned interest of the husband, the trustees to stand possessed of £4,000 in trust for the wife's brother, William Knight Thompson, if he should be living at the death of the wife, but if he should be dead, in trust for his children as thereinmentioned and as to the residue of the trust fund in trust for such persons as the wife should appoint and in default of appointment in trust for her next-of-kin as if she had died intestate and unmarried.

C The wife died on Jan. 29, 1844, without having exercised her power of appointment among children, survived by her husband, three children and her brother, William Knight Thompson. By her will dated Jan. 12, 1844, she appointed the trust fund in case any children died under twenty-one and unmarried to her husband whom she appointed her sole executor. There were four children of the marriage all of whom died under twenty-one and unmarried, one in the lifetime of the wife and three subsequently up to Aug. 5, 1854.

D William Knight Thompson died on June 16, 1847, and the plaintiffs who filed the bill for rectification of the settlement were his executors and in the events which happened they also claimed the £4,000; this sum was also claimed by the assignee in the bankruptcy of the husband as personal estate of the wife as passing to him as administrator.

E Sir Hugh Cairns, Q.C., Giffard, Q.C., and Roget for the executors of the wife's brother.

Rolt, Q.C., and H. Prendergast for the assignee in bankruptcy of the husband.

Willcock, Q.C., and Southgate for the husband.

Kay and Coates for other parties interested.

F **PAGE-WOOD, V.-C.**—The most important point raised in this case is the question, which was argued with much force, whether a volunteer has any right to have a settlement rectified by putting the trusts into the shape in which they were intended to be declared. I apprehend that it is clear, that, if a trust is declared, and the property placed in the hands of trustees, it is competent for a volunteer to file a bill, stating that the trusts had been erroneously declared contrary to the intention of the parties, and, on making out his case, to have the error rectified, even though the error should be of such a nature as to carry the property back to the original settlor. To this extent, I think the argument is sound.

G Counsel for the husband contended, that, where an instrument has been executed by two parties, partly for their own benefit, but also containing provisions in favour of volunteers, and where both the contracting parties are content with the instrument as it stands, and maintain that there is no error in it, in such a case it is not competent for a volunteer to insist that there is an error in the instrument, and to come to this court to have it rectified. There is a fallacy in this argument, as applied to the present case, because the two parties to the agreement are not here in any other sense than that the husband happens to represent the wife's estate. If it should turn out that there really was an error in the settlement, I am of opinion that it would not be a sufficient answer for the husband to say, that he, as representing both his original interest and that of his late wife, is satisfied that the instrument contains no error at all.

H It is for the plaintiffs to prove the existence of the mistake which they allege to have been committed; but if they can clearly make out such a case, I do not think that the circumstance of the husband having become the representative of his wife's estate, is sufficient to disentitle the plaintiffs to relief, although I am not aware of any case where a person in the position of the present plaintiffs has filed a bill to rectify a settlement. I think, therefore, that I am bound, notwithstanding

ing the plaintiffs represent a volunteer, to enter into the merits, and consider the evidence adduced as to the intention with which the settlement was framed. A

The real question is whether any material mistake is proved on the part both of the husband and the wife. On the wife's side, I think it clear that there was error, though I have some doubt as to the extent of it. Mr. Lace, the solicitor, jotted down certain notes of the verbal instructions which he received for the preparation of the settlement. The memorandum is so brief as to be scarcely intelligible, except to persons very conversant with such matters; and the only way in which it could be used in evidence, was for the purpose of assisting Mr. Lace's memory as to what passed on the occasion, as was done with similar documents in *Duke of Bedford v. Marquess of Abercorn* (1). The memorandum is to this effect: B

"To wife for separate use, then £100 per annum to Mr. B. for life—subject to—for the children by deed or will—in default equally—Proviso half to children of intended marriage," C

which is worked out no doubt correctly in the actual settlement, so as to mean that, in the event of a second marriage, the power should cover all the children, but so that one-half, at least, of the property should go to the children of the then intended marriage. Then it goes on D

"If no children—then £4,000 to W.K.T.—if living, if not, to his children, if any. If none, then as to the £4,000 and residue for such persons as Miss T. by deed or will shall appoint—in default for next-of-kin." E

This, again, when it came to be expounded in the hands of a conveyancer, would naturally be worked out in the ordinary form of limitations to the children to be absolute on sons attaining twenty-one, or daughters attaining twenty-one or being married; but, in this settlement, the vesting is at twenty-one or marriage, both as to sons and daughters. So the note, "if none," though it would, *prima facie*, point to an entire absence of issue, would suggest to a conveyancer the event of no children becoming capable of taking a vested interest under the trusts of the settlement. F

The settlement does give the £4,000 to W. H. Bainbrigge

"in case there shall be no child of the said Martha Maria Thompson, by her said intended husband, or, being such, he, she, or they shall all die under the age of twenty-one years and unmarried in the lifetime of the said Martha Maria Thompson." G

The alteration insisted on is, to strike out the clause "in the lifetime of the said Martha Maria Thompson." But that would not make the gift of the £4,000 coincident with the failure of previous limitations, because the power of appointment is not limited to children attaining twenty-one or marrying, and would be very likely to be exercised to some extent in favour of sons under age. The effect of adopting this alteration would be, in the event of all the children dying under twenty-one, to give Mr. Thompson the £4,000 absolutely, and to leave the residue of the fund to fall under the absolute power of appointment of Mrs. Bainbrigge. H It was suggested that, to prevent an appointment from being defeated by the gift over to Mr. Thompson, the wife might have made an appointment directing out of what part of the trust funds the appointed sum should be taken. It is possible that that might have been done, but, independently of that, the settlement would not be consistent with the proper form of limitation over, "in default of a child living to take a vested interest," which would meet every contingency. I

Being satisfied, therefore, that there was a mistake on the part of the wife, though I cannot see exactly in what way it ought to be rectified, I have now to examine, whether the plaintiffs can say that the husband also married on the faith of the settlement being framed in a form different from that which it actually bears. That cannot be asserted on the evidence before me. Where a settlement contains a variety of provisions, and there is a desire to avoid all delay in the treaty, it may very well happen that some of the clauses are passed over without attention, so

A as to leave the husband unable to say that he had made up his mind as to every particular; but it does not follow that, on all these points, the matter was left absolutely to the lady's discretion, so that a mistake on her side alone would be conclusive on a question of rectification. This would amount to saying, that, whenever the wife's advisers make any mistake, and the husband is unable to say that he would have acted differently if the mistake had been pointed out, there, there

B is a mutual mistake. That cannot possibly be so. The husband's advisers received the settlement in the form in which it stands, and, until the alleged error was brought to their notice, they were not called upon to form any judgment upon the point.

I do not think the husband is bound, in order to sustain the settlement, to say, that, if the error had been pointed out and proposed to be corrected, he would have

C refused his assent to the settlement, or, to say more than he does say, that he took the settlement as it was, and that no new bargain ought now to be forced upon him. The single fact of there being no discussion on a particular point, will not justify the court in saying that a mistake committed on one side must be taken to be mutual. But here, there was discussion on this very point, the husband's advisers objecting to this part of the settlement in toto. A clause, providing absolutely for collaterals in default of children, is most unusual, and was naturally

D protested against. The husband's advisers objected that the clause, as it stood, was too favourable to the brother, and now the contention is, that it was intended to be in a still more favourable shape.

How can I infer, that, if it had been put in such a form, it would have been acquiesced in? It is possible, that the husband might have submitted to this, as he

E did to the actual clause; but I am asked to assume that that must have been the result. The agreement, as it stands, was all that the husband was called upon to consider. The absence of the evidence of Mr. Moss, the husband's solicitor, was rightly commented on. But it is not clear that he observed the alleged mistake. Even supposing the error to have been noticed, the husband's advisers might perhaps say, "You offered a very objectionable settlement; we took as it stood,

F though we protested against it, and it was not for us to correct any error into which you may have fallen." I do not impute any such disingenuousness; but, even if the fact had been so, it would have been very far short of establishing the right of the brother to an additional chance of obtaining the £4,000, the gift of which, in any shape, was protested against by the husband. The more reasonable supposition is, that the form of the clause was not very much considered. There

G was discussion as to the objectionable character of the clause altogether, but none, so far as appears, as to the exact contingencies on which it was to take effect.

No case has gone nearly to the extent to which I am asked to go, in inferring, from such circumstances, the existence of mutual mistake; and there is this additional element of weakness in the case, that the alteration suggested at the Bar would not make the settlement hang consistently together, nor is it easy to say

H what correction would do so. I cannot say that the intention on the wife's side was so clear, that the husband could only have accepted the settlement in the sense which the plaintiffs now insist upon. They have failed to fix upon the husband any notice, that, in the events which have happened, the £4,000 was to go to the brother, and the case is, therefore, not brought up to the point at which the court is justified in interfering. The bill must be dismissed, but, as the parties

I have acted for some time on the plaintiff's view, it must be without costs.

Order accordingly.

BRETTEL AND OTHERS *v.* WILLIAMS AND OTHERS

[COURT OF EXCHEQUER (Parke, Alderson, Rolfe and Platt, BB.), June 20, December 4, 1849]

[Reported 4 Exch. 623; 19 L.J.Ex. 121; 14 L.T.O.S. 255;
154 E.R. 1363]

Partnership—Authority of one partner to bind firm—Act not in ordinary course of partnership business, but reasonable towards effecting partnership purposes—Guarantee given by one partner without authority of other partners.

The defendants, who were in partnership as railway contractors under the name of W., A. & Co., contracted with a railway company to do certain works. W., A. & Co., entered into a sub-contract with U. & R. to do part of the work, and as U. & R., to perform that work, required coals to make bricks, A., without the knowledge or assent of his co-partners, signed in the name of the firm, and delivered to the plaintiffs, a guarantee, not addressed to any person, for the payment for coals to be supplied to U. & R. The plaintiffs having pointed out the omission, a clerk of W., A. & Co. by the direction of A. wrote to the plaintiffs, stating that the guarantee was intended for them. The clerk, also, without the knowledge of the other partners, wrote to the plaintiffs certain letters amounting to evidence of an account stated in respect of the amount due on the guarantee.

Held: (i) the guarantee and subsequent letter together constituted a sufficient memorandum in writing within the Statute of Frauds, 1677; (ii) a partner communicated to another partner or other partners, simply by the creation of the relation of partnership and as incident thereto, all the authority necessary to carry on their partnership in its ordinary course and all such authority as was usually exercised by partners in the same sort of trade, but a partner could not bind another by contracts outside the apparent scope of the partnership business merely because they were reasonable acts towards effecting the partnership business, and, therefore, there being no evidence to show the usage of the defendants in this particular business, or of others in a similar business, or of sanction of the acts of one partner by the others, the firm was not bound by the guarantee.

Notes. As to the power of a partner to bind the firm, see the Partnership Act, 1890, s. 5 (see 17 HALSBURY'S STATUTES (2nd Edn.) 584).

Distinguished: *Re West of England Bank, Ex parte Booker* (1880), 14 Ch.D. 317. Approved: *Small v. Smith* (1884), 10 App. Cas. 119.

As to power of partner to bind the firm, see 28 HALSBURY'S LAWS (3rd Edn.) 503 et seq.; as to memorandum in more than one document, see 8 HALSBURY'S LAWS (3rd Edn.) 96; and for cases see 36 DIGEST (Repl.) 471-472. For the Statute of Frauds (1677), s. 4, see 4 HALSBURY'S STATUTES (2nd Edn.) 658.

Cases referred to:

- (1) *Ex parte Gardom* (1808), 15 Ves. 286; 33 E.R. 762, L.C.; 36 Digest (Repl.) 472, 421.
- (2) *Duncan v. Lowndes and Bateman* (1813), 3 Camp. 478; 170 E.R. 1452, N.P.; 36 Digest (Repl.) 472, 422.
- (3) *Hasleham v. Young* (1844), 5 Q.B. 833; Dav. & Mer. 700; 13 L.J.Q.B. 205; 3 L.T.O.S. 34; 8 Jur. 338; 114 E.R. 1463; 36 Digest (Repl.) 472, 425.
- (4) *Sandilands v. Marsh* (1819), 2 B. & Ald. 673; 106 E.R. 511; 36 Digest (Repl.) 462, 329.
- (5) *Hawtayne v. Bourne* (1841), 7 M. & W. 595; 10 L.J.Ex. 224; 5 Jur. 118; 151 E.R. 905; 1 Digest (Repl.) 370, 413.

A Also referred to in argument :

Blair v. Bromley (1846), 5 Hare 542; 16 L.J.Ch. 105; affirmed (1847), 2 Ph. 354; 16 L.J.Ch. 495; 11 Jur. 617; 41 E.R. 979, L.C.; 43 Digest (Repl.) 410, 4360.

Cross-Rules Nisi obtained in an action of assumpsit on a guarantee for the payment to the plaintiffs of the price of coals to be supplied by them to a firm named Unit & Roberts. There was also a count for money due on an account stated.

B The defendant Aykroyd suffered judgment by default. The defendants Williams and Price, except as to a small sum which they paid into court on the last count, pleaded that they did not promise, and other pleas not material.

At the trial before PLATT, B., at the Worcester Spring Assizes, 1849, it appeared that the defendants, who were in partnership as railway contractors, under the name of Williams, Aykroyd & Co., had contracted with a railway company to do certain works. Unit & Roberts had made a sub-contract with them to do part of the works, and required coals to make bricks for that purpose. As they were not able to procure coals from the plaintiffs on their own credit, Aykroyd signed the following guarantee in the name of the firm :

"Campden, August 16, 1847.

D "Gentlemen—The bearers, Messrs. Unit & Roberts, have a large contract from us for brickmaking, and will require a large quantity of coals. We have no doubt of their stability, and will consider ourselves bound to see their coal bills paid. We are, gentlemen, yours respectfully,

"WILLIAMS, AYKROYD & Co."

E This document not being addressed to anyone, the plaintiffs, on its being presented to them by Unit & Roberts wrote to Williams, Aykroyd & Co., pointing out the omission, and requesting that it might be stated that the guarantee was meant for them. On Aug. 25 one Hamlet, the clerk of the firm, by the direction of Aykroyd wrote to the plaintiffs as follows :

F "The promise to see Messrs. Unit & Roberts' coal bills paid was intended for you. We are, gentlemen, your obedient servants,

"Per pro, WILLIAMS, AYKROYD & Co.,
E. HAMLET."

G On the faith of the above guarantee coals were then supplied by the plaintiffs to Unit & Roberts. Other letters were written to the plaintiffs by Hamlet, on behalf of the firm, which, it was contended, contained evidence of an account stated respecting what was due on the coal account under the guarantee. It was not proved, however, that the defendants Williams & Price authorised the clerk to write those letters, or that they sanctioned or knew of the guarantee.

H It was objected, on behalf of the defendants, that the plaintiffs could not recover on the guarantee : first, because it was not addressed to them; and, secondly, because it was given by Aykroyd only, who, it was contended, had no power to bind the other partners by entering into a guarantee in the name of the firm. The plaintiffs relied on the letters of the clerk as evidence of an account stated, the defendants contending that they were not admissible. The learned judge received them subject to the objection, and directed a verdict for the plaintiffs on the first count, and for the defendants on the other count, reserving leave to move on both the above points. The defendants subsequently obtained a rule nisi to enter a verdict for them on the first count, and the plaintiffs also obtained a rule nisi to enter a verdict for them on the last count.

By s. 4 of the Statute of Frauds (1677), so far as is material :

"... no action shall be brought ... whereby to charge the defendant upon any special promise to answer for the debt default or miscarriages of another person ... unless the agreement upon which such action is brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

Phipson for the plaintiffs.

Keating for the defendants.

Cur. adv. vult.

Dec. 4, 1849. **PARKE, B.**, delivered the following judgment of the court.—This case was tried before **PLATT, B.**, at the Spring Assizes at Worcester. It was an action on a guarantee alleged to have been given in the partnership name, by the defendants guaranteeing to the plaintiffs the payment for all such coals as they should supply to certain persons carrying on business under the firm of Unit & Roberts. There was also a count on an account stated.

It appeared on the trial, that the defendants were in partnership together, and had entered into a contract with a railway company to do certain works. Messrs. Unit & Roberts had made a sub-contract with them to do part of the works, and required clay and coals to make bricks for that purpose. Not being able to procure credit for coals, one of the partners gave a guarantee in the name of the partnership firm, not addressed to anyone in particular, stating that the bearers, Messrs. Unit & Roberts, had a contract for bricks, and required a large quantity of coals, engaging to see those coals paid for. The plaintiffs received the guarantee, and supplied coals on the faith of it, for the amount of which this action was brought.

It was objected on the trial, that the plaintiffs could not recover on the guarantee: first, because it was not addressed to them, nor their names mentioned in it; and secondly, because the guarantee, being given by one partner, did not bind the others, not being within the scope of the authority communicated by one partner in a railway contract to another. The first of these objections was obviated by the production of a letter from the defendants, who subscribed the guarantee to the plaintiffs, stating that the guarantee was meant to be given to them. Upon that proof, the letter and the guarantee together constituted a note in writing having all the parties, and sufficient to satisfy the Statute of Frauds, and to bind the defendant who actually signed it. Whether the other defendants were also bound, was a question deserving much consideration, and was reserved by **PLATT, B.** It was also insisted that there was evidence on the account stated; and that point also was reserved, a verdict being directed for the plaintiffs on the first, and for the defendants on the last count, reserving both points. Counsel for the defendants moved to enter a verdict for the defendants on the special count, counsel for the plaintiffs to enter a verdict for the plaintiffs on the account stated, and cross-rules were granted, which were argued at the Sittings after last Trinity Term.

Upon the first question it was contended by counsel for the plaintiffs, that this guarantee bound all the partners, because the supply of bricks by Messrs. Unit & Roberts was material to enable them to carry on the partnership contract with the company; and that the supply of coals by the plaintiffs to Messrs. Unit & Roberts was equally material, as this was the only mode of procuring those bricks; and that, though one partner could not bind another by a guarantee for collateral purposes, he had that power where the guarantee was connected with the partnership business, and a reasonable mode of giving effect to a transaction within the scope of the partnership dealings; and he relied on *Ex parte Gardom* (1).

That one of two partners engaged in business as merchants had not, by reason of that connection alone, power to bind the other by a guarantee apparently unconnected with the partnership trade, was decided by **LORD ELLENBOROUGH** in *Duncan v. Lowndes and Bateman* (2), and the Court of Queen's Bench gave a similar decision in *Hasleham v. Young* (3), where the defendants were in partnership as attornies. No proof was given in either of these cases of the previous course of dealing or practice of the partners, which, it is admitted in both cases, might be sufficient to prove a mutual authority; nor was any evidence given of the usage of similar partnerships to give such guarantees; nor was there any of a recognition and adoption by the other partners, which would have the same effect. *Sandilands v. Marsh* (4) proceeded on the latter ground. In the present case, no evidence was given to show the usage of the defendants in this particular business,

A or of others in a similar business; nor was there any evidence of the sanction by the other defendants of the act of their co-partner; for a witness, who was called to prove the latter fact, would not, on cross-examination, swear that he was authorised by them to write a letter, which, if proved to have been so written, would have been sufficient. Simply as railway contractors, they could not have any such power.

B The only question then is, whether they had it in this particular case, in consequence of its being a reasonable mode of carrying into effect an acknowledged partnership contract. We think that the contention of counsel for the plaintiffs cannot be maintained. One partner does communicate to the other, simply by the creation of that relation, and as incident thereto, all the authority necessary to carry on their partnership in its ordinary course: see *Hawtayne v. Bourne* (5); and all such

C authority as is usually exercised by partners in the same sort of trade, but no more. To allow one partner to bind another by contracts out of the apparent scope of the partnership dealings, because they were reasonable acts towards effecting the partnership purposes, would be attended with great danger. Could one of the defendants in this case have bound the others by a contract to lease or buy lands, or a coal mine, though it might be a reasonable mode of effecting a legitimate object

D of the partnership business? Our opinion is, that one partner cannot bind the others in such a case, simply by virtue of the partnership relation. In *Ex parte Gardom* (1) this point was not fully discussed, but given up by SIR SAMUEL ROMILLY, who had two other objections to the guarantee, on which he could rely, and on one of which he succeeded. Besides, we are not sufficiently informed by the report, whether there might not have been some peculiar circumstances in the case which

E caused the abandonment of that point. We do not think that is an authority sufficient to establish the doctrine now contended for.

We think, therefore, that the defendants' rule to enter a verdict on the first count must be made absolute. The rule on the part of the plaintiffs to enter a verdict for them on the account stated cannot be supported, because there was no evidence of an admission by the defendants, who did not sign the guarantee. That

F rule must be discharged.

Orders accordingly.

BULLOCK AND OTHERS *v.* DOWNES AND OTHERS

[HOUSE OF LORDS (Lord Campbell, L.C., Lord Brougham, Lord Cranworth, Lord Wensleydale and Lord Kingsdown), June 7, 8, July 24, 1860]

[Reported 9 H.L.Cas. 1; 3 L.T. 194; 11 E.R. 627]

Will—Gift to next-of-kin—Gift to testator's son for life, then to testator's next-of-kin—Time when next-of-kin to be ascertained—Right of son's personal representatives to share of capital—Right of next-of-kin to take as tenants in common—Long delay in claiming share due to mistake of law.

A testator gave the residue of his estate in trust for his son R. for life and after R.'s death to R.'s children, and in case there should be no children of R., then to "such persons of the blood or next-of-kin as would by virtue of the Statute of Distributions have become and been entitled thereto in case I had died intestate." R. died without issue. For some twenty-four years after R.'s death the family assumed that R.'s personal representatives were not entitled to a share of the capital of the estate, and the income of the estate had been distributed after R.'s death on this footing, but the trustees retained a considerable part of the testator's property. On a claim by the executors of R. to a share of the testator's estate.

Held: (i) the next-of-kin of the testator were to be ascertained at his death, so that R. was included among them; (ii) (LORD WENSLEYDALE dissenting) the next-of-kin took as tenants in common, not as joint tenants; and (iii) the claim was not barred by laches or acquiescence or under the Real Property Limitation Act, 1833.

Notes. The Real Property Limitation Act, 1833, has been repealed by the Limitation Act, 1939. As to actions in respect of trust property or the personal estate of deceased persons, see ss. 19, 20 of the 1939 Act. The Statute of Distributions, 1670, has been repealed as to deaths occurring after 1925. See now the Administration of Estates Act, 1925, as amended by the Intestates' Estates Act, 1952.

Considered: *Chalmers v. North* (1860), 28 Beav. 175. Applied: *Royds v. Royds* (1863), 1 New Rep. 516; *Michell v. Bridges* (1864), 11 L.T. 727. Considered: *Day v. Day* (1870), 18 W.R. 417. Applied: *Cusack v. Rood* (1876), 24 W.R. 391. Distinguished: *Re Morley's Trusts* (1877), 25 W.R. 825. Followed: *Mortimore v. Mortimore* (1879), 4 App. Cas. 448. Applied: *Hood v. Murray* (1889), 14 App. Cas. 124; *Re Rees, Williams v. Davies* (1890), 44 Ch.D. 484; *Re Nash, Prall v. Bevan* (1894), 71 L.T. 5; *Re Ford, Patten v. Sparks* (1895), 72 L.T. 5. Distinguished: *Re Mellish, Day v. Withers*, [1916-17] All E.R.Rep. 634; *Hutchinson v. National Refuges for Homeless and Destitute Children*, [1920] All E.R.Rep. 707; *Re Gansloser's Will Trusts, Chartered Bank of India, Australia and China v. Chillingworth*, [1951] 2 All E.R. 936. Referred to: *Lees v. Massey* (1861), 3 De G.F. & J. 113; *Travis v. Taylor* (1866), 12 Jur.N.S. 791; *White v. Springett* (1869), 4 Ch. App. 300; *Sturge and Great Western Rail. Co.* (1881), 19 Ch.D. 444; *Clarke v. Hayne* (1889), 37 W.R. 667; *Re King's Settlement, Gibson v. Wright* (1889), 60 L.T. 745; *Re Wilson, Wilson v. Batchelor*, [1907] 2 Ch. 572; *Re Winn, Brook v. Whitton*, [1908-10] All E.R.Rep. 593; *Re Helsby, Neate v. Bozie* (1914), 84 L.J.Ch. 682; *Re Kilvert, Midland Bank Executor and Trustee Co. v. Kilvert*, [1957] 2 All E.R. 196; *Re Kramitz's Will Trusts, Kramitz v. Crawford*, [1959] 3 All E.R. 793.

As to gifts to next-of-kin, see 39 HALSBURY'S LAWS (3rd Edn.) 1042-1044; as to words creating tenancy in common, see *ibid.* 1103-1105; as to delay in applying to set aside family arrangement, see 17 HALSBURY'S LAWS (3rd Edn.) 229-230; and for cases see 44 DIGEST 875-886. For the Limitation Act, 1939, ss. 19, 20, see 13 HALSBURY'S STATUTES (2nd Edn.) 1179, 1180.

A Cases referred to :

(1) *Wharton v. Barker* (1858), 4 K. & J. 483; 4 Jur.N.S. 553; 6 W.R. 534; 70 E.R. 202; 44 Digest 557, 3736.

(2) *Jacobs v. Jacobs* (1853), 16 Beav. 557; 22 L.J.Ch. 668; 21 L.T.O.S. 97; 17 Jur. 293; 1 W.R. 238; 51 E.R. 895; 44 Digest 868, 7241.

(3) *Lewis v. Morris* (1854), 19 Beav. 34; 52 E.R. 261; 44 Digest 997, 8548.

B (4) *Godkin v. Murphy* (1843), 2 Y. & C.Ch. Cas. 351; 7 Jur. 505; 63 E.R. 155; 44 Digest 885, 7417.

(5) *Martin v. Glover* (1844), 1 Coll. 269; 8 Jur. 640; 63 E.R. 414; 44 Digest 743, 6013.

(6) *Bird v. Luckie* (1850), 8 Hare, 301; 14 Jur. 1015; 68 E.R. 375; 44 Digest 883, 7394.

C (7) *Mattison v. Tanfield* (1840), 3 Beav. 131; 4 Jur. 933; 49 E.R. 51; 44 Digest 993, 8507.

(8) *Jenkins v. Gower* (1846), 2 Coll. 537; 7 L.T.O.S. 449; 63 E.R. 851; sub nom. *Jenkins v. Gower, Jenkins v. Morgan*, 10 Jur. 702; 44 Digest 879, 7358.

(9) *Horn v. Coleman* (1853), 1 Sm. & G. 169; 22 L.J.Ch. 779; 20 L.T.O.S. 290; 17 Jur. 408; 1 W.R. 194; 65 E.R. 73; 44 Digest 978, 8341.

D (10) *Richardson v. Richardson* (1845), 14 Sim. 526; 5 L.T.O.S. 142; 9 Jur. 322; 60 E.R. 462; 44 Digest 989, 8462.

Also referred to in argument :

Miller v. Eaton (1815), Coop.G. 272; 35 E.R. 556; 44 Digest 885, 7413.

Jones v. Colbeck (1802), 8 Ves. 38; 32 E.R. 264; 44 Digest 891, 7486.

E *Clapton v. Bulmer* (1840), 5 My. & Cr. 108; 9 L.J.Ch. 261; 5 Jur. 477; 41 E.R. 312, L.C.; 44 Digest 885, 7416.

Long v. Blackall (1797), 3 Ves. 486; 30 E.R. 1119, L.C.; 44 Digest 897, 7562.

Briden v. Hewlett (1831), 2 My. & K. 90; 1 L.J.Ch. 114; 39 E.R. 878; 44 Digest 885, 7414.

F *Butler v. Bushnell* (1834), 3 My. & K. 232; 3 L.J.Ch. 139; 40 E.R. 88; 44 Digest 885, 7415.

Urquhart v. Urquhart (1844), 13 Sim. 613; 2 L.T.O.S. 438; 8 Jur. 161; 60 E.R. 239; 44 Digest 882, 7387.

Gundry v. Pinniger (1852), 1 De G.M. & G. 502; 21 L.J.Ch. 405; 18 L.T.O.S. 325; 16 Jur. 488; 42 E.R. 647, L.J.J.; 44 Digest 879, 7364.

Cable v. Cable (1853), 16 Beav. 507; 21 L.T.O.S. 16; 51 E.R. 874; 44 Digest 883, 7395.

G *Wheeler v. Addams* (1853), 17 Beav. 417; 1 W.R. 473; 51 E.R. 1095; 40 Digest (Repl.) 635, 1284.

Chalmers v. North (1860), 28 Beav. 175; 3 L.T. 140; 6 Jur.N.S. 490; 8 W.R. 426; 54 E.R. 333; 40 Digest (Repl.) 636, 1285.

Withy v. Mangles (1841), 4 Beav. 358; affirmed (1843), 10 Cl. & Fin. 215; 8 Jur. 69; 8 E.R. 724, H.L.; 40 Digest (Repl.) 630, 1225.

H *Clifton v. Cockburn* (1834), 3 My. & K. 76; 40 E.R. 30, L.C.; 43 Digest 999, 4406.

Phillipo v. Munnings (1837), 2 My. & Cr. 309; 40 E.R. 658, L.C.; 32 Digest (Repl.) 473, 879.

Baldwin v. Rogers (1853), 3 De G.M. & G. 649; 22 L.J.Ch. 665; 21 L.T.O.S. 70; 22 L.T.O.S. 29; 17 Jur. 267; 43 E.R. 255, L.J.J.; 44 Digest 800, 6551.

Smith v. Smith (1841), 12 Sim. 317; 59 E.R. 1153; 40 Digest (Repl.) 635, 1283.

Ware v. Rowland (1848), 2 Ph. 635; 17 L.J.Ch. 147; 11 L.T.O.S. 305; 12 Jur. 165; 41 E.R. 1089, L.C.; 44 Digest 880, 7372.

Ford v. Ford (1848), 6 Hare, 486; 67 E.R. 1256; 44 Digest 532, 3488.

Moss v. Dunlop (1859), John. 490; 70 E.R. 515; 44 Digest 880, 7377.

Smith v. Palmer (1848), 7 Hare, 225; 68 E.R. 92; 44 Digest 897, 7565.

Prior v. Horniblow (1836), 2 Y. & C.Ex. 200; 160 E.R. 369; 23 Digest (Repl.) 408, 4788.

Sheppard v. Duke (1839), 9 Sim. 567; 8 L.J.Ch. 228; 3 Jur. 168; 59 E.R. 477; A
32 Digest (Repl.) 472, 867.

Adams v. Barry (1845), 2 Coll. 285; 63 E.R. 737; 32 Digest (Repl.) 471, 865.

Brandon v. Brandon (1856), 7 De G.M. & G. 365; 25 L.J.Ch. 896; 27 L.T.O.S.
310; 2 Jur.N.S. 981; 5 W.R. 1; 44 E.R. 142, L.C.; 8 Digest (Repl.) 621,
615.

Harvey v. Cooke (1827), 4 Russ. 34; 6 L.J.O.S.Ch. 84; 38 E.R. 717; 44 Digest B
656, 4953.

Appeal by the defendants, the trustees of the will of the testator, the Rev. Andrew Downes, from a decision of SIR JOHN ROMILLY, M.R., holding that the plaintiffs, as executors of Robert Downes, were entitled to a share of the testator's residue, and that such claim was not barred by lapse of time.

The late Rev. Andrew Downes left a will, dated in 1815, by which he gave a legacy of £20,000 to his widow Elizabeth Downes; also portions to his unmarried daughters, and the residue was given to trustees to pay a life-annuity of £100 to each of his other unmarried daughters, so long as they continued unmarried, and other annuities, and the interest, after payment of the annuities, was to be paid to the testator's son Robert Downes, during his life, and after his decease to the widow of his said son, an annuity not exceeding £600 during her widowhood, as his said son should appoint; and after other trusts of the residue, the testator added :

"And in case there shall not be any child or children of my said son Robert Downes who under the trusts aforesaid should obtain a vested interest in the said trust-moneys, stocks, funds and securities, then do and shall stand and be possessed of and interested in the said trust-moneys, stocks, funds and securities, and the interest, dividends and annual produce thereof (but subject to the several annuities hereinbefore mentioned), in trust for and to pay, assign and transfer the same moneys, stocks, funds and securities unto such person or persons of the blood or next-of-kin of me the said Andrew Downes as would by virtue of the Statutes of Distribution of Intestates' Effects have become and been then entitled thereto in case I had died intestate."

The testator died in 1820, and the will was duly proved. The trustees paid the residue of the interest and dividends to Robert Downes up to 1832, when he died. In 1821 Robert Downes had married, and in exercise of the power appointed his widow to an annuity of £600 during her life; and he left no issue at his death. The family of the testator were advised by their solicitor, that Robert Downes had no interest whatever under the ultimate contingent trust in the testator's will as to his residuary estate, and accordingly the testator's widow advanced about £7,500 to the said Robert Downes, and she made a voluntary settlement on the same understanding. After his death, the executors of the father went on upon the same assumption as before, and paid the dividends of the residuary property to and among the four daughters, and transferred to them and their children some parts of the capital.

In 1856 the executors of Robert Downes filed a bill for the administration of the testator's estate, and, as representing one of the five children of the testator, claimed a fifth part of the ultimate residue of the estate. The trustees claimed the benefit of the Statute of Limitations, and relied on the acquiescence of the plaintiffs. Four points were raised, viz. : first, whether Robert Downes was entitled to a share in the residue; secondly, whether the right of Robert Downes' representatives had been barred by the Statute of Limitations; thirdly, whether independently of the Statute of Limitations they were barred by laches or acquiescence; and fourthly, whether the ultimate trust of the residue created a joint tenancy in the persons beneficially interested.

By the Real Property Limitation Act, 1833, s. 40 :

"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien or otherwise charged upon

A or payable out of any land or rent at law or in equity or any legacy but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same unless in the meantime some part of the principal money or some interest thereon shall have been paid or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or

B his agent to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

Follett, Q.C., Sir Hugh Cairns, Q.C., and H. W. Busk for the appellants.

Roundell Palmer, Q.C., and Selwyn, Q.C., for the respondents.

C **LORD CAMPBELL, L.C.**—Considering the staleness of the respondents' demand in this case, and the disturbance that it gives to a course of dealing which had proceeded bona fide in the testator's family for so many years after his death, I confess that it would have been agreeable to me to discover any ground on which, according to the rules of law, the claim could have been resisted. But after the

D elaborate arguments which we have heard on both sides, and a reference to the numerous authorities relied upon, I am bound to say that, in my opinion, the decree of the Master of the Rolls must be affirmed.

It seems to me quite clear that upon the just construction of this will the personal representatives of the testator's son were, in the events which happened, entitled to a share of the personal property in question; the son, having been one of the blood, or next-of-kin of the testator, who at the testator's death would, by

E virtue of the Statute of Distributions, have been entitled thereto in case the testator had died intestate. Generally speaking, where there is a bequest to one for life, and after his decease to the testator's next-of-kin, the next-of-kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the

F first taker. Gifts to a class following a bequest of the same property for life vest immediately upon the death of the testator. Nor does it make any difference that the person to whom such previous life interest was given is also a member of the class to take on his death.

There is here a bequest to the testator's son, Robert, for life, and afterwards to his children, and in case of his having no children, unto such person and persons of blood or next-of-kin of the testator as would, by virtue of the Statute of Distributions, have become and been then entitled thereto in case he had died intestate.

G Robert, the son, was one of the class who, as next-of-kin of the testator, would have been entitled at the testator's death to his personalty had he died intestate; and the son having died without having had any children, his personal representatives, prima facie, are entailed to an equal share with his four surviving sisters, the other individuals of the class. There may be, as in *Wharton v. Barker* (1), before PAGE-WOOD, V.-C., a clear indication in the will that notwithstanding the use of such expressions, the time for ascertaining the class is the time fixed by the will as the period of distribution. But in the will now to be construed nothing appears to indicate an intention in the testator contrary to the general rule; and on the contrary the second "then" in this limitation, seems expressly to refer to

H the time of the testator's death as the period when the class was to be ascertained. I, therefore, consider it quite unnecessary again to go over the long string of authorities on this subject, and to try to reconcile them, or to point out any that must be considered erratic.

The only feasible argument against the right of the representatives of the son to a share in the personalty, appeared to me to be that the next-of-kin might be considered to have taken as joint tenants, and that the joint tenancy was not determined in his lifetime. I was immediately struck by the objection, that if this could be rested on any rule of law, it could not have been according to the

intention of the testator; for, although he might not actually have thought of his son's representatives taking any share on the son dying without children, he could not have meant that if one of his daughters should die leaving children in the lifetime of the son her children should not take a share. But we were told that upon the authorities this rigid rule of law was established. However, on reference to the authorities it will be found that in every case in which there has been a gift to persons entitled under the Statute of Distributions, the statute has been held to regulate the interest taken as well as the parties to take; and that upon the death of individuals of the class who were so entitled, representation has been always admitted. These authorities, I have reason to believe will be fully examined and commented upon by a noble and learned friend, whose view of this question your Lordships will have the very high advantage of hearing, and, therefore, I abstain from any further reference to them. The interest being determined by the interest given to the next-of-kin as upon an intestacy, it is clearly not a joint tenancy; nor indeed is it, strictly speaking, a tenancy in common. It is enough to say, that in case of the death of one of the class, representation is admitted.

To the next objection, founded on the Real Property Limitation Act, 1833, the first answer attempted, was that this statute is confined to real estate, and does not apply to a pecuniary legacy not charged upon land. But I am of opinion that s. 40 would be a bar if this were a suit for a legacy. Limiting the time for actions or suits to recover any sum of money secured by mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent at "law or in equity," it adds, "or any legacy," i.e., any action or suit to recover any legacy whatsoever, whether or not it be charged upon or payable out of any land or rent at law or in equity. A better and a conclusive answer to the objection is, that this is neither action nor suit to recover a legacy. The appellants are trustees, in whom the personal property of the testator was vested on certain trusts. A considerable part of that property still remains in their hands undisposed of; for this they are still accountable to the cestui que trust; and the present is a suit calling on them to account for a share alleged to be due to the respondents as representatives of one of the next-of-kin of the testator. It can hardly be contended that there being a continuing duty to distribute the property among the next-of-kin, and the trustees having from time to time paid the interest to the daughters of the testator or their representatives, they were at liberty at the expiration of 20 years from the death of the son, to claim a right to his share as their own property.

By the only remaining objection I was at first much struck, and I thought it might possibly be substantiated by showing, that from the course of dealing which had so long prevailed in the family, founded upon the supposition that the class to take on the son dying without children was to be ascertained at his death, not at the death of the testator, and that the daughters were entitled to divide the whole to the exclusion of the representatives of the son, a family agreement might be presumed to that effect, which cannot now be disturbed. Had a doubt really existed as to the construction of the will in the lifetime of the son, and had it been agreed among all the members of the family that the son should be considered as having no interest in the property on his death without children, and in consideration of this the mother had made over to him large sums of money which she would otherwise have bestowed upon her daughters, I do not think that after the death of the mother the representatives of the son would have been permitted to set aside the agreement on the ground that it proceeded on a mistake of law as to the proper construction of the will. The son having been lucrated by the mistake, and the allowance to the daughters having been diminished by it, his representatives could not fairly claim from the trustees the son's fifth share of the property, although he might have been one of the five next-of-kin entitled to it.

But according to the evidence the question was not considered doubtful. Although fraud is not imputed, it appears that the husband of one of the sisters, a solicitor, and the solicitor for the family, asserted as clear law, that the son would have no title to a share as one of the next-of-kin. There was no consideration for

- A the son renouncing his right. The chief part of the mother's advances to him was made while he was quite a young man, likely to have children, and although the correspondence by letter between the mother and son, when he was moribund, showed that they reciprocally took an erroneous view of his rights, he then gained no advantage which could prevent his representatives, at any subsequent time, from claiming a share to which, on a proper construction of the will, they were entitled.
- B For these reasons, my Lords, I must advise your Lordships that the appeal be dismissed with costs.

LORD BROUGHAM.—I take entirely the same view of this case with my noble and learned friend, after having at one period of the discussion had very considerable doubt upon the point of joint tenancy; but upon examining the case itself, and

C upon examining former cases, I have come to the unhesitating opinion that that doubt has no foundation. The rule is, that where a testator gives a direction for a class of persons to take according to the Statute of Distributions, that is to be regarded not merely as a direction to point out or discover the persons who are to take, but as affecting the interests so to be taken.

- D The cases are almost innumerable. My noble and learned friend has referred to a very able statement of those cases which we have had the benefit of having access to, which has been prepared by my noble and learned friend opposite, who will presently state them more fully to your Lordships. I rely upon *Jacobs v. Jacobs* (2) and *Lewis v. Morris* (3), as laying down clearly this principle. There was some doubt expressed upon the point in *Godkin v. Murphy* (4) by KNIGHT-BRUCE, V.-C. There was no decision there, but he indicated a strong inclination
- E of opinion; but in the subsequent case of *Martin v. Glover* (5), and also in *Bird v. Luckie* (6), he certainly came to an opposite conclusion. I, therefore, consider that the cases taken altogether are all one way upon this point, namely, that where under a will property is to go to the persons entitled under the Statute of Distributions, and there is no indication of an intention to exclude the effect of the Statute of Distributions as to interest as well as persons, that Statute must be
- F applied to determine the interest as well as the persons. I hesitate to say that I feel no doubt that they did take the inheritance as tenants in common, but it is sufficient to say that they did not take in joint tenancy.

I, therefore, think with my noble and learned friends that this appeal ought to be dismissed.

- G **LORD CRANWORTH.**—Upon the main question raised in this cause, namely, the question whether, on the death of Robert Downes in 1832, the residuary personal estate of the testator became divisible in fifths or in fourths, we should, I believe, have been fully prepared to give our judgment at the close of the argument. All of your Lordships then present were satisfied that the decision of the Master of the Rolls was in strict conformity with the law as now understood. Where a
- H testator, having by his will, made contingent dispositions of his estate or of any part of it to take effect after the termination of particular interests for life, has proceeded to direct that if the contingencies do not arise, on which those dispositions are to take effect, then the property shall go to his next-of-kin according to the statute, the courts have in modern times held that *prima facie* his language is to be taken to refer to those who are his next-of-kin at his death, not to those who
- I may happen to answer that description at the determination of the preceding particular interests.

This rule of construction in general prevails even though the person or persons taking as next-of-kin, or some or one of them, may have been the person or persons entitled to the particular interest. It is true that there are authorities which have held that in such cases the property is to go to those who were next-of-kin at the termination of the preceding interests; and it is impossible to say that the language of a will may not be such as to show that persons answering the description of next-of-kin according to the statute at some time other than that of

the testator's death, may have been those intended to take. But as a general rule, the death of the testator is the time to which the testator must be held to refer. Whether the circumstances which have induced the courts to put on the will a construction different from that which the general rule would have prescribed, have in all cases been sufficient to warrant the decisions, is a matter on which I do not think it necessary to speculate. It is sufficient to say that I agree with the Master of the Rolls in the conclusion at which he arrived in this case, namely, that there is nothing in this will to warrant a deviation from the general rule. Neither the circumstance that the son was himself one of the next-of-kin, nor the use of the words "then entitled," as describing the person to take in the event which happened of the son dying without issue, is sufficient to affect the construction.

The son was one of the persons of the blood of the testator who would, by virtue of his Statute of Distributions, have become entitled to his personal estate if he had died intestate; and, even assuming that the word "then," as connected with the word "entitled," is to be read as an adverb of time, still the time indicated is not the time of the death of the testator, but the time when the persons would come into the enjoyment of that which is bequeathed to them. The legatees to take on the son dying without issue are not the persons who would have been entitled if the testator had then died, but those who would then be entitled if the testator, when he died, had died intestate.

On two other questions discussed at the Bar none of your Lordships, I believe had, at the close of the argument, any doubt. I allude to the defences set up, grounded, first, on the Statute of Limitations, and, secondly, on the long acquiescence of all parties interested. The Statute of Limitations can have no operation in a case like the present, where the residuary estate has been set apart, and appropriated on the trusts of the will, whatever those trusts may be; as between trustee and cestui que trust, the statute does not apply. The defence resting on the ground of lapse of time and long acquiescence obviously fails. There has been no acquiescence after the parties interested were apprised of their rights; and there is nothing to satisfy me, if that be material, that any of the parties have, under a mistaken notion of their rights, made dispositions of their property which they would not have made if their rights had been correctly understood.

On all these grounds your Lordships were, as I believe, prepared at the close of the argument, to express your concurrence in the decree of the Master of the Rolls. But a point was raised in the course of the discussion here, not it seems argued before the Master of the Rolls; at all events not adverted to by him in his judgment. It was contended that, assuming it to be true that the son, as well as the four daughters, were entitled to claim, as coming under the description of one of the next-of-kin of the testator, entitled, according to the Statute of Distributions, still his representatives could have no claim, as he and his sisters must be deemed to have taken as joint tenants; and so by his death, the whole interest survived to his sisters. On this point I have felt considerable doubt. The language of the will merely indicates, by a general description, the persons who are to take the residue. They are to be the persons who, being of the blood of the testator, would have been entitled to his personal estate by virtue of the Statute of Distributions. This would exclude the widow, and would embrace only his son and four daughters, and therefore it was said the will must be read as if the direction had been that the trustees should hold the residuary moneys, stocks, funds and securities in trust for the son and four daughters, which undoubtedly would have made them joint tenants.

When the testator died, it was certain who the persons were who would take in the event of the son dying without issue; and it was contended that the will might, therefore, be read as if, instead of describing those persons by the description of next-of-kin, according to the statute, the testator had described them all by name, in which case they would have taken as joint tenants. I am far from saying that interpreting the testator's language with strict grammatical accuracy the construc-

A tion contended for might not be correct. But an examination of the authorities has satisfied me that we cannot act on such a construction without overruling a number of decisions, which have given to words similar to those now before us, an interpretation different from that contended for by the appellants. The authorities seem to establish, that where there is a bequest to the persons who would have been entitled under the Statute of Distributions, those persons are to take as they would have taken if there had been an intestacy.

B In *Mattison v. Tanfield* (7), there was a devise of real estates in trust for the person or persons who at my decease shall be next-of-kin of R.D., according to the statute. It was held that the persons entitled took unequal shares per stirpes, and not per capita. The question of joint tenancy did not arise in that case, as the devisees were expressly made tenants in common; but the circumstance that they took in unequal shares per stirpes, shows conclusively that the words used did more than merely indicate who were the persons to take. In *Martin v. Glover* (5), under a bequest to the persons who would have been entitled under the Statute of Distributions, the widow and only child were held to take in the proportions pointed out by the statute, a construction necessarily excluding joint tenancy. In *Jenkins v. Gower* (8), under a similar bequest, where the testator left a widow and a sister, but no issue, the widow and sister were held to take equally as tenants in common. The same principle was acted on in the subsequent cases of *Jacobs v. Jacobs* (2), *Horn v. Coleman* (9), *Lewis v. Morris* (3). I am aware that in *Richardson v. Richardson* (10), SHADWELL, V.-C., in construing a similar bequest, held that the widow and four children of the testator took as joint tenants, but this is the only case in which such a construction has prevailed, for *Godkin v. Murphy* (4) might have been decided on other considerations, and the very learned judge, whose decision it was, has more than once intimated distrust of its correctness.

E Considering, then, how probable it is that many estates have been administered on the faith that the law has been correctly understood in the numerous cases to which I have referred, and considering further, that the rule of construction there acted on is one which recommends itself to the common sense of mankind, as probably carrying into effect the real intention of the testator, I think your Lordships ought not to depart from it merely because, according to the strict grammatical interpretation of the words, they do no more than point out who are the persons intended to be legatees, without indicating the quantum or quantity of the interest they are to take.

F I will only add, that I do not think the case is altered merely because the persons to take are not all the next-of-kin according to the statute, but all excluding (as in this case) the widow. The principle must be the same whether all are to be benefited, or only some. The question is whether the statute is to be looked to as the guide in interpreting the language used, and as showing not merely who are to take, but how, and in what proportions they are to take. If it is, I see no difference whether all the persons entitled under the statute are indicated, or only a part of them.

H On these grounds I advise your Lordships to dismiss this appeal with costs.

I **LORD WENSLEYDALE.**—Three questions arise in this case; the first, as to the construction of the clause in the will of the Rev. Andrew Downes; the second, whether the appellants' claim was barred by the Statute of Limitations; third, whether the laches of the appellants in lying by for so many years afford any answer. I think it unnecessary to enter into the second and third questions; I agree in the opinion so clearly expressed by the Master of the Rolls upon that part of the case.

The only question remaining is as to the construction of the clause in the will, which gives the property over in the event of there not being a child or children of Robert Downes, who should obtain a vested interest under the prior trust in the property devised. On the part of the appellants it was contended, first, that the true construction was, that on the event occurring, the persons to whom the

property was to be given, were those who would have been next-of-kin of the testator if he had then died intestate; secondly, that the clause only designating the persons who were to take by description, and not stating what interest they should take, the true construction was, that it should be read as if all those persons who filled that character were introduced by name into the will; and so read, that they must all take the entire interest, and there being no words of distribution, they must all take as joint tenants. I agree in opinion with my noble and learned friends on the first of these propositions. On the second I am not satisfied, so as to be able to concur with them. A B

For the proper construction of this devise we must apply the established rules. The question is strictly not what the testator meant, but what is the meaning of the words; for the use of the expression "the intention of the testator," is apt to lead the mind to speculate as to what the testator meant to do, instead of inquiring what he has done. Further, the words used must be read in their ordinary and grammatical sense, unless that construction would lead to some obvious absurdity or inconsistency repugnant to the declared intention of the testator, to be collected from the whole instrument. It is much more useful to attend closely to these rules, than to look out for guides in decisions on the construction of words in similar instruments. It seldom happens that the decisions on the meaning of words in one instrument are of any assistance in the construction of others, the context in each case, and the circumstances admissible in evidence vary so much as to give a different meaning to the expressions used. It may happen indeed, but it must be rarely, that some particular words have by a long previous course of decisions acquired a certain meaning, and may be supposed to have been used in that acquired sense by the framer of the instrument, but subsequent decisions on somewhat similar words used in other instruments can hardly ever be of the least use, though it is the common practice to quote them all at length. C D E

Applying these rules, the persons who would by the Statute of Distribution of Intestates' Effects have been entitled to them in case he died intestate, are those who filled the character of wife or next-of-kin at the time of the testator's death. The testator has provided that those (except the widow), if there should be no child of his son Robert who should obtain a vested interest, should receive the residue of his estate; but he has not said that those who would have been entitled if the testator had then died, that is died at the time of the event happening, should be entitled. The daughters and son of the testator are the persons who answer the description. It has long been held that courts should try to construe every legacy so as to make it vest at the earliest possible period consistent with the words of the bequest, and not to be contingent unless the words require it; and therefore we ought to hold that this legacy to the next-of-kin should be construed as giving the residue to the son and daughters, subject to the son's life estate. To interpolate the word "then" before the word "died" is to add to the will something that is not within it, and is contrary to the rule of construction of written instruments, now fully established, of looking for the meaning of the words in the will, but adding none. I should rather have thought, if there was not so strong a tendency in courts to construe all legacies to be vested at the earliest possible period, that the natural meaning of the words used was, that, on the death of his son without issue, the property should then be divided among those who filled the character of next-of-kin at that time, and not at that when the testator died, and that the son could not then have taken a share, because he was no longer alive. But in compliance with the rule above mentioned, I think we ought to hold that all who were next-of-kin at his death then took a vested interest in remainder after the son's life estate. I think, therefore, that the Master of the Rolls came to a perfectly right conclusion on this part of the case. F G H I

The next question is, What is the proper construction, applying the same rule, of the latter part of the clause in question? [His LORDSHIP read the clause.] The persons who are the intended legatees are sufficiently described, but nothing is expressly said as to the nature of the estate they were to take. When those persons

A are ascertained, you are to insert into the will their names; and that done, the persons so named would take the whole, and there being no words of distribution, would take the whole as joint tenants, unless you can collect some further qualification from other words in the will. My noble and learned friends are of opinion that this may be done, and my doubts as to that part of the case will produce no effect. I think if the testator had left the whole to those who would have been
B entitled thereto under the Statute of Distributions, there might be some good ground to say that he meant them to take the whole as they would have taken it under an intestacy. That is *Horn v. Coleman* (9), before STUART, V.-C., for the next-of-kin were the only persons there entitled, and other cases to the same effect which were cited in the argument. But in this case he has given the whole to those who, under the statute, would take only two-thirds, for the wife would take
C one-third.

It seems to me that the bequest, taken as it stands, means clearly that the next-of-kin are to take the whole. He expresses no intention that they are to take less than the whole. It cannot be held that the bequest is to be cut down to two-thirds, and that he died intestate as to the remaining one-third. If that could be done, those who were next-of-kin to the testator's widow, who died in 1836,
D at the time of her death would be entitled to share that one-third, and the decree would not be right. But I think it impossible to contend that the meaning of the words used is not that the legatees are the persons to take the whole. The Master of the Rolls suggests that the words "would have been entitled thereto in case I had died intestate," mean as if he had died intestate, and the persons of my blood, who are the next-of-kin pointed out by the statute, had been the only persons
E entitled under the statute. But this is to introduce many additional words into the will. Whether the testator had the idea of so bequeathing his property, is a pure matter of conjecture, very likely not an improbable one, but the words to carry that intention into effect are wanting. If he meant it, he certainly has not said so.

The result is, that in putting a just construction on this will, I cannot help thinking we ought to hold that the testator meant that all the next-of-kin should
F take the whole, and not having expressed any other intention, they must take as joint tenants, and consequently that on the death of Robert, the sisters took by survivorship. This result is satisfactory, as it is in conformity with the mode in which the members of the family have enjoyed the property for so many years.

LORD KINGSDOWN.—On the only point on which there is any difference of
G opinion among your Lordships, I have never myself entertained any doubt. On the happening of the event contemplated, the trustees are "to pay," etc. [HIS LORDSHIP read the clause.] There is no gift except in the direction to pay and transfer. There is no expression of the interest which any of the persons who may answer the description are to take, except by reference to their title under the statute. They are to take according to their title under the statute. The words seem to
H me, according to their natural import, to mean this: "My trustees shall transfer the funds according to the title created by the statute among my next-of-kin," and I think that this is the construction settled by the decided cases. It is useless to go again through the authorities which have been cited by my noble and learned friend below me. It may, however, be worth while to make one or two observations on the two cases which are supposed to be opposed to this construction, which I
I think the true one, *Richardson v. Richardson* (10) and *Godkin v. Murphy* (4).

In *Richardson v. Richardson* (10) the trust was to assign unto and among the person or persons who at the time of the testator's death would be entitled under the Statute of Distributions. There were a widow and four children, and it was argued on behalf of the children that the words "unto and amongst" created a tenancy in common (for which authorities were cited), and that the children were, therefore, entitled to take equal shares as tenants in common with the mother. It was argued on the other side, that the statute was to be resorted to not only for the purpose of ascertaining the parties to take, but also the shares. The

vice-chancellor held that the plaintiffs, i.e., the children and their mother, took the estates in equal shares as tenants in common. This case occurred in 1845, but neither of the preceding cases of *Mattison v. Tanfield* (7) and *Martin v. Glover* (5) was referred to. This decision proceeded, as I collect, on the ground that the gift to the legatees as tenants in common excluded the statute, and had the same effect as would have been attributed to the word "equally." No reason is assigned in the report for the judgment which is expressed in the words above quoted.

Godkin v. Murphy (4), when it is examined, has really no bearing upon the question. The limitation there was to such persons as would be entitled under the statute. There was no decision; but KNIGHT-BRUCE, V.-C., expressed an opinion that as the testator had made a gift to those who would be entitled if he had made no gift, he must be understood to intend something different from that which would have happened if he had made no gift, and that, to create such difference, the words must be read either as intending next-of-kin at a time different from that provided by the statute, or as creating an interest different from that given by the statute, viz., a joint tenancy, instead of a tenancy in common amongst those who would be entitled under the statute. This reasoning is not, perhaps, very satisfactory. It seems to me inconsistent with the subsequent decision of the same learned judge in *Martin v. Glover* (5), and he himself in *Bird v. Luckie* (6), expresses some doubt about it. But however that may be, the ground of the observations in that case entirely fails in the present, for here, there was an obvious reason for the gift, though the parties intended to take were to take according to the statute, for the next-of-kin were alone the objects of the testator's bounty, and the widow was excluded.

The authorities seem to me to bear out the proposition, in itself (as I think) perfectly reasonable, and most likely to give effect to the intention of testators, that under a direction to pay to those entitled under the statute, if no other expression or indication of intention be found as to the interests to be given, reference must be had to the statute for the measure as well as the objects of the gift. The rule laid down by STUART, V.-C., in *Horn v. Coleman* (9), that if the reference to the statute is for the purpose of ascertaining only the object, and not the measure of the gift, the parties will not take according to the statute, is no doubt a sound one, though the cases to which he refers in support of it do not seem to apply. There may be words to restrict the effect of this reference, as it was held that there were in *Richardson v. Richardson* (10), and as LORD LANGDALE held, that there might be in *Mattison v. Tanfield* (7), such as "equally" among the objects, and so on, but it seems to me that the other is the natural construction of the words, and that, according to the authorities, unless there be something in the context to exclude it, it must prevail. For these reasons I think that the children took as tenants in common.

Appeal dismissed.

MARTIN v. MARGHAM AND OTHERS

[VICE-CHANCELLOR'S COURT (Shadwell, V.-C.), July 16, 17, 1844]

[Reported 14 Sim. 230; 13 L.J.Ch. 392; 3 L.T.O.S. 433;
8 J.P. 532; 8 Jur. 609; 60 E.R. 346]

Charity—Cy-près doctrine—Failure of named purpose—Invalid direction to accumulate—Regard to objects specified in will.

A testator by will directed that the income from his estate should be accumulated to raise a fund producing a net income of £600 per annum, which was then to be applied for the benefit of named charity schools. To raise such a fund it would have been necessary to accumulate the income from his estate for over twenty-one years.

Held: the direction to accumulate could not be carried into effect, but the property would be applied cy-près, and in settling a scheme, regard would be had to the objects specified in the will.

Notes. The Accumulations Act, 1800, was repealed by the Law of Property Act, 1925, and replaced by ss. 164 to 166 of that Act; section 164 of the Law of Property Act, 1925, was amended by s. 13 of the Perpetuities and Accumulations Act, 1964.

Considered: *Re Swain, Monckton v. Hands*, [1905] 1 Ch. 669; *Re Monk, Giffen v. Wedd*, [1927] All E.R.Rep. 157. Applied: *Re Bradwell's Will Trusts, Goode v. Board of Trustees for Methodist Church Purposes*, [1952] 2 All E.R. 286.

As to effect of excessive accumulation, see 29 HALSBURY'S LAWS (3rd Edn.) 338; as to cy-près doctrine generally, see 4 HALSBURY'S LAWS (3rd Edn.) 317 et seq.; and for cases see 8 DIGEST (Repl.) 442–443, 461–462. For the Law of Property Act, 1925, ss. 164–166, see 20 HALSBURY'S STATUTES (2nd Edn.) 771–777, and for the Perpetuities and Accumulations Act, 1964, s. 13, see 44 HALSBURY'S STATUTES (2nd Edn.) 884.

Cases referred to in argument:

Webb v. Webb (1840), 2 Beav. 493; 48 E.R. 1273; 37 Digest (Repl.) 147, 688.

Curtis v. Larkin (1842), 5 Beav. 147; 11 L.J.Ch. 380; 6 Jur. 721; 49 E.R. 533; 37 Digest (Repl.) 57, 16.

Brandon v. Aston (1843), 2 Y. & C.Ch. Cas. 24; 7 Jur. 10; 63 E.R. 11; 5 Digest (Repl.) 712, 6201.

Pym v. Lockyer (1841), 12 Sim. 394; 11 L.J.Ch. 8; 59 E.R. 1183; 5 Digest (Repl.) 711, 6197.

A.-G. v. Bishop of Chester (1785), 1 Bro.C.C. 444; 28 E.R. 1229, L.C.; 8 Digest (Repl.) 422, 1129.

A.-G. v. Ironmongers' Co. (1834), 2 My. & K. 576; 3 L.J.Ch. 11; 39 E.R. 1064, L.C.; subsequent proceedings (1840), 2 Beav. 313; (1841), Cr. & Ph. 208, L.C.; sub nom. *Ironmongers' Co. v. A.-G.* (1844), 10 Cl. & Fin. 908, H.L.; 8 Digest (Repl.) 508, 2328.

Moggridge v. Thackwell (1803), 7 Ves. 36; 32 E.R. 15, L.C.; affirmed (1807), 13 Ves. 416, H.L.; 8 Digest (Repl.) 450, 1462.

Suit for the administration of the trusts of a will.

Samuel Butler, the testator, being possessed of considerable personal property, by his will, dated May 13, 1821, having directed that all his property not consisting of money should be converted into cash, and after the payment of his debts, be invested by the executors in the testator's name in the 3 per cent. consols, and the annual interest thereof to be disposed of in the first place to certain annuitants therein named, with a direction that as they might drop off, their respective annuities should be added to his estate to accumulate for the express purpose thereafter specified, goes on as follows:

"I now come to the plan of my great desire, which is to establish a sinking fund, to begin with a net income of £600 per annum, and in case I should not

have so much at my death, my will and desire is, whatever sum I may leave at my decease in the care of my trust (trustees) that every half-year's dividend may be added to the amount of principal till it arrives at the net income of £600 per annum, and with that sum to begin my proposed sinking establishment. I should then hope that every five years' receipt of income so managed would produce an increase of income, say £150 per annum, and my will and desire is that every such increase of income, say £150 per annum, be appropriated in the care of my trust, as I shall hereafter specify, for the benefit of the parish charity schools in this country in the following order."

The testator then specified ten different charity schools in and about London, which he directed should take the benefit of his bounty; and also directed the manner in which he intended they should be regulated in reference to their internal discipline, and the prizes to be awarded to the boys, and the apprenticing them out to tradesmen. The testator having appointed his executors, requested them, when they should have duly and faithfully executed his will according to his instructions, to assign over all his property, both real and personal, belonging to him at his death, to the Vintners' Company, to the end that the same might be applied by them to the several charitable purposes thereinbefore directed.

The testator made his first codicil to his will dated May 13, 1824, wherein having expressed that the great object and tendency of his will being to serve the poor charity boys of his country, he was induced by his codicil to appoint to his already chosen trustees Lord Giffard, Master of the Rolls, and, in case of his death before him, the testator, the Master of the Rolls for the time being to continue in trust with the Vintners' Company for ever. He died on May 15, 1837, and the present suit was instituted for the purpose of carrying out the trusts of the will under the direction of the court. It appeared by the master's reports, that the testator's property amounted to about £8,000 and the various annuities charged upon that fund amounted to £200. The cause came on for further directions.

By the Accumulations Act, 1800 :

"Section 1. No person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlers, or the term of twenty-one years from the death of any such grantor, settlor, deviser or testator, or during the minority or respective minorities of any person or persons who shall be living or in ventre sa mere at the time of the death of such grantor, deviser or testator, or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will or other assurances directing such accumulations would for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed.

"Section 2. Provided always, that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settlor or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor or deviser, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this Act had not passed."

A *Cooper* and *Lloyd*, for the next-of-kin, contended that, according to the master's report, to raise sufficient to yield an income of £600 per annum, it would be necessary to accumulate for about thirty years, which would bring it within the mischief pointed out by the Accumulations Act, 1800.

Romilly and *Daniel* for the Master of the Rolls.

B *Jarvis* for the Vintners' Co.

Stuart and *Heathfield* for another party.

Spence for Maugham, an executor and trustee.

Wray on behalf of the Attorney-General.

SHADWELL, V.-C.—The general impression upon my mind is, that although the particular mode which the testator has pointed out cannot take effect literally, nor the disposition of his property in behalf of the schools to take in succession be carried out according to his own views, yet there is virtually a clear intention to benefit the schools, which precludes the next-of-kin from taking any share of the property. Where there is a general intention declared for objects of a charity, the particular mode in which the benefit is directed to take effect amounts to nothing, that is, in relation to the question whether the devotion for charitable purposes shall take effect or not; but the main question will be this, viz., whether it cannot be carried out by means of some other scheme. The testator evidently intended the charity boys to receive the benefit of his bequests. They cannot do so in the way indicated by him; therefore, the court will endeavour to effectuate the general intention as far as it can.

Declaration accordingly.

F

BRANDAO *v.* BARNETT AND OTHERS

[HOUSE OF LORDS (Lord Lyndhurst, L.C., and Lord Campbell), February 25, March 3, 9, 10, August 28, 1846]

G [Reported 3 C.B. 519; 12 Cl. & Fin. 787; 7 L.T.O.S. 525;
186 E.R. 207]

Bank—Banker's lien—Judicial notice—Extension of lien to all securities deposited with banker as banker—Deposit for safe custody.

H The general lien of bankers is part of the law merchant and is to be judicially noticed. The lien extends to all securities deposited with a banker, as a banker, by a customer unless there be an express contract, or circumstances which show an implied contract, inconsistent with a lien, as, e.g., in the case of securities deposited with the banker for safe custody, or held by him for a limited period and a specified purpose pending return to the customer. In such a case the securities could not be regarded as deposited with the banker as a banker.

I *Bank—Banker's lien—Implied pledge—Customer apparent, but not true, owner of securities deposited with banker.*

Per LORD CAMPBELL: The right acquired by a general lien is that of an implied pledge, and where it would arise it would equally exist, the banker claiming it having acted with good faith, although the customer were the apparent, and not the true, owner of the securities deposited with the banker, which in fact belong to a stranger.

Notes. Considered: *Jones v. Peppercorn* (1858), John. 430; *Bock v. Gorrisen* (1860), 2 De G.F. & J. 434. Distinguished: *Frith v. Forbes* (1862), 31 L.J.Ch.

793. Considered: *Wylde v. Radford* (1863), 33 L.J.Ch. 51. Distinguished: *Leese v. Martin & Co.*, [1861-73] All E.R.Rep. 912. Approved: *Misa v. Currie*, [1874-80] All E.R.Rep. 686. Followed: *London Chartered Bank of Australia v. White* (1879), 4 App. Cas. 413. Referred to: *Smart v. Sandars* (1846), 3 C.B. 380; *Bank of Australasia v. Breillat* (1847), 6 Moo.P.C.C. 152; *Foley v. Hill* (1848), 2 H.L.Cas. 28; *Gibson v. Small* (1853), 1 C.L.R. 363; *Hare v. Henty* (1861), 10 C.B.N.S. 65; *Thayer v. Lister* (1861), 30 L.J.Ch. 427; *Jeffryes v. Agra and Masterman's Bank* (1866), L.R. 2 Eq. 674; *Webb v. Whinney* (1868), 18 L.T. 523; *Goodwin v. Roberts* (1875), L.R. 10 Exch. 337; *Stumore v. Campbell & Co.*, [1891-4] All E.R.Rep. 785; *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q.B. 416; *Biddel v. E. Clemens Horst Co.*, [1911] 1 K.B. 934; *Hope v. Glendinning*, [1911] A.C. 419; *Loescher v. Dean*, [1950] 2 All E.R. 124.

As to the banker's lien, see 2 HALSBURY'S LAWS (3rd Edn.) 210-213; and for cases see 3 DIGEST (Repl.) 321-330.

Case referred to:

(1) *Davis v. Bowsher* (1794), 5 Term Rep. 488; 101 E.R. 275; 3 Digest (Repl.) 325, 1014.

Also referred to in argument:

Rushforth v. Hadfield (1806), 7 East, 224; 3 Smith, K.B. 221; 103 E.R. 86; 32 Digest (Repl.) 281, 281.

Oppenheim v. Russell (1802), 3 Bos. & P. 42; 127 E.R. 24; 32 Digest (Repl.) 283, 299.

Lucas v. Dorrien (1817), 1 Moore, C.P. 29; 7 Taunt. 278; 129 E.R. 112; 3 Digest (Repl.) 322, 996.

Leuckhart v. Cooper (1836), 3 Bing.N.C. 99; 7 C. & P. 119; 2 Hodg. 150; 3 Scott, 521; 6 L.J.C.P. 131; 132 E.R. 347; 32 Digest (Repl.) 280, 270.

Cruger v. Wilcox (1755), 1 Dick. 269; 21 E.R. 272; sub nom. *Kruger v. Wilcox*, Amb. 252; 1 Keny. 32, L.C.; 32 Digest (Repl.) 268, 146.

Drinkwater v. Goodwin (1775), 1 Cowp. 251; 98 E.R. 1070; 1 Digest (Repl.) 640, 2173.

Collins v. Martin (1797), 1 Bos. & P. 648; 126 E.R. 1113; 3 Digest (Repl.) 229, 564.

Naylor v. Mangles (1794), 1 Esp. 109, N.P.; 32 Digest (Repl.) 280, 274.

Holderness v. Collinson (1827), 7 B. & C. 212; 1 Man. & Ry.K.B. 55; 6 L.J.O.S. K.B. 17; 108 E.R. 702; 32 Digest (Repl.) 281, 277.

Scarfe v. Morgan (1838), 4 M. & W. 270; 1 Horn & H. 292; 7 L.J.Ex. 324; 2 Jur. 569; 150 E.R. 1430; 32 Digest (Repl.) 272, 183.

Hewison v. Guthrie (1836), 2 Bing.N.C. 755; 2 Hodg. 51; 3 Scott, 298; 5 L.J.C.P. 283; 132 E.R. 290; 32 Digest (Repl.) 275, 208.

Bolland v. Bygrave (1825), Ry. & M. 271, N.P.; 3 Digest (Repl.) 321, 994.

Jourdain v. Lefevre (1798), 1 Esp. 66; 3 Digest (Repl.) 231, 583.

Bosanquet v. Dudman (1814), 1 Stark. 1, N.P.; 6 Digest (Repl.) 324, 2356.

Wookey v. Pole (1820), 4 B. & Ald. 1; 106 E.R. 839; 1 Digest (Repl.) 399, 593.

Vanderzee v. Willis (1789), 3 Bro.C.C. 21; 29 E.R. 385, L.C.; 3 Digest (Repl.) 323, 1004.

Stevenson v. Blakelock (1813), 1 M. & S. 535; 105 E.R. 200; 32 Digest (Repl.) 267, 136.

Appeal by the plaintiff from a decision of the Court of Exchequer in an action in trover in which the plaintiff sought to recover from the defendants, bankers, the possession of certain exchequer bills over which the defendants claimed to have a lien and so to be entitled to retain them against an overdraft on the account of the plaintiff's agent.

The plaintiff was a Portuguese merchant, who up to the year 1834 resided at Rio de Janeiro, but who in that year returned to Portugal, and had since resided

A at Lisbon and other towns in that country. Edward Burn, for many years before and down to his bankruptcy hereinafter mentioned, resided in London, and carried on business as a merchant, under the firm of James Burn & Co. He was the correspondent of the plaintiff, who from time to time remitted bills of exchange and money to him, and employed him upon commission to invest the proceeds in exchequer bills. Burn was also employed by other correspondents to purchase
B exchequer bills for them. The defendants were bankers in London, in co-partnership, and for many years before and since the year 1833 acted as such for Burn, who kept cash and an account with them under the style James Burn & Co.

The government paid the interest upon exchequer bills at certain periods, and, when such interest was paid the exchequer bills in respect of which it was paid were delivered up, and, unless their amount was applied for in money, new ex-
C chequer bills were issued to the holder in exchange for them.

It was the custom of bankers, in the course of their trade, to receive the interest upon exchequer bills for their customers, and to exchange the exchequer bills when interest was paid. Burn had, on various occasions prior to December, 1836, requested the defendants to receive the interest upon exchequer bills which he had bought at the request and for the account of the plaintiff, and also to receive the
D new exchequer bills issued in exchange for the former. These bills were kept at the bank in a tin box of which Burn kept the key. When interest on the bills became due he went to the bank with the key of the tin box, took out of the box such of the exchequer bills as were wanted, and delivered them to the defendants, requesting them to receive the interest and to exchange the exchequer bills. Burn generally received from the defendants the new exchequer bills within a week or a
E fortnight after they were exchanged, and he then deposited the new exchequer bills in the tin box. The defendants gave credit to Burn, in his account with them, for the interest received by them on the exchequer bills, and that interest formed part of the cash balance to Burn's credit with the bankers. In November, 1836, Burn held exchequer bills to the amount of £30,400, which had been purchased with the money of the plaintiff and were locked up in the tin box at the defendants' bank, and, in pursuance of an order from the plaintiff, Burn sold part of those exchequer
F bills through a broker who knew him only in the transaction to the amount of £10,800. The proceeds of the bills were paid by the broker by cheques payable to Burn, who paid them to the defendants, as his bankers, to his account, as his own money. Burn, in pursuance of an order from the plaintiff, remitted the amount of the proceeds by bills to the brother of the plaintiff in Lisbon. By the execution
G of the above order, the amount of exchequer bills so as aforesaid purchased with the plaintiff's funds, was reduced to £19,600. Of these bills, £9,500 were delivered by Burn to Offley & Co. (no question arising in the present case regarding them), and there were then left in Burn's hands bills purchased with the money of the plaintiff to the value of £10,100, the renewals of which were the exchequer bills sought to be recovered in this action.

H In December, 1836, Burn became ill and was unable to attend to business with the result that on Jan. 21, 1837, his account with the defendants was overdrawn to the amount of £3,211 19s. 7d. In respect of this debt to them the defendants claimed to be entitled to retain the £10,100 bills just mentioned. The plaintiff thereupon began this action in trover to recover possession of the bills. At the
I trial before TINDAL, C.J., in 1840, a verdict was returned for the plaintiff, and after argument judgment was given for him. In 1843 the Court of Exchequer Chamber reversed this decision, holding (i) that the courts would take judicial notice of the general lien which bankers had, by the law-merchant, on the securities of customers in their hands, and (ii) that the exchequer bills in question, having come to the hands of the defendants as bankers, in the usual course of their business, were subject to such general lien. The plaintiff appealed to the House of Lords.

Sir T. Wilde, Serjt., W. H. Watson and M. Smith for the appellant.

Sir Fitzroy Kelly and S. Martin for the respondents.

LORD CAMPBELL.—The first question arising upon this record is whether judicial notice is to be taken of the general lien of bankers on securities of customers in their hands. The exchequer bills for which this action is brought are found to be the property of the appellant, and the respondents rest on the plea that the appellant was not possessed, etc., claiming a lien for the balance due to them from Burn.

The usage of trade by which bankers are entitled to a general lien, is not found by the special verdict; and, unless we are to take judicial notice of it, the appellant is at once entitled to judgment. But, my Lords, I am of opinion that the general lien of bankers is part of the law-merchant, and is to be judicially noticed—like the negotiability of bills of exchange, or the days of grace allowed for their payment. When a general usage has been judicially ascertained and established, it becomes part of the law-merchant, which courts of justice are bound to know and recognise. Such has been the invariable understanding and practice in Westminster Hall for a great many years; there is no decision or dictum to the contrary; and justice could not be administered, if evidence were to be given, toties quoties, to support such usages, an issue being joined upon them in each particular case.

It is hardly disputed that under the plea of "not possessed," a lien may be made available as a defence, and, therefore, if this special verdict sets forth facts which show that, by the law-merchant, the respondents have a lien upon these exchequer bills, the judgment in their favour ought to be affirmed. But I am of opinion, that, upon the facts found, there was no lien, and that the judgment ought to be reversed. I do not, however, proceed upon the ground taken by the Court of Common Pleas—that, these Exchequer bills being the property of Brandao, there was no lien as against him, although there might have been as against Burn. I think that the respondents were entitled to consider the exchequer bills as the property of Burn, without any express representation by him to that effect. Exchequer bills are negotiable securities passing by delivery. The holder of negotiable securities is to be assumed to be the owner; and third persons, acting bona fide, may treat with him as owner. It is admitted that Burn might have effectually sold these exchequer bills, or pledged them, by an express contract, without any representation that they were his own property. But the right acquired by a general lien is that of an implied pledge, and where it would arise—supposing the securities to be the property of the apparent owner—I think it equally exists, the party claiming it having acted with good faith, although they turn out to be the property of a stranger. I think that the just view was taken of this point by the judges in the Exchequer Chamber, and that they were right in holding the reasoning of the judges of the court of Common Pleas to be, in this respect, untenable.

But, my Lords, after much anxious consideration, I have come to the conclusion, that the judges in the Exchequer Chamber have erroneously decided the question on which the Court of Common Pleas expressed no opinion; and that the facts found by the special verdict, would not have entitled the respondents to a lien, if the exchequer bills had been the property of Burn. Bankers, most undoubtedly, have a general lien on all securities deposited with them, as bankers, by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with lien. **LORD KENYON** says in *Davis v. Bowsher* (1):

"Bankers have a general lien on all securities in their hands, for their general balance, unless there be evidence to show that any particular security was received under special circumstances which would take it out of the common rule."

And **LORD DENMAN**, in pronouncing judgment in the present case in the Exchequer Chamber, says:

"If, indeed, there had been an agreement, express or implied, inconsistent with a right of lien—as, to return them absolutely, at all events, to the depositor, at a certain time—the case would have been different."

It seems to me that, in the present case, there was an implied agreement on the

- A part of the defendants inconsistent with the right of lien which they claim. Your Lordships will bear in your recollection that the exchequer bills for which this action is brought are the new exchequer bills which the respondents obtained for the express and only purpose of being delivered by them to Burn, that he might deposit them in the tin box of which he kept the key. They not only were not entered in any account between Burn and the respondents, but they were not to
- B remain in the possession of the respondents who were employed merely to carry and hold till the deposit in the tin box could be conveniently accomplished. Whether this deposit was to be made the same hour in which the securities were obtained from the government, without even being placed in a drawer belonging to the respondents, or after the lapse of some days, seems to me quite immaterial, bearing in mind the purpose for which they were obtained, and for which they
- C remained in the respondents' possession. Nor can it make any difference, that on the particular occasion out of which this action originated, on account of the illness of Burn, so long a time had elapsed from the obtaining of the securities without their being demanded by him for the purpose of being locked up in the tin box; for, if the respondents had not a right of lien upon them the moment they obtained them, the actual lien clearly could not afterwards be claimed, when Burn's account
- D had been overdrawn. Nor, I presume, can any weight be attached to the circumstance that the tin box in which the exchequer bills were to be locked up, and of which Burn kept the key, remained in the house of the respondents. Were not these exchequer bills obtained by the respondents to be delivered to Burn, who was himself to be the depositary and custodian of them? Bankers have a lien on all securities deposited with them as bankers; but these exchequer bills cannot be
- E considered as deposited with the respondents as bankers.

- During the argument in the Exchequer Chamber, it was very properly admitted by counsel for the bankers that if bills of exchange were delivered to a banker merely for the purpose of being deposited in a box, there would be no lien. Does it signify whether the respondents were to deposit the securities in the box themselves, or were to deliver them for that purpose to Burn? I think, that, under
- F such circumstances, bankers acquire no lien, either upon the bills to be exchanged, or upon the bills received in exchange. It is hardly denied, that, if there had been an express undertaking by the respondents to exchange the bills and to return the new ones as soon as obtained to Burn that he might lock them up, no lien would have been acquired. But the special verdict shows the course of dealing between the parties, and states facts which raise an implied promise on the part of the
- G respondents which operates as if it were express. This seems to me to be like the case put of bank-notes given to a banker to procure a bank-post bill for a customer, or a promise by a purchaser to pay ready money, which excludes set-off. There can be no implied right inconsistent with a positive obligation. It certainly would be most inconvenient, if a lien could be claimed under such circumstances, for then an agent holding exchequer bills for another could not, although he should keep
- H them carefully guarded under lock and key, employ a person to get them exchanged who happens to be a banker, lest he might, without being aware that he was acting improperly, commit a crime for which he would be liable to very serious punishment.

Much stress was laid upon the finding that

- I "it is the custom of bankers, in the course of their trade, as such, to receive the interest upon exchequer bills for their customers, and to exchange the exchequer bills when such interest is paid,"

but there is no finding that the exchequer bills for which this action is brought and on which the lien is claimed were in the possession of the respondents in the course of their trade as bankers or that it was their duty as bankers to perform these offices. I think the transaction is very much like the deposit of plate, in locked chests, at a banker's. A special verdict might find that it is the custom of bankers, in the course of their trade, to receive such deposits from their customers, but I

do not think that, from that finding, a general lien could be claimed on the plate chests. In both cases, a charge might be made by the bankers, if they were not otherwise remunerated for their trouble. I further beg leave to observe, that, in a course of dealing like this, where the old exchequer bills are immediately to be delivered to the government and the new exchequer bills are to be locked up in the box of the customer, it can hardly be supposed that the bankers will accept or pay bills of exchange for their customer on the credit of securities that, in the usual course of dealing, are for so short a time to be in their custody. No reliance, I think, can be placed on the circumstance of the interest received on the old exchequer bills going to the credit of the account of the customer, for, while he gives the bankers the interest to keep for him with one hand, he locks up the new exchequer bills in his tin box with the other.

Upon the whole I would humbly advise your Lordships to give judgment for the appellant. If your Lordships should concur with me, this judgment will leave untouched the rule that bankers have a general lien on securities deposited with them as bankers, but will prevent them from successfully claiming a lien on securities delivered to them for a special purpose inconsistent with the existence of the lien claimed. I move that the judgment of the court of Exchequer Chamber be reversed.

LORD LYNDHURST, L.C.—I entirely concur in the opinion which has been so clearly and so fully expressed by my noble and learned friend. With respect to some of the points in the case, no doubt whatever can for a moment be entertained. I think there is no question that, by the law-merchant, a banker has a lien upon securities deposited with him for his general balance. I consider this as part of the established law of the country. The courts will take notice of it; it is not necessary to plead it; nor is it necessary that it should be given in evidence in the particular instance. Therefore, as to that part of the case, I think it is entirely free from doubt.

The only question that remains to be considered, is, whether the facts of this case bring this deposit within the general rule. I think the argument and reasoning of my noble and learned friend are decisive on the subject, and that the case is not within the general rule. The deposit in this instance was not such, under all the circumstances, as to give the bankers a lien upon the exchequer bills. They were deposited in a box; they were kept under lock and key; the key was kept, not by the bankers, but by the party, Burn, who was holder. From time to time, he called for the purpose of taking the exchequer bills out of the box in order that the interest upon them might be received, or, when the bills were called in by the government, in order that they might be exchanged for others. Burn himself attended on those occasions; he took the bills out of the box; he delivered them for that special purpose to the bankers. They were always almost immediately delivered to him, and they were again put under lock and key in the same place of deposit.

It is impossible, considering how this business was carried on, that we can come to any other conclusion than that it was the understanding between the parties that the exchequer bills were to be returned after the interest was received, or after they were exchanged. If so, and that was the understanding—the fair inference from the transaction—it is quite clear that there could be no lien, and that the case does not come within the general rule. What my noble and learned friend has stated is, I think, perfectly correct, that, although from the accidental circumstance of the illness of Burn, these exchequer bills happened to remain for a longer period in the hands of the bankers than was usual, that accidental circumstance alone will not vary the case, or give the bankers a lien, if, under other circumstances, that lien would not have attached. I entirely concur in the judgment of my noble and learned friend.

Appeal allowed.

A

M'MANUS v. LANCASHIRE AND YORKSHIRE RAIL. CO.

[COURT OF EXCHEQUER CHAMBER (Erle, Williams, Crompton, Crowder and Willes, JJ.), December 1, February 16, May 17, 1859]

B

[Reported 4 H. & N. 327; 28 L.J.Ex. 353; 33 L.T.O.S. 259; 24 J.P. 4; 5 Jur.N.S. 651; 7 W.R. 547; 157 E.R. 865, Ex. Ch.]

Carriage of Goods—Contract—Special contract—Carrier exempted from liability—Need for condition to be just and reasonable—Carrier "not responsible for any injury or damage (however caused)"—Avoidance of condition.

C

Carriers are under an obligation to supply vehicles which are reasonably suitable for the conveyance of animals the carriage of which they undertake. The sufficiency or insufficiency of the vehicle supplied is, generally speaking, a matter which the carrier alone can have the means of ascertaining fully, and it would be not only unreasonable but mischievous if they were to be allowed to absolve themselves from the consequence of neglecting to perform properly that which seems entirely to belong to them as a duty. It is unreasonable that the carrier should stipulate for exemption from liability for the consequences of their own negligence, however gross, or misconduct, however flagrant.

D

Where a railway company undertook the carriage of the plaintiff's horses on a ticket which was stated to be issued "subject to the owner's undertaking all risks of conveyance, loading, and unloading whatsoever, as the company will not be responsible for any injury or damage (however caused) occurring to livestock of any description travelling [on the company's railway] or in their vehicles," and the horses were injured owing to the truck in which they were carried being unsound as a result of the negligence of the company's servants,

E

Held by WILLIAMS, J., CROWDER, J., CROMPTON, J., and WILLES, J., ERLE, J., dissenting: the condition contained in the ticket was not just or reasonable, and the plaintiff was entitled to recover in an action for negligence against the company in respect of the depreciation in the value of the horses.

F

Notes. The Railway and Canal Traffic Act, 1854, was repealed by the Transport Act, 1962 (42 HALSBURY'S STATUTES (2nd Edn.) 558), but the Act of 1854 is to be found at 19 HALSBURY'S STATUTES (2nd Edn.) 695.

G

Followed: *Beal v. South Devon Rail. Co.* (1860), 5 H. & N. 875; *M'Cance v. London and North Western Rail. Co.* (1861), 7 H. & N. 477. Considered: *Harrison v. London, Brighton and South Coast Rail. Co.* (1862), 2 B. & S. 152; *Peek v. North Staffordshire Rail. Co.* (1863), 10 H.L.Cas. 473. Followed: *Gregory v. West Midland Rail. Co.* (1864), 2 H. & C. 944. Considered: *McCawley v. Furness Rail. Co.* (1872), L.R. 8 Q.B. 57; *Kendall v. London and South Western Rail. Co.* (1872), L.R. 7 Exch. 373. Referred to: *Lewis v. Great Western Rail. Co.* (1860), 29 L.J.Ex. 425; *Hodgman v. West Midland Rail. Co.* (1864), 5 B. & S. 173; *Rooth v. North Eastern Rail. Co.* (1867), 15 L.T. 624; *Cohen v. Great Eastern Rail. Co.* (1876), 45 L.J.Q.B. 298; *Harris v. Great Western Rail. Co.* (1876), 1 Q.B.D. 515; *Great Northern Rail. Co. v. L.E.P. Transport and Depository, Ltd.*, [1922] All E.R. Rep. 18.

H

I

As to the variation of a carrier's common duty and liability and the carriage of animals, see 4 HALSBURY'S LAWS (3rd Edn.) 154-163 and 166-168. For cases see 8 DIGEST (Repl.) 89 et seq., 142 et seq.

Cases referred to:

- (1) *Simons v. Great Western Rail. Co.* (1856), 18 C.B. 805; 26 L.J.C.P. 25; 4 W.R. 651; 139 E.R. 1588; 8 Digest (Repl.) 62, 405.
- (2) *Peek v. North Staffordshire Rail. Co.* (1858), E.B. & E. 958; 27 L.J.Q.B. 465; 32 L.T.O.S. 71; 4 Jur.N.S. 370; reversed (1860), E.B. & E. 986; 1 L.T. 407; 6 Jur.N.S. 370, Ex. Ch.; reversed (1863), 10 H.L.Cas. 473; 3 New

- Rep. 1; 32 L.J.Q.B. 241; 8 L.T. 768; 9 Jur.N.S. 914; 11 W.R. 1023; 11 A E.R. 1109, H.L.; 8 Digest (Repl.) 60, 394.
- (3) *Wise v. Great Western Rail. Co.* (1856), 1 H. & N. 63; 25 L.J.Ex. 258; 27 L.T.O.S. 110; 4 W.R. 551; 156 E.R. 1119; 2 Digest (Repl.) 369, 479.
- (4) *Pardington v. South Wales Rail. Co.* (1856), 1 H. & N. 392; 26 L.J.Ex. 105; 28 L.T.O.S. 67; 2 Jur.N.S. 1210; 5 W.R. 8; 156 E.R. 1254; 8 Digest (Repl.) 63, 415. B
- (5) *Pickford v. Grand Junction Rail. Co.* (1841), 8 M. & W. 372; 2 Ry. & Can. Cas. 592; 9 Dowl. 766; 10 L.J.Ex. 342; 5 Jur. 731; 151 E.R. 1083; 8 Digest (Repl.) 16, 75.
- (6) *Jackson v. Rogers* (1683), 2 Show. 327; 89 E.R. 968; 8 Digest (Repl.) 12, 55.
- (7) *Johnson v. Midland Rail. Co.* (1849), 4 Exch. 367; 6 Ry. & Can. Cas. 61; 81 L.J.Ex. 366; 13 L.T.O.S. 305; 154 E.R. 1254; 8 Digest (Repl.) 13, 58. C
- (8) *Mors (Morse) v. Slew (Slue)* (1672), 2 Keb. 866; 3 Keb. 72, 112, 135; 2 Lev. 69; 1 Mod. Rep. 85; T.Raym. 220; 1 Vent. 190, 238; 84 E.R. 548, 601, 624, 638; 8 Digest (Repl.) 20, 106.
- (9) *Gibbon v. Paynton* (1769), 4 Burr. 2298; 98 E.R. 199; 8 Digest (Repl.) 20, 107.
- (10) *Nicholson v. Willan* (1804), 5 East, 507; 2 Smith, K.B. 107; 102 E.R. 1164; 8 Digest (Repl.) 44, 264. D
- (11) *Marsh v. Horne* (1826), 5 B. & C. 322; 8 Dow. & Ry.K.B. 223; 4 L.J.O.S.K.B. 267; 108 E.R. 120; 8 Digest (Repl.) 48, 295.
- (12) *Hinton v. Dibbin* (1842), 2 Q.B. 646; 2 Gal. v. Dav. 36; 11 L.J.Q.B. 113; 6 Jur. 601; 114 E.R. 253; 8 Digest (Repl.) 51, 318.
- (13) *Bodenham v. Bennett* (1817), 4 Price, 31; 146 E.R. 384; 8 Digest (Repl.) 45, 270. E
- (14) *Smith v. Horne* (1818), 8 Taunt. 144; 2 Moore, C.P. 18; 129 E.R. 388; 8 Digest (Repl.) 43, 256.
- (15) *Birkett v. Willan* (1819), 2 B. & Ald. 356; 106 E.R. 397; 8 Digest (Repl.) 43, 257.
- (16) *Walker v. York and North Midland Rail. Co.* (1853), 2 E. & B. 750; 23 F L.J.Q.B. 73; 22 L.T.O.S. 95; 18 Jur. 143; 2 W.R. 11; 2 C.L.R. 237; 118 E.R. 948; 8 Digest (Repl.) 55, 362.
- (17) *Wyld v. Pickford* (1841), 8 M. & W. 443; 10 L.J.Ex. 382; 151 E.R. 1113; 8 Digest (Repl.) 15, 73.
- (18) *Austin v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1852), 10 C.B. 454; 7 Ry. & Can. Cas. 300; 21 L.J.C.P. 179; 19 L.T.O.S. 256; 16 Jur. 763; 138 E.R. 181; 8 Digest (Repl.) 146, 933. G
- (19) *Carr v. Lancashire and Yorkshire Rail. Co.* (1852), 7 Exch. 707; 7 Ry. & Can. Cas. 426; 21 L.J.Ex. 261; 19 L.T.O.S. 124; 17 Jur. 397; 155 E.R. 1133; 8 Digest (Repl.) 146, 931.
- (20) *Chippendale v. Lancashire and Yorkshire Rail. Co.* (1851), 7 Ry. & Can. Cas. 824; 21 L.J.Q.B. 22; 15 Jur. 1106; 8 Digest (Repl.) 145, 929. H
- (21) *Shaw v. York and North Midland Rail. Co.* (1849), 13 Q.B. 347; 6 Ry. & Can. Cas. 87; 18 L.J.Q.B. 181; 13 L.T.O.S. 43; 13 Jur. 385; 116 E.R. 1295; 8 Digest (Repl.) 145, 928.

Also referred to in argument:

York, Newcastle and Berwick Rail. Co. v. Crisp (1854), 14 C.B. 527; 23 L.J.C.P. 125; 23 L.T.O.S. 78; 18 J.P. 361; 18 Jur. 606; 2 W.R. 428; 139 E.R. 217; sub nom. *Crisp v. York and Newcastle Rail. Co.*, 2 C.L.R. 1357; 8 Digest (Repl.) 146, 936. I

Heydon's Case (1584), 3 Co. Rep. 7a; 76 E.R. 637; 42 Digest 614, 143.

Appeal from the Court of Exchequer in an action for damage suffered by the plaintiff in respect of injury to horses belonging to him which he had sent to the defendant company for conveyance by their railway.

The plaintiff had occasion to send three horses from Liverpool to York. He sent

A the horses by his servant to the cattle station of the defendants' railway at Liverpool to be forwarded to York. A clerk of the company required the plaintiff to sign a ticket, which contained this condition,

"This ticket is issued subject to the owner's undertaking all risks of conveyance, loading, and unloading whatsoever, as the company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway or in their vehicles."

B A servant of the company provided for the carriage of the horses a truck which he believed to be in a proper condition, but, in fact it was not sound and during the journey a hole was made in the bottom of the truck, and the horses were injured.

C The company had two scales of charges for horses. One was 2d. per mile for conveyance in open trucks from the cattle station, subject to the terms of non-liability of the company as in the above form set forth; the other was 4d. per mile for horses forwarded in horse-boxes from the passenger station, subject to the like special terms of contract as to the non-liability of the company in case of injury or accident. The plaintiff paid 2d. per mile for the carriage of his horses.

D The horses having been injured, the plaintiff brought this action against the company for recovery of the damage sustained by reason of the insufficiency of the trucks for the conveyance of the horses. The defendant company said that the carriage of the horses was made upon and subject to the terms that the plaintiff should undertake all risks whatever of the carriage and conveyance by the defendants of the horses, and that the defendants would not be responsible for any injury or damage, however caused, occurring to the horses while being carried and conveyed upon the railway. The case came on for trial at the Liverpool Summer Assizes, 1857, before WATSON, B., when a verdict by consent was taken for the plaintiff, with leave to move to enter the verdict for the defendants upon the ground that the defendants were not responsible for the injury and damages of which the plaintiff complained. When the matter came before the Court of Exchequer that court held that the notice in this case was reasonable, and decided in favour of the

F defendants. The plaintiff appealed.

Blackburn and Brett for the plaintiff.

Unthank for the defendant company.

Cur. adv. vult.

G Feb. 16, 1859. **ERLE, J.**—This is an appeal from the Court of Exchequer to the Court of Exchequer Chamber, and two questions are raised: First, whether the railway company can enforce a special contract signed with the plaintiff for the carriage of horses if a judge does not think the condition therein named just and reasonable, and, secondly, whether the conditions in this contract are just and reasonable. The plaintiff contends that each question should be answered in the negative.

H With respect to the first, he relies on the construction of the Railway and Canal Traffic Act, 1854, given in *Simons v. Great Western Rail. Co.* (1), and adopted by the Court of Queen's Bench in *Peek v. North Staffordshire Rail. Co.* (2), deciding that the whole railway itself is placed under the control of the judges, so that no contract signed with a customer respecting liability for carriage shall protect the company unless the judge shall think every condition therein just, and no just condition respecting liability for carriage shall protect the company, unless it be contained in the contract signed with the customer. The defendant relies upon the construction given by the Court of Exchequer in *Wise v. Great Western Rail. Co.* (3), and *Pardington v. South Wales Rail. Co.* (4), deciding that the clause in the statute relating to conditions does not extend to special contracts.

I In my opinion, the defendants are right, and in support of that opinion I propose to distinguish the duties arising by the mutual consent of the carrier and customer as expressed in the contract, so binding the work to be done, and in terms, and the

responsibility from the duty of a carrier arising by law from the profession of a carrier and from a bailment to carry. These are the duties which may attach where there is no express contract, or be superinduced beyond the terms of any contract; and as they did not originate with the will of the person making the profession or taking the bailment, so, by that will, without the will of the customer, they may be qualified and regulated in many respects. For an example of the duty created by law without a contract, or beyond a contract and regulated by it, I would cite the following case. If a person chooses to profess to be a common carrier, the law creates a duty to receive things brought for carriage, and he may be liable ex delicto for refusing to receive: *Pickford v. Grand Junction Rail. Co.* (5). But this duty is regulated according to his will in many respects. He may choose the kind of conveyance, the times of transit, the mode of delivery of the articles which he would profess to carry, what price he will have, when it shall be paid, and the duty to receive is always limited by his convenience to carry: see *Jackson v. Rogers* (6), and *Johnson v. Midland Rail. Co.* (7).

This right to qualify the duty of receiving according to the terms and conditions fixed by the carrier alone comprises the right to qualify the common law duty of insuring safely—a duty which has given rise to much discussion, and is now for our consideration. When a contract is not only for carriage and delivery, but also for safe delivery, either absolutely or in degree, the contractor may sue the carrier for breach of contract in common course. But we are dealing with the duty of safe delivery imposed upon the carrier either where the law of contract does not apply, as in the case of consignees of goods who were no parties to the contract for carriage, or where there was no mutual consent between the customer and the carrier upon the point. In all cases where he has accepted the goods generally, the duty of the carrier to insure the safe delivery, excepting only the act of God or of the Queen's enemies, is clear, but the duty is attached to him upon the assumption that he has had an opportunity of securing to himself remuneration adequate to the risk so cast upon him. If he has not had the opportunity, or, if the circumstances make the precaution reasonable, he may, by a special acceptance, either limit his responsibility upon conditions, or be clear of it altogether.

LORD HALE's authority is to this effect, saying:

"If a carrier will, he may make a caution for himself, which, he omitting and taking in the goods generally, he shall answer for what happens: *Morse v. Stue* (8), 1 Vent. at p. 238."

The carriers' notices rejecting responsibility, unless the condition of assurance be complied with, are special acceptances imposing a liability by the will of the carrier against the will of the customer. LORD MANSFIELD, in his court, so treats the right: see *Gibbon v. Paynton* (9) (4 Burr. at p. 2301). LORD ELLENBOROUGH so treats them, and he says that the legal right of a carrier thus to protect himself had rendered legislative interference for his protection needless: see *Nicholson v. Willan* (10). LORD TENTERDEN in *Marsh v. Horne* (11), so treats them, where a customer knew of the notice to insure, and the carrier knew of the value of the article, and the first did not offer and the other did not ask for the premium, the carrier was protected by his notice. The court says (5 B. & C. at p. 326):

"A person may engage to place goods in the course of conveyance and delivery, and yet declare that he will not be answerable for their loss."

Other cases upon carriers' notices are to the same effect; and, although those conditions are called at times special contracts, as well as special acceptances, it is clear from the context that the right in the carrier to guard himself against a party attempting to overreach him by imposing a risk without paying the premium, is always meant, which is not a contract in its true sense. After the time of these cases this protection from notice became practically lost to the carrier, by imputing the damage or loss to gross negligence, the damage or loss being some evidence of negligence, and the line between negligence and gross negligence being undefined, as was observed by LORD DENMAN, in *Hinton v. Dibbin* (12) (2 Q.B. at p. 662).

A The judgment of GARROW, B., declaring what was sufficient evidence of gross negligence tended to this result: see *Bodenham v. Bennett* (13); and this tendency was increased by the judgment of BURROUGH, J., lamenting that the doctrine of notice had ever been introduced into Westminster Hall: *Smith v. Horne* (14).

In deference to these cases the ruling of LORD DENMAN giving effect to carrier's notices was set aside and a new trial granted in *Birkett v. Willan* (15), whereupon the legislature interposed and granted to land carriers, by the Carriers Act, 1830, fair protection in respect of specified articles unless the customer insured. It granted a new right in respect of these articles; in all other respects it left the existing rights of a carrier to limit his liability either by special acceptance or special contract unaltered, and by s. 4 it was provided that no public notice or declaration should limit or affect the common law liability of a common carrier: see *Walker v. York and North Midland Rail. Co.* (16). The carrier's duty to receive and his right to reject, in some cases absolutely, in others conditionally, without regard to the will of the customer, and, therefore, without special contract, remained as before; and although before the Railway and Canal Traffic Act, 1854, it was immaterial whether the carrier was said to limit his responsibility by special acceptance or by special contract, yet, as that statute, in my view, subjected the validity of the conditions imposed by special contract to the contingency of being thought just, and of conditions imposed by special contract to that of being signed, a discussion which has now become very material was, in the cases occurring in the interim between the two statutes, scarcely worth regard. These cases are much relied on by the plaintiff, and although in the court below they may be the foundation of the reasons for the decision, following the decisions of a co-ordinate court, in a superior court I hope I may, without impropriety or want of due deference, speak of them as I think.

In *Wyld v. Pickford* (17) the point arose. The plaintiff brought case for loss of maps by a carrier; the plea was that the defendants gave notice to the plaintiff at the time of delivery of the maps that they would not be responsible for them unless insured, that they accepted the maps on those terms, and that the maps were not insured. The plaintiff demurred to the plea, and argued that as there was no fraud, the carrier could only limit his liability by special contract, and that the plea showed no consent of the plaintiff, and, therefore, no contract. The defendants argued that a carrier could limit by special acceptance simpliciter, without the consent of the customer, and cited many clear authorities to prove it. The judgment was that the plea alleging special acceptance without any act of special contract was still good, and the ground of the judgment is remarkable. It shows that a carrier can only limit his responsibility by a special contract, and as the special acceptance in the terms of a notice does limit his liability, it must be imagined that the customer agreed with the carrier to forego his right to the common law responsibility of the carrier in consideration of the carrier foregoing his right to prepayment of the carriage by the customer. The judgment upon this point concludes thus (8 M. & W. at pp. 458, 459):

I "It is objected that there is no express averment that the plaintiff consented to these terms, but assuming he did not, the defendant did not accept the maps upon any other, and the plaintiff is in this difficulty: he is seeking to enforce the obligation upon a common carrier, because he does not refuse to pay the price of the carriage beforehand, and if he sued upon a bailment to the defendants upon special terms, it must be a bailment upon those terms upon which alone they have agreed to accept the goods."

With great deference I beg to submit that this judgment in some degree recognises the right of the carrier to stipulate, with the consent of the customer, and at all events it does not establish that a carrier has no right to protect himself if the customer refuses consent. Moreover, as the judges from LORD HALE to LORD TENTERDEN have supposed that the right of a carrier to protect himself from the extreme obligation of common law by special acceptance; as that right would be

nugatory if it depended upon the customer's consent; and as there is no trace of the notion of a contract in consideration of being let off prepayment in this case, as before surmised, in my opinion, the judgment, upon the ground of special acceptance simpliciter, as the defendants' pleader pleaded, and as counsel argued, would have better accorded with the tenor of the preceding authorities.

In *Walker v. York and North Midland Rail. Co.* (16), the carrier limited his responsibility by special acceptance. The judgment was that he was protected thereby. The judgment, which placed a protection upon the ground of a special contract, or presumed a contract implied by the court, was rather a fiction of law for the purpose of doing right to the carrier without clashing with the last case, than as a matter of fact. The plaintiff complained of delay in delivering fish; the defendants showed a notice served upon the plaintiff that they carried fish at a low rate upon the terms of no liability for delay in the delivery, and that they accepted the goods upon these terms. The plaintiff, so far from agreeing to the terms of the notice, claimed to treat it as null and void. The judge ruled that if a carrier gave a notice to a customer of the custom of the carrier, and there was no acquiescence or dissent by the customer who sent the goods, that was a ground from which the jury might infer the customer's assent to a special contract in the terms of the notice, and so the verdict was for the defendant and the court upheld it. That case really affirms that a special acceptance by a carrier may bind the customer, but in a circuitous mode from which a jury may infer a contract by the customer contrary to his express intention. The cases relating to animals are not to the point, as they were special contracts as well as special acceptances: *Austin v. Manchester, Sheffield and Lincolnshire Rail. Co.* (18); and *Carr v. Lancashire and Yorkshire Rail. Co.* (19).

Then the Railway and Canal Traffic Act, 1854, s. 7, was passed, regulating carriage by canals and railways. I submit that when that section became law a carrier had some employment imposing conditions upon his common law liability by special acceptance, without the consent of the customer to these conditions; and a carrier had, besides, the same free capacity to make any other lawful contracts as other subjects possess. Construing the statute with reference to this state of the law, the defendants' construction gives full effect to every word in its ordinary meaning; it also accords with the context, and the enactment as to contracts has an intelligible policy. The plaintiff's construction cannot be true unless the greater part of the words have no effect, or the context is violently transposed, or the legislature intended what seems to me iniquitous against this class of carriers. According to the defendants, the carrier's right to refuse general acceptance and impose conditions by notice, condition or declaration and other special acceptance, was in some degree in conflict with the supposed duty to receive whatever he could conveniently carry, and the law had not defined the line when the customer could sue the carrier in case he had not given anything but a qualified acceptance and so imposed unreasonable conditions. Then s. 7 declares that no notice, condition or declaration shall restrict his liability unless the condition shall be thought just and reasonable by a judge. Notice and declaration without the consent of the customer can only operate by imposing conditions. The statute recognises that they may still so operate if the conditions are thought just by a judge; and on this view full effect is given to the clause relating to conditions. After several clauses upon other matters, comes the proviso relating to contracts: "No special contract shall affect the customer unless signed." A special contract is contrasted with a general contract, and a bailment to carry with acceptance by the bailee, either absolute or qualified, is probably the general contract intended; which bailment creates, by operation of law, many duties and rights distinguishable from the contract for or in respect of acts to be done, and persons interested therein may sue thereon. But a special contract creates and defines by its own terms the course of duty of the contracting parties between themselves, the parties being as free to contract as they are to use their property in any way that the law does not forbid, and the right to contract being the vital essence of trade. According to the defendants this all-

A important right remains unaltered, except the customer's signature is pre-appointed, which shows the only evidence of his agreement.

Upon this construction all the words operate and the effect is reasonable. According to the plaintiff the law before the statute was that a carrier could in no way restrict his common law liability unless the customer assented to the special contract, so that all the rights of the carrier under the Act would have been defeated

B if the customer had offered to pre-pay the carriage; and he contended for the meaning of the enactment expressed by JERVIS, C.J., in *Simons v. Great Western Rail. Co.* (1), that a carrier may make special contracts binding upon his customers, provided they are signed by the customer and thought just by a judge. But, if the enactment relates to contracts only, the words "notice, condition and declaration" are unintelligible. If the liability could only be limited by a contract with the

C customer, the words "notices given by the company" and "conditions given by the company" are inappropriate. Mutual consent is the first element of contract, and the legislature cannot have thought that the assent of one side would create a contract. The use of different terms for the same idea in the same sentence is the essence of confusion; and the plaintiff promotes that confusion in supposing that the notices, conditions and declarations, in the first part of s. 7 mean the same idea

D as is adverted to by special contracts in the other part. This he does notwithstanding the certainty of the legislature in the Carriers Act, 1830, making public notices and declarations void, distinguishing them there from special contracts. If the legislature never intended to regulate personal notices and declarations, and still distinguished them from special contracts, the sequence of ideas would be reasonable, and the use of the words would be apt. The plaintiff's construction

E supposes that a proviso, which usually restrains, here operates to enlarge the enacting clause. Thus, if a meaning is to be gathered from the words and the context, they seem to afford many reasons for the defendants' view, and none for the plaintiff's. Where one of two constructions is to be chosen, expediency has some weight.

According to the defendants the carrier may limit his common law liability by conditions which are thought just, and the statute tends to give certainty to the law,

F for it defines it by referring to a judge the doubtful line between the carrier's right to qualify his acceptance and the customer's right to reject the qualification. The statute also defines part of the proof required for a special contract. According to the plaintiff the intention was that all contracts made by companies for carriage, although valid against them absolutely, shall not be enforced for them except upon the contingency of a judge thinking them just and reasonable. As to the profit which

G a carrier would make for carrying, railways like other carriers are perpetually infested by attempts to overreach them and fraud, which are only to be defeated by vigilance in making the contracts, and the protection of the law in enforcing them. An intention to make their contracts uncertain appears to have the evil of taking from that property that security which belongs to all other property in trade. The evil also is greater in proportion as the contingency is uncertain, and the test of

H "just and reasonable" in the mind of the person who happens to be the judge is peculiarly uncertain. Some judges seem to have thought it just that a carrier should always pay for every damage and loss; and other judges seem to have thought that just and reasonable as tested by the intuitive perception of right which they have themselves. Some judges seem to think that a party to a bargain should take care of his own interest, and that, if he chooses to enter into a bargain, he shall

I keep to it: other judges may attempt to question the interest of railways and customers respectively, and try the reasonableness of these contracts by this knowledge, but their situation makes this knowledge almost impossible.

Upon the argument the supposed hardship upon companies was said to be based upon the assumption that the carriers had a monopoly. JERVIS, C.J., in *Simons v. Great Western Rail. Co.* (1), says:

"The monopoly created by railways compels the public to employ them, and therefore the legislature has imposed security upon them."

It is true that the railway proprietors have produced accommodation so excellent A
that the public prefers it to every other; but that, for that reason, the argument
against monopoly should be brought against railways is not right. In monopolies
the seller of a bad article by virtue of his grant compels the buyer to pay too much
for it; here the buyer chooses the article on account of its goodness, and compels the
seller to take too little; and the public has granted nothing to railway companies
without exacting full price; their Acts, and their land, and their works, are all paid B
for, subject to conditions imposed originally; they have the same right of property
as other owners, and the confiscation of any of these rights is not justified by an
unfounded imputation of monopoly. The notion that customers of railways require
protection on account of their incapacity to resist oppression is not more true than
the notion that a certain large proportion of customers of railway companies stand
in need of every accommodation which the law offers. C

For these reasons I think that the plaintiff's construction is wrong, and that a
special contract binds them, notwithstanding that the judges may think some of
the conditions are not just or not reasonable. If the plaintiff is right upon the first
question, then the second arises, whether the condition that the carrier shall under-
take all risk of conveyance is just and reasonable. This condition does not extend
to wilful neglect or other misfeasance. The general words respecting the company D
not being responsible are added as explanatory of the express words of the condi-
tion, and are limited in the same way. This condition is imposed in respect of
horses, and I can find neither authority nor principle for holding that the defen-
dants were bound to receive living animals as common carriers. On the contrary,
in *Carr v. Lancashire and Yorkshire Rail. Co.* (19), animals are shown not to be
within the principle which affects carriers' responsibility. The tempers and habits E
of the animal are probably better known by the owner than by the company, and
that knowledge is essential to secure safe carriage. The treatment which would be
harmless to some animals would be fatal to others, and it is more reasonable that
the owner should be bound to take precaution than the company. If cattle are very
wild, they may break out of the truck which would confine a tamer creature:
Chippendale v. Lancashire and Yorkshire Rail. Co. (20). So if a horse is vicious F
he may kick down the partition which would be strong enough for a quieter animal:
Shaw v. York and North Midland Rail. Co. (21). If the owner chooses to employ a
railway instead of a road, what principle of justice or reason makes it wrong for the
company to stipulate that the owner should take the risk? It is absurd to suppose
that the question would depend upon a mercantile calculation of whether a payment
of 2d. per mile per horse, to include a place for a man, is sufficient to pay for the
risk of the journey, as well as the conveyance; and it is equally absurd to suppose G
that that calculation would be within the judicial cognisance of a judge. Probably
no judge knows what labour, skill and capital have been laid out in transmitting
these horses, and what profit ought to be realised to make a prudent investment of
capital, and what rate of profit 2d. per mile per horse is likely to give if the owner
takes the risk. Unless he has that knowledge he has not the data required for H
determining the bargain made by the plaintiff with the company to be so unjust as
that he shall be allowed to break it off, and to put upon the company a liability
which they had agreed not to take. But even if this general proposition cannot be
maintained, here the plaintiff had the option of two conveyances, one at a higher
price than the other, and if he chooses to take the lower price, and with it the
greater risk, it is unreasonable and unjust in him to cast upon the company a loss I
which might not have occurred if he had taken the more expensive accommodation.
I, therefore, answer the second question in the affirmative, adding that, in my
opinion, the defendants are entitled to judgment.

May 17, 1859. **WILLIAMS, J.**—I will deliver the judgment of the judges who
heard the arguments, with the exception of my brother ERLE, who has already
delivered his judgment. Two questions were raised in this case: First, whether
the clause of s. 7 of the Railway and Canal Traffic Act, 1854, making void all

A notices, conditions and declarations made and given by the company limiting their liability, unless such as the court or the judge trying the cause may adjudge to be just and reasonable, extends to cases where a special contract has been signed in conformity with the subsequent provision in the section; secondly, whether, supposing it does extend, the conditions contained in the special contract in question ought to be adjudged just and reasonable.

B As to the former of these questions, the argument which the subject admits appears to have been exhausted by the judges who gave their opinions in *Peck v. North Staffordshire Rail. Co.* (2), and it is sufficient for us to say that, having fully considered them, as well as the able arguments of the counsel in this court, we agree with the opinion expressed by JERVIS, C.J., in *Simons v. Great Western Rail. Co.* (1) (18 C.B. at pp. 829, 830) that the true construction of the Act, and
C the result of the provisions is this, namely, that

“the company may make special contracts with their customers, provided they are just and reasonable, and signed. And whereas the monopoly created by railway companies compels the public to employ them in the conveyance of their goods, the legislature has thought fit to impose a further security that the court shall see that the conditions or special contracts are just and reasonable.”

D In effect, before the statute every case in which a special limited liability was substituted for the general common law obligation of the carrier, whether by notice acquiesced in or document signed by the customers, was one of special contract, and the statute is to be construed with reference to that state of the law. It remains, therefore, to consider whether the condition or special contract in the case
E before us is just and reasonable; and we are of opinion that it is not. In order to bring the defendants within its protection, it is necessary to construe it as excluding responsibility for loss occasioned not only by all risks of whatever kind directly incident to the transit, but also for that caused by the insufficiency of the carriages provided by the defendants, though occasioned by their own negligence or misconduct. The sufficiency or insufficiency of the vehicles by which the company are
F to carry on their business is a matter, generally speaking, which they and they alone can and ought to have the means of fully ascertaining, and it would, we think, be not only unreasonable but mischievous if they were to be allowed to absolve themselves from the consequence of neglecting to perform properly that which seems entirely to belong to them as a duty. It is unreasonable that the company should stipulate for exemption from liability for the consequences of their own
G negligence, however gross, or misconduct, however flagrant; and that is what the condition under consideration professes to do. That condition is, therefore, void, and the case stands simply on the ground that the plaintiff has employed the defendants to carry his horses safely, and that they have used an inefficient and improper vehicle for that purpose, whereby the horses have been injured.

This being the opinion of the majority of the court, the judgment of the Exchequer
H must be reversed, and judgment given for the plaintiff. This is the opinion of myself, CROMPTON, CROWDER, and WILLES, JJ.

Appeal allowed.

HALL v. WRIGHT

[COURT OF EXCHEQUER CHAMBER (Pollock, C.B., Williams, Crowder and Willes, JJ., Martin, Bramwell and Watson, BB.), February 2, 4, November 26, 1859]

[Reported E.B. & E. 765; 29 L.J.Q.B. 43; 1 L.T. 230;
6 Jur.N.S. 193; 8 W.R. 160; 120 E.R. 695, Ex. Ch.]

Breach of Promise—Defence to action—Illness of defendant—Danger to life by going through marriage ceremony or consummating marriage.

In an action for breach of promise of marriage the defendant pleaded that after the agreement to marry and before any breach thereof he became, and still was, so ill with consumption of the lungs that he was incapable, without great danger to his life, of going through the marriage ceremony or of consummating the marriage.

Held by WILLIAMS, J., MARTIN, B., CROWDER, J., and WILLES, J. (POLLOCK, C.B., BRAMWELL, B., and WATSON, B., dissenting) that those facts did not constitute a good defence to the action.

Notes. Explained and Applied: *Brown v. Royal Insurance* (1859), 1 E. & E. 853. Followed: *Baker v. Cartwright* (1861), 30 L.J.C.P. 364. Doubted: *Cavell v. Prince* (1866), 4 H. & C. 368. Distinguished: *Boast v. Firth* (1871), L.R. 4 C.P. 1. Considered: *Robinson v. Davison*, [1861-73] All E.R.Rep. 699; *Jefferson v. Paskell*, [1914-15] All E.R.Rep. 156; *Gamble v. Sales* (1920), 36 T.L.R. 427. Referred to: *Beachey v. Brown* (1860), E.B. & E. 796; *Parkins v. Scott* (1862), 1 H. & C. 153; *Taylor v. Caldwell*, [1861-73] All E.R.Rep. 24; *Turner v. Goldsmith* (1891), 60 L.J.Q.B. 247; *Nickoll v. Ashton, Edridge & Co.* (1900), 5 Com. Cas. 252; *Krell v. Henry*, [1903] 2 K.B. 740; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corp., Ltd.*, [1941] 2 All E.R. 165.

As to defences to actions for breach of promise, see 19 HALSBURY'S LAWS (3rd Edn.) 771-773; and for cases see 27 DIGEST (Repl.) 29-33.

Cases referred to:

- (1) *Greenstreet (falsely called Cumyns) v. Cumyns* (1812), 2 Hag. Con. 332; 2 Phillim. 10; 161 E.R. 761; 27 Digest (Repl.) 270, 2163.
- (2) *Sparrow (falsely called Harrison) v. Harrison* (1841), 3 Curt. 16; 163 E.R. 638; affirmed sub nom. *Harrison v. Harrison* (1842), 4 Moo.P.C.C. 96, P.C.; 27 Digest (Repl.) 278, 2224.
- (3) *R. v. Millis* (1844), 10 Cl. & Fin. 534; 8 Jur. 717; 8 E.R. 844, H.L.; 27 Digest (Repl.) 45, 232.
- (4) *Paradine v. Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, 3236.
- (5) *Barker v. Hodgson* (1814), 3 M. & S. 267; 105 E.R. 612; 12 Digest (Repl.) 333, 2579.
- (6) *Chamberlaine v. Williamson* (1814), 2 M. & S. 408; 105 E.R. 433; 27 Digest (Repl.) 26, 38.
- (7) *Lowe v. Peers* (1770), 4 Burr. 2225; Wilm. 364; 98 E.R. 160; 12 Digest (Repl.) 278, 2131.
- (8) *Woodhouse v. Shepley* (1742), 2 Atk. 535; 26 E.R. 721, L.C.; 27 Digest (Repl.) 36, 133.
- (9) *Leeds v. Cook* (1803), 4 Esp. 256, N.P.; 27 Digest (Repl.) 31, 78.
- (10) *Atchinson v. Baker* (1796), Peake, Add. Cas. 103; 27 Digest (Repl.) 31, 83.
- (11) *Hochster v. De La Tour* (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 17 Jur. 972; 1 W.R. 469; 1 C.L.R. 846; 118 E.R. 922; 12 Digest (Repl.) 377, 2960.
- (12) *Avery v. Bowden* (1856), 6 E. & B. 953, 962; 26 L.J.Q.B. 3; 28 L.T.O.S. 145; 3 Jur.N.S. 238; 5 W.R. 45; 119 E.R. 1119, 1122, Ex. Ch.; 12 Digest (Repl.) 381, 2978.

- A (13) *Hadley v. Clarke* (1799), 8 Term Rep. 259; 101 E.R. 1377; 12 Digest (Repl.) 459, 3426.
- (14) *Atkinson v. Ritchie* (1809), 10 East, 530; 103 E.R. 877; 41 Digest 464, 2955.
- (15) *Lawrence v. Twentiman* (1611), 1 Roll. Abr. 450, pl. 10; 2 D'Anvers Abr. 84, pl. 10; 12 Digest (Repl.) 419, 3246.
- B (16) *Thornborow v. Whitacre* (1705), 2 Ld. Raym. 1164; 6 Mod. Rep. 305; 3 Salk. 97; 92 E.R. 270; 12 Digest (Repl.) 418, 3240.
- (17) *Walton v. Waterhouse* (1672), 2 Wms. Saund. 415 c.

Also referred to in argument :

- Wild v. Harris* (1849), ante, p. 413; 7 C.B. 999; 7 Dow. & L. 114; 18 L.J.C.P. 297; 13 L.T.O.S. 283; 13 Jur. 961; 137 E.R. 395; 27 Digest (Repl.) 23, 14.
- C *Mortimer v. Mortimer* (1820), 2 Hag. Con. 310; 161 E.R. 753; 27 Digest (Repl.) 414, 3432.
- Sparrow v. Sowgate* (1621), W.Jo. 29; Win. 61; 82 E.R. 16; 27 Digest (Repl.) 215, 1647.
- Williams v. Lloyd* (1628), W.Jo. 179; 82 E.R. 95; 3 Digest (Repl.) 66, 76.

D **Appeal** against a decision of the Court of Queen's Bench, discharging a rule nisi, granted pursuant to leave reserved at the trial, to enter the verdict for the plaintiff on a plea on which at the trial the verdict was directed by the judge to be entered for the defendant.

E The declaration stated that on April 15, 1855, the plaintiff and the defendant agreed to marry one another within a reasonable time in that behalf, and, although a reasonable time for the marriage had elapsed and the plaintiff had always been ready and willing to marry the defendant, he had neglected and refused to marry her. In his defence the defendant said that after the agreement to marry and before any breach thereof he became, and thenceforth had been, and still was, afflicted with dangerous bodily disease which had occasioned frequent and severe bleeding from his lungs, by reason of which disease he became and still was incapable of marriage without great danger to his life, and, therefore, unfit for the married state, whereof the plaintiff had notice before the commencement of the action. The action came on to be tried before ERLE, J., at the sittings in London after Michaelmas Term, 1857, when evidence was given that the defendant had been attacked with bleeding of the lungs in 1855, and that in the autumn of 1856 he was far advanced in consumption. The medical witnesses expressed it as their opinion that at that time it would have been dangerous to his life to have married, and that any excitement would renew the hæmorrhage and in all probability prove fatal. It did not appear that the defendant knew of his real state, but there was no evidence of his having informed the plaintiff of it. On this issue the jury found for the plaintiff except as to the allegation that the plaintiff had notice before the commencement of the action of the defendant's condition. They assessed the damages at £100 contingently. Thereupon the verdict was entered for the defendant on this issue, leave being reserved for the plaintiff to move the court that the verdict on that issue be entered for the plaintiff. On Jan. 12, 1858, the plaintiff obtained a rule to show cause why the verdict obtained in the cause should not be set aside, and a verdict entered for the plaintiff for £100 damages. On June 11, 1858, the Court of Queen's Bench discharged the rule. LORD CAMPBELL, C.J., and CROMPTON, J., were of opinion that the plea on this issue was not in excuse or suspension of the performance of the promise, that the contract to marry was not dissolved by the circumstances alleged in the plea, and that the plea was, therefore, bad. Further, that, if the plea was to be taken as pleaded, by way of excuse only, without treating the contract as dissolved, it was bad for not averring that before or at the expiration of a reasonable time the defendant gave the plaintiff notice of his state of health. WIGHTMAN and ERLE, JJ., were of opinion that the plea did not admit any breach of the contract as alleged in the declaration, but showed a state of circumstances existing down to the time of plea pleaded which justified the defendant's refusal to marry, and that it was a good plea without any averment

of notice to the plaintiff. CROMPTON, J., as junior judge, withdrew his judgment, A
and, consequently, the rule was discharged. The plaintiff appealed.

Mellish (J. R. Davison with him) for the plaintiff.

Edward James (Henderson with him) for the defendant.

Cur. adv. vult.

Nov. 26, 1859. The following judgments were read.

WATSON, B.—This was an appeal from a judgment of the Court of Queen's Bench, which judgment was for the defendant. The question turns on a special plea. The action was for breach of promise of marriage, in which the declaration alleged that the defendant promised to marry the plaintiff within a reasonable time, that a reasonable time had elapsed, and that the defendant had refused. The plea C
was that after making the agreement, and before any breach thereof, the defendant became and was, and henceforward hitherto had been, and still is, afflicted with a dangerous bodily disease which has caused frequent and severe bleeding from his lungs, by reason of which disease the defendant then became and still was incapable of marriage without the greatest danger to life, and, therefore, unfit for the married state, whereof the plaintiff had notice.

In the argument at the Bar in this court, and at the Bar and on the Bench of the court below, much discussion took place as to what was the meaning and effect of the plea. The plea is an excuse, namely, that before breach, and up to the time of the commencement of the action, the defendant was afflicted by a dangerous bodily disease, and was, therefore, "incapable of marriage," and, therefore, "unfit for the married state." The plea does not properly confess any breach of the promise. E
The question before us arises after verdict, and every intendment is to be made so as to support the plea, if possible. The terms are twofold. "Incapable of marriage" may mean two things—either incapable of going through the ceremony of marriage, or incapable of performing the functions required in the married state. In either view of the question I think the plea good. Certainly these words may be considered to apply to the ceremony of marriage, and then the defendant is not to pay damages by reason of a physical inability. The latter words, "unfit for the married state," are not by any means dubious. If it means the want of that which is, as LORD STOWELL expresses it, "a competency to perform the duties which the married state requires": *Greenstreet (falsely called Cumyns) v. Cumyns* (1) then the words "fit" or "not fit" seem to be the apt words to express this state in proceedings in the ecclesiastical court: *Sparrow (falsely called Harrison) v. Harrison* (2). Marriage, according to our law, as decided in the House of Lords, was a contract requiring a religious ceremony to its validity: *R. v. Millis* (3). According to the Rubric, the parties are to declare at the altar that there is no lawful impediment to the marriage, and that is with reference to the object and purposes of marriage as therein stated. This is declared to be the law of the Church. Here the parties in this case could not, without a falsehood, make such a solemn declaration. H
It would be no answer to say that, by modern legislation, the parties are relieved from going through the services of the Church of England. We are now declaring what the law is as to the contract of marriage. Supposing this marriage being performed, the wife may at any distance of time, presently, or at a future time, crave a decree declaring the marriage to be void. It seems to be strange that a man is liable in damages for not doing that which is against law, human and divine. I

The real ground of my opinion is that this contract is, like many other contracts incident to the statute, subject to conditions; among others, that the parties remain in health to undergo the ceremony, do not become unfit, and that the circumstances should not render it contrary to law. It was conceded on the argument, and in the court below, that insanity of mind would be an excuse, and that the insane person would not be responsible in damages. If so, why not insanity of body? In each case, as alleged, he is to answer in damages for not marrying. In each case the marriage is void. In each case it is no act of the defendant, but the act of

A God. It is not a dissolution of the contract except at election, such as a man refusing to marry on the score of the want of chastity of the intended wife. With this view of the plea it is clear that the allegation of notice was unnecessary, and need not be proved. In this declaration it is said the defendant "refused to marry." That is explained by this, that this by itself constituted no breach before the defendant's illness, and it shows that before a reasonable time had elapsed he was attacked by disease. If so, then a reasonable time had not elapsed. The term "reasonable time" refers to health under all the circumstances.

B The cases cited in the court below have little or no application, in my view of the case—namely, *Paradine v. Jane* (4), a covenant to repair a house; or, *Co. Litt.* 209, a, to enfeoff a stranger; or to load a ship, *Barker v. Hodgson*, (5). In these and in all like cases, the covenantor or promisor agrees to do the acts, or the acts shall be done conditionally, and, at all events, that for them he is liable if living, or his real or personal representative, as the case may be, having assets. It is clear that, in one respect, death dissolves the contract to marry: *Chamberlaine v. Williamson* (6). The performance of such contracts is still subject to be excused by subsequently becoming illegal. An argument much relied on is that this promise might have been made with a knowledge of the defendant's infirmity. To this there were two answers: first, the infirmity arose after the promise of marriage; secondly, it must, from the declaration, be taken to be a contract of marriage of the ordinary kind, with all its usual obligations and incidents. If it had been otherwise it should have been so alleged. For these reasons I think the judgment of the court below should be affirmed.

E **BRAMWELL, B.** (read by MARTIN, B.)—In this case the verdict should be entered for the defendant, if so much of the plea as is proved is an answer to the breach of contract complained of. The averment of notice was not proved, but that is immaterial unless the plea with or without it is bad. It is good if it justifies the breach complained of. It is good, therefore, if it justifies the not marrying (for a refusal to marry is not marrying) at the time when but for the reason alleged the defendant ought to have married. What are the consequences whether the contract is rescinded, or whether the defendant is liable to marry at some other time, or what else may result, I will advert to hereafter. At present the question is, Does the plea justify the particular breach alleged?

F The plea alleges that before and at the time of the breach the defendant was afflicted by bodily disease, which made him incapable of marriage without great danger of his life and unfit for the married state. The question was at first argued as to this point of unfitness for sexual intercourse. But counsel for the defendant said it meant, and it appears from the judgment of ERLE, J., that it meant, not only that, but also an incapacity to bear the fatigue and excitement of the marriage ceremony. It was proved to be true in both these meanings. I think either matter a justification for not marrying. But it is necessary to examine both, as some seem to consider the plea merely to mean unfitness for the ceremony of marriage; others the other unfitness I have mentioned. As neither fraud nor illegality is alleged, the excuse for not performing the contract must be found in the terms of the contract itself. The plea, therefore, assumes that it is a term of the contract declared on that, in the event named in the plea, the defendant should be excused from marrying, and as there is no reason why such term should be in this particular contract, unless it is in all such contracts, the question is reduced to this—is it a term in an ordinary agreement to marry that, if a man from bodily disease cannot marry without danger to his life, and is unfit for marriage from the cause mentioned at the time appointed, he shall be excused marrying then? The plea assumes it is. I think it is.

I Of course, I admit the parties might stipulate otherwise, but if they do not, I think they are implied terms of the ordinary contract. I quite agree that where parties can make their own terms, the law ought not, rightly, to imply any. But there are instances in which it is done from the necessity, or almost necessity, of

the case, and if it is reasonable to do it, it is no contract to marry. Consider how it is made, and how it is proved—made without formality, usually without witnesses; perhaps without the word itself having been used, or any word of contract; an undertaking between the parties rather than a bargain come to; at least very often in a state when the feelings are much excited; proved by a variety of acts and conduct which assume the contract to exist. It seems unreasonable to deal with it as with a contract for the sale of goods, or other business transaction, though no doubt the same principle governs both. In *Lowe v. Peers* (7), LORD MANSFIELD said (4 Burr. at p. 2230):

“All these contracts should be looked on (as LORD HARDWICKE said in *Woodhouse v. Shepley* (8)) with a jealous eye. . . . These engagements are liable to many mischiefs—to many dangerous consequences.”

These mischiefs and danger would be greater if the engagement was taken to be unconditional and unqualified. That terms are implied in contracts is admitted: contracts for personal service for matters dependent on personal capacity, as to write a book or paint a picture, are conditional on the continuance of the ability mental and corporal to perform them. This very contract to marry has an implied condition that the woman shall continue chaste; other instances may be given. Similar conditions make one think that such conditions, as the plea assumes are to be implied in the ordinary contract to marry. Surely if a man said to a woman: “I have promised to marry you, I must and will, but will never live with you or treat you as a wife,” he would not be offering, but refusing to perform, his contract: *Leeds v. Cook* (9). The contract is a contract to marry and perform the duties of marriage.

I think it better to recognise what we all know exists, and to assume it exists for a good purpose, than to affect to ignore it. Besides, there is abundant warranty for so doing. The marriage of an impotent man is null; and two of the three reasons for matrimony given in the marriage service involve a capacity for sexual intercourse. Can it be doubted, then, that, if death were the certain result of the fatigue and excitement of the ceremony, the defendant would be excused, or that impotency supervening on the promise would excuse him? Could he be bound, in performance of his promise, to commit suicide, or go through a ceremony which would be a nullity? But if the certainty of a fatal result would excuse, so would great danger of it. If impotency would, so surely should great danger; death from the exercise of capacity, more so. But to possess the lawful means of gratifying a powerful passion, with the alternative of abstaining or perilling life, is indeed “to incur the risk of intense misery instead of mutual comfort”; and it does seem to me, with great respect, a great mistake to lose sight of these considerations and suppose happiness can be procured in such a marriage by the gratification of an innocent desire to enjoy the consortium vitæ with a man, obtain rank and station as his wife, and be dowable of his lands. Moreover, am I to think only of the woman and not of the man who might object that her wishes, however innocent, were very unreasonable towards him, in wishing him to put himself in the temptation of perilling his life, and he might even doubt the innocence of such a desire, certainly, of wishing him to go through a ceremony which might be fatal to him.

This suggests the following. If the man is not excused, but bound, is the woman bound in such a case? Impossible, one would think. But if not, it must be on account of some implied condition in the contract. It is not as though the man was in default. She could not refuse to marry in such a case on the ground that he had broken his contract by not continuing fit for marrying, for, if so, she might not only refuse to marry him, but might maintain an action against him for becoming unfit. That cannot be. He does not thereby break his contract. Yet she is excused. If so, so must he be, for if without default of one party to the contract the other has a right to refuse to perform on the happening of a certain event, it must be assumed, till the contrary appears, that the right is common to both. If in such a case she could rely on an implied condition to excuse her marrying him, why may

- A not he on one to excuse his marrying her? The contract of marriage has been assimilated to those to which it bears no resemblance. A man contracts to build a ship, and cannot. Well, that is his misfortune; a loss will be sustained by him or the shipowner, and it is convenient that, if he puts no condition on his contract, none should be implied; and that, if his contract is unconditional, he should bear the loss consequent on his nonperformance. If so, also of a contract to sell corn. But
- B in the case of a contract to marry with supervening impotency, there is a loss which must fall on both, whether the contract is fulfilled or not. It seems to me, then, that sexual intercourse is contemplated by parties who agree to marry as an essential part of their engagement. The inability for it in one party is an excuse from performance by the other—that, where such excuse exists without any default in the disabled party, it is contrary to principle to hold that an option is given to the
- C other; consequently that the right of secession in such a case is mutual.

The authorities are in favour of this view: POTHIER, *TRAITE DU MARIAGE* (part 2, c. 1, Art. 7, s. 61). But it is said his authority is impaired by his adding as a cause of dissolution,

“a derangement of fortune, which put him out of condition to be able to support the charges of the marriage which he had promised to contract.”

- D I own I see nothing unreasonable in this, nor anything very different from our law. People who agree to marry, not having the means, agree with the implied condition to wait till they have them—the legal expression of which is that their engagement is to marry in a reasonable time, and that does not arrive till their means are sufficient. Suppose, after the engagement, poverty falls on them; that is an excuse for not immediately marrying. Is it reasonable that the woman should wait till the man becomes able to maintain her? This reasoning may be wrong; still there is POTHIER's authority direct on the question in hand. Then there is the opinion of LORD KENYON, in *Atchinson v. Baker* (10), cited and approved in 1 PARSONS ON CONTRACTS, 550. *Paradine v. Jane* (4), and similar cases cited for the plaintiff, are misapplied. They beg this question. No doubt, if the contract made by the
- F parties is unconditional, death or disease is no excuse, but the question in this case is whether the contract is not conditional on the continuance of life and health. Why, if the defendant died before breach, could not his executors be liable? The answer is because he has not undertaken to live; neither has he to continue competent in health; and the one is as much a condition of matrimony as the other. [By the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, an action for breach of promise survives against or for the benefit of a party to the action.] This disposes of *Barker v. Hodgson* (5). LORD ELLENBOROUGH's remark (3 M. & S. at p. 270), “Perhaps it is too much to say that the freighter was compellable to load his cargo,” does not mean he was excused from so doing, for the plaintiff recovered in respect of the defendant not having done so. The damages were for breach of the covenant to do it. What LORD ELLENBOROUGH means, I imagine to be that the
- H defendant was not compellable or would not have had specific performance enjoined. It is to me unintelligible how, if the man is not bound to perform the contract, he can be liable to pay damages for its non-performance. But it is said notice ought to have been given to the plaintiff. In point of right feeling I agree; but the parties here are at law with each other. The defendant says: “I have a legal answer to your legal demand.” As a rule, a man is not bound to say why, and I
- I see no reason why he should be in this case of a contract to marry. It may be the defendant communicated to the plaintiff in the most delicate way an objection to marry, but refused to say why. If she chooses to go to law with him, as on a bargain, she must abide by the rules of law applicable to all cases of bargains and contracts. I understand the opinion of CROMPTON, J., to be rather as above expressed, with this difference: he thinks that, at the utmost, all the defendant was entitled to do was to rescind the contract. But, if so, I think the plea is good. When is he to rescind? If a contract gives a right to rescind it, but expresses no time for rescinding, it need not be done till the time arrives for performance; no

previous notice need be given. In truth, such a right to rescind is a right to say "no" when the time arrives for performance. It may be that a person who rescinds must give notice; but when? He does give notice when he refuses; is he bound to give it earlier—if so, why? In the not very probable case of the lady going to the altar without previous arrangement, surely he might, if afflicted as the defendant is, fairly send word, in answer to the invitation to join her, that he would not. In the more probable case of some previous request, he refuses when it is made; in other words, till he refuses there is no breach of contract, and when he refuses, he by so doing gives notice that he will not perform. Is he bound to say why? I cannot understand why he is. No doubt, if after his disability arises he goes on with the engagement, he may well be bound, as that would be evidence that the original contract was not conditioned as I think ordinary contracts to marry are, or would furnish evidence of a fresh contract. Further, if it is said that the facts proved only justify a postponement of marriage, I think the plea good. The plaintiff complains the defendant refused: the defendant says, "When I did, I had a sufficient reason." I do not understand the breach to be "you refused, and refused for ever." I do not understand such a breach in point of law. I do not understand what is meant by a plea "in excuse or suspension of the performance," as distinguished from "or in discharge of the promise." *Hochster v. De La Tour* (11) turns on the relation of master and servant. If I contract to do a thing and am sued for not doing it, it is a good defence to say the time for doing it has not arrived, and I take it it would be a bad replication to say, "True, but you said you would": see *Avery v. Bowden* (12).

The plaintiff can only be entitled to recover on these pleadings and proof on the ground that the asserted and proved incompetency is no ground for refusing to marry when the request so to do is made. I am of opinion it is. In short, the defendant here says: "You complain I refused; I admit that I did so for a good reason, namely, my performance was conditional on my continuing in a competent state, and I ceased to be so." If the plaintiff meant to say the contract was not so conditioned, she should have given evidence, in my opinion, that the contract in this case was not of the ordinary contract to marry. If she meant to say there was a new contract evidenced by the engagement continuing after the disability was known, she should have new assigned. But if she relies on and proves the common contract only, it is, in my opinion, a good answer to prove that the defendant, when he refused, laboured under either of the infirmities mentioned in this case. If I am to say whether I think the contract ended by such an event, I say I do, and on this ground—that it is so vitally for the benefit of both parties that that should be the agreement between them, that common sense requires it to be so implied. The disability of the defendant, if not incurable, was one of indefinite duration, and of a lasting character. Had it been that he broke a leg, or was afflicted with a fever which disabled him from marriage at the time appointed, I should have thought him not liable to an action for not marrying then, but bound to marry on his recovering. This last consideration seems to me to suggest an argument in favour of the contract being conditional as suggested, for in ordinary contracts, if not liable at the day appointed, the person would not be at another time; but in this contract it is absurd to suppose that, if a day was named for a marriage, and the man broke his leg, was ill of a fever, lost a parent, or from some other consideration of health or decency could not marry on the day in question, he would either be liable to an action, or wholly discharged from the promise to marry. The same good sense and convenience which would reject such a conclusion would, in my judgment, require that the contract should be construed with the conditions I attach. For these reasons, as well as those of WIGHTMAN, J., and ERLE, J., I think the judgment of the court below should be affirmed.

WILLES, J.—I am of opinion, for the reasons stated at large by LORD CAMPBELL in the court below, that the judgment therein given against his Lordship's opinion, and that of CROMPTON, J., ought to be reversed, and judgment given for the plaintiff

- A** for the damages assessed in her favour by the jury, with costs. This is not a case of impotency, and I need give no opinion upon such a case. The law is clear upon the point that only impotency, permanent and incurable, such as that which results from the loss of one of the necessary organs of generation, constitutes an impediment to marriage, and not that which may be temporary or curable. The contract in this case, as stated by the plaintiff in the declaration, is admitted by the defendant in his plea to be an unconditional contract, and, being in terms an unconditional one, it is guesswork, not construction, to read it as conditional. Its performance is not impossible, and it is not enough to show, in analogy to an action upon a contract, that its performance is inconvenient, or might be dangerous. The delicacy of health alleged as an excuse is the man's misfortune, not to be visited, beyond what is inevitable, upon the woman. If either party is to have the option of breaking off the match, it ought to be the woman. The court have no right to say what is best for her. If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life. I do not sympathise with such a woman, if any there be. But this is not a question of sentiment; if it were, I might put the case of a real attachment, where such an illness as that stated in the plea supervening might make the woman more anxious to marry, in order to be a companion and the nurse, if she could not be the mistress, of her sweetheart. For these reasons I think the judgment of the court below ought to be reversed, and judgment given for the plaintiff.

- CROWDER, J.**—The question in this case is whether the plea affords any legal answer to the declaration, and I am of opinion that it does not. The declaration is upon a contract to marry, and avers the breach of that contract by not marrying in a reasonable time. The plea, as I understand it, admits the breach as alleged in the declaration, but sets up an excuse for it, and the question to be decided is whether that excuse is a legal answer to the declaration. I think that it is quite impossible to construe the defendant's plea as alleging any physical impossibility to go through the ceremony of marriage, or any physical incapacity to perform the duties of marriage. Whether, if such allegations had existed, they need have afforded any answer to the declaration, I do not think it necessary in this case to decide, and I abstain from giving any opinion upon that point. But I am of opinion that it is no excuse for the breach of a promise to marry that the performance of the conjugal duties need be attended with danger to the defendant's life. Such a state of illness renders it matter of the greatest prudence on his part to break his contract, and to pay such damages as the jury may award against him for the breach, but, in my opinion, it is no legal answer to this action. I desire to refer to the arguments and reasoning of LORD CAMPBELL in the court below, as conclusive in my mind upon this view of the case. It would be idle for me to repeat them, and I think, therefore, the judgment should be for the plaintiff below.

- H MARTIN, B.**—This is an appeal from the judgment of the Court of Queen's Bench. The action is for a breach of promise to marry. The declaration is in the common form, alleging a promise to marry within a reasonable time. Among other pleas, the defendant pleaded that before breach he became, and was, and is, afflicted with a dangerous bodily disease which occasioned frequent and severe bleeding from the lungs, by reason of which disease he became and was, and is, incapable of marriage without great danger to his life, and, therefore, unfit for the marriage state; whereof the plaintiff before action (not before breach) had notice. Issue was joined upon this plea. The cause was tried before ERLE, J., and the jury found that all the averments in the plea were proved, except that as to notice. The judge directed the verdict to be entered for the defendant, giving the plaintiff leave to move to enter it for her. The other issues were found for the plaintiff, and the damages assessed contingently at £100. A rule was obtained to enter the verdict for the plaintiff; and after argument the court were equally divided, LORD CAMPBELL and CROMPTON, J., holding the plea bad, in which case, the averment in it not

being proved, the plaintiff would be entitled to have the verdict entered for her, while WIGHTMAN, J., and ERLE, J., thought the plea as proved good. CROMPTON, J., being the junior judge, gave way for the purpose of this appeal, and the plaintiff's rule was discharged. A

I agree with LORD CAMPBELL and CROMPTON, J., and think the plea not good. The law of England permits an action to recover damages for the breach of the promise to marry although I am aware that many persons think such an action should not be allowed. The action is not for the specific performance—a suit which I apprehend no court in this country would entertain—but for damages for the non-performance of the contract. The plea is one in confession and avoidance of the facts alleged in it (exclusive of the notice to the plaintiff). The defendant ought to excuse or justify the breach. The judges of the Court of Queen's Bench do not seem to have been agreed as to the exact meaning of the plea. But, to put it in the most favourable way for the defendant, it may be assumed that the promise to marry involves the promise to consummate the marriage, and that the incapacity and danger to life mentioned in the plea has been caused by an inevitable misfortune, without any act or conduct of the defendant conducing to it. B C

The general rule upon the subject is that when a person by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract: *Paradine v. Jane* (4), cited and acted on in *Hadley v. Clarke* (13), and *Atkinson v. Ritchie* (14): see also COMYNS' DIGEST "Assumpsit" G.; and I know of no authority, except it be *Lawrence v. Twentiman* (15), having any tendency to shake it, or to show that such a state of facts as alleged in the plea is an answer to an action for pecuniary damages for the breach of a contract to marry. I think it very much better to adhere to the rule than to create an arbitrary exception, for which, no doubt, plausible reasons may be given. To admit exceptions of this kind utterly destroys the certainty of law, and, in my opinion, is inconvenient. But in the present case what the defendant promised to do was to marry the plaintiff, and this he could have done. It is quite consistent with the averment in the plea that the incapacity and danger to life may have been caused by the defendant's own acts or conduct, and a case will rightly suggest itself where, after an agreement to marry, an incapacity to consummate marriage and danger to life in attempting to do so might arise in which it would seem absurd to suppose that damages could not be recovered. The supposed objection of the plaintiff would be the grossest aggravation of the cause of action. D E F

As to *Lawrence v. Twentiman* (15), except it be explainable in the manner suggested by LORD CAMPBELL in his judgment in this case—namely, that time was not of the essence of the contract, or that the law relating to holding intercourse with persons affected by the plague (1 Jas. 1, c. 31), made the performance of his contract illegal—I cannot agree with it. It is no doubt referred to in several books of authority, but, unless explained by others, it seems contrary to the rule of law. The placitum is to the effect that a man had contracted to build a house before a given day, but was excused because the plague had broken out and continued to the day in the very neighbourhood, but, it is added, he must build it afterwards. Unless the contract really was to build the house within a reasonable time, or the building was illegal (in which case, the decision, by reason of the existence of the plague in that neighbourhood, was right), this case cannot be sustained. How is it possible to maintain covenant by any obligation to build it afterwards? The builder never contracted to do so, and the common law could not impose such a contract upon him: see SHEPPARD'S TOUCHSTONE by PRESTON, p. 174; and *Barker v. Hodgson* (5), which seem to the contrary. It must be that the law deems the contract to marry to be one of pecuniary value, and assuming that it could not reasonably be enforced under the circumstances stated in the plea that the defendant should marry the plaintiff, I can see no reason why he should not compensate her for the breach of the contract. Why should the consequences of the mistake fall upon her, and not upon the defendant?: see LORD ELLENBOROUGH's judgment in *Barker v.* G H I

A *Hodgson* (5), and the dicta of LORD HOLT in *Thornborow v. Whitacre* (16). For these reasons I think the judgment of the court below ought to be reversed.

WILLIAMS, J.—I am also of opinion that the plea is bad. The plaintiff is, therefore, entitled to the judgment of the court. It appears to me to be a plea in confession and avoidance; that is to say, the defendant pleads that he is justified for not keeping the promise because after making it he became incapable of marriage without great danger to his life. I am of opinion that, though this may be a good reason why he should not be compelled to a specific performance of the contract, and a very good reason why he should in prudence prefer paying damages for the breach of his contract in not performing it, it is no ground for resisting the payment of damages, according to the general rule of law applicable to such contracts. The plea is insufficient in conformity with the rule cited by LORD CAMPBELL in his judgment, which is laid down in *Paradine v. Jane* (4), and which is established by the authority in SERJT. WILLIAMS's notes to *Walton v. Waterhouse* (17) (2 Wms. Saund. at p. 422). But it is alleged that the contract to marry stands on a peculiar footing, and is subject to implied conditions peculiar to themselves; and the authorities certainly afford ground for contending that if the parties in this case had been reversed the present plaintiff might have set up the bodily infirmity of the present defendant as a ground for refusing to perform her contract, just as he might have pleaded her corporeal inaptitude for marriage or want of chastity, which might have been discovered since the making of the contract.

There is no authority that I am aware of, or any good reason, for allowing one party to set up his or her corporeal infirmity or unfitness for marriage, or his or her immorality, in answer to the requisition of one who may nevertheless wish and insist on the performance of the contract. The woman would not be allowed to plead her own want of chastity if she was sued for a breach of promise of marriage, notwithstanding the man might be allowed to set it up as an answer if she were to seek to enforce the contract. It has been argued that this is not a plea in confession and avoidance, but a kind of circuitous traverse of a reasonable time having elapsed before the matter which suspended the performance of the contract. In answer to this it is enough to say I entirely agree in the view that LORD CAMPBELL, C.J., and CROMPTON, J., have taken, and I adhere to what they have said on this head. But I would add that this question, though a nice and curious one, is not likely, in my opinion, to be of great practical importance, because surely the cases must be very rare where a woman, if she is informed that the man to whom she is affianced is in such a state of health at the time of the alleged promise as to incapacitate him, and is requested to excuse him from the completion of the marriage contract, would insist on the performance of it; or where, if she were so advised, to bring an action for breach of promise of marriage, that a jury could be found who, under such circumstances, would give her more than nominal damages. In the present case the defendant broke off the marriage without informing the plaintiff that he had such grounds. For these reasons I am of opinion that the judgment should be affirmed.

POLLOCK, C.B.—After the discussion that this case has undergone, I do not think it necessary to say anything on the form of the pleadings, but I shall proceed at once to the question upon which a difference of opinion was raised among the members of this court and the court below, and that is, what is the real meaning of a contract to marry within a reasonable time, which is the contract stated in the declaration? Some learned judges think it is of the same character as any other contract, and that no waiver or conditions can be implied by the law, and that, if it be not performed in the terms expressed, the parties failing to perform it must pay damages for the breach. Other learned judges think that there are implied conditions and exceptions on the subject, and that the matter stated in this plea is one of them, and that, therefore, the defendant cannot be called on to pay damages for the non-performance, as alleged in the declaration, under the circumstances which appear upon the whole record.

It must be conceded on all hands that there are contracts to which the law implies exceptions and conditions which are not expressed. All contracts for personal services, which can be performed only during the lifetime of the party contracting, are subject to implied conditions that he shall be alive to perform it, and that should he die, his executor is not liable to an action for the breach of contract occasioned by his death: so a contract by an author to write a book within a reasonable time, or by a painter to paint a picture within a reasonable time, would, in my judgment, be deemed subject to the condition, that if the author became insane, or the painter became blind, and so incapable of performing the contract by the act of God, he is not liable personally in damages any more than his executors would be liable if he had been removed by death. In truth, the reasonable time has not arrived if the party contracting to perform the act has been deprived by illness of the means of performing it. But I should decline to put my judgment on that ground, though I think that in this case, and on this record, it would be quite sufficient. I prefer putting it on the broader ground, namely, that there is an implied exception in a contract of marriage, including the state of facts alleged in the plea and found by the jury to be true. In the case of an ordinary contract to marry, such as is presented to the court by the evidence in an action of this sort, I think no one can doubt that the continuance of life is an implied condition, though certainly not expressed.

The question then is, really, in this case: Is the condition of the continuance of health—that is, of such a state of health as makes it not improper to marry—an implied condition? I am of opinion that it is. There are conditions to be implied in such a contract on both sides. I think every one would admit that there is a condition on the part of the female that she should continue chaste. The contract contains no such expression at all; it is introduced by the law, because it is a perfectly reasonable condition and what every one must suppose the parties intended, and, perhaps, more generally—though this is not so clear and would possibly not so readily meet with the assent of everybody—but, perhaps, there may also be a condition that the conduct of the woman should not be such as to make a marriage with her improper. For instance, it has been decided in the case of want of chastity that the contract to marry cannot be enforced. Can it be enforced where the character of the woman has become referable to some other breach of good conduct or immorality? Could she enforce the contract in that case? If she yielded to other indulgences besides those of not preserving her chastity, by not keeping one particle of her sobriety, could she enforce the contract? If she forgot what was due to the laws of the country, as being dishonest, and were sentenced for some petty larceny to so many months' imprisonment and hard labour, could she then enforce the contract to marry? I should have thought certainly not.

I think that one test that may be safely applied to ascertain whether any such condition may be implied or not, is to consider what would have been the case if the man were, after making such a promise to marry, to lose by accident or disease the capacity to contract matrimony by becoming impotent. I put it in the large and perfect sense to which WILLIAMS, J., has alluded in his judgment. To such a case the decisions about impossibility I think will apply. By the act of God the contract has become void, and I may here incidentally, with reference to what fell from MARTIN, B., say that the plea in this case states that the defendant became and was, and from thenceforth has been, and still is, afflicted with a dangerous bodily disease. I apprehend, in all cases, the presumption of law is that disease or death is the visitation of God, and is so to be treated by us in considering this record. But, in the case that I am putting, of a man by accident or disease becoming altogether unfit for matrimony, the contract to marry has, in my opinion, become void, because the party cannot contract matrimony. The man may go through the ceremony of marriage, but he cannot marry. A ceremony gone through by such a man with a person of the other sex does not constitute a marriage. Assuming the fact to be so, and when the time arrived the marriage would become

- A in question and the court would have to consider whether it was a marriage or not, they would be bound to treat it as no marriage at all: the ceremony would not be binding, and would operate nothing. The contract to marry in reality is broken by the very calamity of his becoming impotent. It has been suggested that in such a case the woman may be contented with the society of the man, and that the choice ought to rest with her, and if she is willing to marry he must marry or pay damages.
- B I am of opinion that such is not the law of this country. I think, if a man were to say with truth: "By the visitation of Providence I am not capable of marriage," he cannot be called on to marry or pay damages for not marrying. I think this is an implied exception in all agreements to marry, and I think the view of the law which puts a contract to marry on the same footing as a bargain for a horse or a bale of goods is not in accordance with the general feelings of mankind, and is supported by no authority.

C I think the judgment of the court below ought to be affirmed. There being, however, a majority, four of the judges being of opinion that the judgment should be reversed and three only that it should be affirmed, the judgment of the court below is reversed and judgment given for the plaintiff.

Appeal allowed.

D

E

TODD v. FLIGHT

F [COURT OF COMMON PLEAS (Erle, C.J., Williams, Byles and Keating, JJ.), November 20, 1860]

[Reported 9 C.B.N.S. 377; 30 L.J.C.P. 21; 3 L.T. 325;
7 Jur.N.S. 291; 9 W.R. 145; 142 E.R. 148]

Landlord and Tenant—Reversion—Damage to reversion—Damage through ill-repair of adjoining premises—Liability of reversioner of adjoining premises.

- G The defendant, the reversioner of premises of which the chimneys were in a ruinous and dangerous state, let the premises to B. Subsequently the chimneys fell down and damaged adjoining buildings of which the plaintiff was the reversioner.

H **Held:** the defendant was liable to the plaintiff for the damage sustained, notwithstanding that the premises were occupied by a tenant, as, at the time of the letting, the defendant knew that the chimneys were in a ruinous and dangerous state and so was guilty of the wrongful non-repair.

Per Curiam: If a wrong causing damage arises from nonfeasance or misfeasance of the lessor, the party suffering damage from the wrong may sue him.

- I **Notes.** Distinguished: *Pretty v. Bickmore* (1873), L.R. 8 C.P. 401; *St. Anne's Well Brewery Co. v. Roberts*, [1928] All E.R.Rep. 28. Considered: *Cunard v. Antifyre, Ltd.*, [1932] All E.R.Rep. 558; *Wilchick v. Marks*, [1934] All E.R.Rep. 73; *Wringe v. Cohen*, [1939] 4 All E.R. 241. Referred to: *Gwinnell v. Eamer* (1875), L.R. 10 C.P. 658; *Nelson v. Liverpool Brewery Co.* (1877), 2 C.P.D. 311; *Heaven v. Pender* (1882), 30 W.R. 749; *Hall v. Norfolk*, [1900] 2 Ch. 493.

As to liability of landlord to third parties for injuries due to want of repair, see 23 HALSBURY'S LAWS (3rd Edn.) 570 et seq., and as to dangerous property as a private nuisance, see 28 HALSBURY'S LAWS (3rd Edn.) 144; and for cases see 31 DIGEST (Repl.) 380 et seq.

Cases referred to :

- (1) *Tenant v. Goldwin (or Golding)* (1704), 1 Salk. 21, 360; Holt, K.B. 500; 2 Ld. Raym. 1089; 6 Mod. Rep. 311; 91 E.R. 20, 314; 36 Digest (Repl.) 287, 356.
- (2) *Cheetham v. Hampson* (1791), 4 Term Rep. 318; 100 E.R. 1041; 31 Digest (Repl.) 388, 5132.
- (3) *Russell v. Shenton* (1842), 3 Q.B. 449; 2 Gal. & Dav. 573; 11 L.J.Q.B. 289; 6 Jur. 1083; 114 E.R. 579; 36 Digest (Repl.) 318, 642.
- (4) *Payne v. Rogers* (1794), 2 Hy. Bl. 350; 126 E.R. 590; 31 Digest (Repl.) 380, 5081.
- (5) *Roswell v. Prior* (1701), Holt, K.B. 500; 12 Mod. Rep. 635; 90 E.R. 1175; sub nom. *Rosewell v. Prior*, 1 Ld. Raym. 713; 2 Salk. 460; 6 Mod. Rep. 116; 36 Digest (Repl.) 318, 640.
- (6) *R. v. Pedley* (1834), 1 Ad. & El. 822; 3 Nev. & M.K.B. 627; 3 L.J.M.C. 119; 110 E.R. 1422; 36 Digest (Repl.) 318, 641.
- (7) *Rich v. Basterfield* (1847), 4 C.B. 783; 16 L.J.C.P. 273; 9 L.T.O.S. 77, 356; 11 Jur. 696; 136 E.R. 715; 36 Digest (Repl.) 318, 643.

Also referred to in argument :

- Chauntler v. Robinson* (1849), 4 Exch. 163; 19 L.J.Ex. 170; 14 L.T.O.S. 107; 31 Digest (Repl.) 380, 5082.
- R. v. Watts* (1703), 1 Salk. 357; 91 E.R. 311; sub nom. *R. v. Watson*, 2 Ld. Raym. 856; 26 Digest (Repl.) 495, 1791.
- Humphries v. Brogden* (1850), 12 Q.B. 739; 20 L.J.Q.B. 10; 16 L.T.O.S. 457; 116 E.R. 1048; sub nom. *Humfries v. Brogden*, 15 Jur. 124; 19 Digest (Repl.) 180, 1207.
- Vaughan v. Menlove* (1837), 3 Bing.N.C. 468; 3 Hodg. 51; 4 Scott, 244; 6 L.J.C.P. 92; 1 Jur. 215; 132 E.R. 490; 36 Digest (Repl.) 29, 126.
- Fay v. Prentice* (1845), 1 C.B. 828; 14 L.J.C.P. 298; 5 L.T.O.S. 216; 9 Jur. 876; 135 E.R. 769; 36 Digest (Repl.) 254, 54.

Action for damages for the loss caused to the plaintiff's building by the falling down of the defendant's chimneys which were alleged to be in a ruinous state.

The plaintiff was the reversioner of a building and chapel which he leased to Francis Cuthbertson, John Henry Adams and Walter Arthur King, as tenants in possession. The defendant was the reversioner of a building adjoining the plaintiff's property and which was leased to Benjamin Batt, as tenant in occupation. The plaintiff alleged that the chimneys on the defendant's building were in a "dilapidated, decayed, ruinous, insecure and improper state" and were in danger of falling down and damaging the plaintiff's buildings; and that the defendant well knowing the state of the premises had let the building to Benjamin Batt, as tenant, and wrongfully permitted the chimneys to continue to be kept in the same state of repair until the chimneys fell down on to and damaged the plaintiff's building.

The defendant denied that the chimneys were in an insecure state and contended that the obligation to repair rested on the occupier and not on the lessor and that any damage was the liability of the occupier. The plaintiff maintained that the defendant having leased his building with the chimneys in a dangerous state, with an existing nuisance and having continued it was liable for the damage notwithstanding that he had leased the premises to a tenant.

Phipson and Gallway for the plaintiff.

Honyman for the defendant.

Cur. adv. vult.

Nov. 20, 1860. **ERLE, C.J.**, delivered the following judgment of the court.—In this case the plaintiff's right to sue someone in respect of the damage he sustained from the fall of the defendant's chimneys was not denied, so that it is not necessary for us to advert to the authorities on the rights of parties in respect of adjoining premises, nor to say whether the writ *de domo reparandâ* would lie at common law,

A as said in Co. Litt. 56, a; or only by local custom, as said by LORD HOLT, C.J., in *Tenant v. Goldwin* (1); or to consider what were the rights on a quod permittat issued in a case of nuisance.

The point here in contest is whether the defendant is the proper party to be sued. As to this point the material allegations are that the defendant at the time the cause of action arose was the reversioner, he having demised the premises to B Batt, who was then in occupation; that the chimneys were ruinous and in danger of falling, and were known by him to be so at the time when he demised them to Batt; and that he has, therefore, kept and maintained them in such ruinous and dangerous state. Upon the facts the defendant contended that the action should be against the lessee in occupation, and not against himself, being the reversioner, and cited *Cheetham v. Hampson* (2), where the action was for non-repair of fences, C and was held to lie against the landlord; and also *Russell v. Shenton* (3), where the action was for not cleansing the drains and sewers, and was held not to lie against the landlord.

On the other hand, the plaintiff contended that in many cases the party suffering damage from a nuisance had the option of suing either the lessee in occupation or the lessor. Thus, where the damage was from the non-repair of a trap-door over D a cellar, and it appeared that it was the duty of the lessor to do this repair, as between him and the lessee, it was held that the action lay against the lessor: *Payne v. Rogers* (4); and where the damage arose from the wrongful act of the defendant in erecting a wall which obstructed the plaintiff's right, and the defendant had, before action brought, leased the premises to the party who was in possession, still the lessor was held liable for the continuance of the wall after the lease, because E it existed at the time of the demise: *Rosewell v. Prior* (5). So where the lessor demised houses, either with a privy or with the right of resorting thereto, it was held that if he demised the privy, either when it had become a nuisance, or if he had the duty of cleansing it after it became a nuisance, he might be indicted for the nuisance: *R. v. Pedley* (6). These cases are authorities for saying, if a wrong causing damage arises from nonfeasance or misfeasance of the lessor, the party F suffering damage from the wrong may sue him.

We are of opinion that the principle so contended for on the part of the plaintiff is the law, and common to all the cases. In *Cheetham v. Hampson* (2), it was held the action did not lie against the landlord for non-repair of the fences, because he had no duty to repair them, and therefore was guilty of no wrong in non-repair. So in *Russell v. Shenton* (3) the court affirmed the lessor not bound to cleanse the G drains during the damage, and so was guilty of no wrong. In *Rich v. Basterfield* (7) the lessor was held liable for the damage occasioned by smoke from the fires which the lessee chose to make, but the reasoning of the judgment assumes it to be law that the lessor may be liable in cases of nuisance if he has been guilty of a wrong, causing the smoke which made the cause of action. This is expressed in many parts of the judgment, but more particularly after commenting on *R. v. H Pedley* (6), CRESSWELL, J., says (4 C.B. at p. 805):

"If the lessor had demised the buildings when the nuisance existed, or had relet them after the use of the buildings had created the nuisance, or had undertaken the cleansing and had not performed it, we think he would have been made liable properly."

I In the present case it is assumed that the defendant let the houses when the chimneys were known by him to be ruinous and in danger of falling, and he kept and maintained them in that state; thus he was guilty of the wrongful non-repair that led to the damage, and after the demise the fall had arisen from no default of the lessee, but by the laws of nature. We, therefore, hold the action lies against the lessor, and our judgment is for the plaintiff.

Judgment for plaintiff.

SIMPSON v. SAVAGE

[COURT OF COMMON PLEAS (Cresswell, Williams and Crowder, JJ.), November 19, 21, December 1, 1856]

[Reported 1 C.B.N.S. 347; 26 L.J.C.P. 50; 28 L.T.O.S. 204;
21 J.P. 279; 3 Jur.N.S. 161; 5 W.R. 147; 140 E.R. 143]

Landlord and Tenant—Reversion—Damage to reversion—Nuisance during tenancy—Permanency of damage.

In order to give the reversioner the right to sue for nuisance during a tenancy the injury to the reversion must be of a permanent nature.

The defendant erected buildings and furnaces adjoining premises occupied by a tenant of the plaintiff, and caused fires, smoke, and noise to the great annoyance of the tenant.

Held: the causing of the noise, fires and smoke, being acts of a temporary character and such as might be discontinued at any time before the end of the tenant's term, were not sufficient to enable the plaintiff to maintain an action for injury to his reversion.

Notes. Extended: *Jones v. Chappell* (1875), L.R. 20 Eq. 539. Applied: *Mott v. Shoolbred* (1875), L.R. 20 Eq. 22; *White v. London General Omnibus Co.* (1914), 58 Sol. Jo. 339. Referred to: *Metropolitan Association for Improving Dwellings of Industrious Classes v. Petch* (1858), 5 C.B.N.S. 504; *Bell v. Midland Rail. Co.* (1861), 30 L.J.C.P. 273; *Cooper v. Crabtree* (1881), 19 Ch.D. 193; *Byass v. Bettam* (1885), 2 T.L.R. 88; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508; *Jones v. Llanrwst U.D.C.*, [1908-10] All E.R.Rep. 922.

As to the right of a reversioner to sue for nuisance, see 28 HALSBURY'S LAWS (3rd Edn.) 153; and for cases see 36 DIGEST (Repl.) 306-309.

Cases referred to:

- (1) *Mumford v. Oxford, Worcester and Wolverhampton Rail. Co.* (1856), 1 F.H. & N. 34; 25 L.J.Ex. 265; 27 L.T.O.S. 58; 157 E.R. 1107; sub nom. *Mountford v. Oxford, Worcester and Wolverhampton Rail. Co.*, 4 W.R. 457; 36 Digest (Repl.) 307, 532.
- (2) *Jesser v. Gifford* (1767), 4 Burr. 2141; 98 E.R. 116; 19 Digest (Repl.) 202, 1420.
- (3) *Tucker v. Newman* (1839), 11 Ad. & El. 40; 3 Per. & Dav. 14; 9 L.J.Q.B. 1; 3 Jur. 1145; 113 E.R. 327; 36 Digest (Repl.) 307, 537.
- (4) *Rich v. Basterfield* (1847), 4 C.B. 783; 16 L.J.C.P. 273; 9 L.T.O.S. 77, 356; 11 Jur. 696; 136 E.R. 715; 36 Digest (Repl.) 318, 643.
- (5) *Baxter v. Taylor* (1832), 4 B. & Ad. 72; 1 Nev. & M.K.B. 11; 2 L.J.K.B. 65; 110 E.R. 382; 19 Digest (Repl.) 133, 864.

Also referred to in argument:

- Aldred's Case* (1610), 9 Co. Rep. 57 b; 77 E.R. 816; 36 Digest (Repl.) 267, 183.
Young v. Spencer (1829), 10 B. & C. 145; 5 Man. & Ry.K.B. 47; 8 L.J.O.S.K.B. 106; 109 E.R. 405; 31 Digest (Repl.) 391, 5165.
R. v. Moore (1832), 3 B. & Ad. 184; 1 L.J.M.C. 30; 110 E.R. 68; 36 Digest (Repl.) 345, 856.
Jackson v. Pesked (1813), 1 M. & S. 234; 105 E.R. 88; 36 Digest (Repl.) 306, 528.
Kidgill v. Moor (1850), 9 C.B. 364; 1 L.M. & P. 131; 19 L.J.C.P. 177; 14 L.T.O.S. 443; 14 Jur. 790; 137 E.R. 934; 36 Digest (Repl.) 308, 547.
R. v. Pappineau (1726), 2 Stra. 686; 2 Sess. Cas.K.B. 34; 93 E.R. 784; 36 Digest (Repl.) 301, 455.
R. v. White and Ward (1757), 1 Burr. 333; 97 E.R. 338; 36 Digest (Repl.) 267, 195.
Hopwood v. Schofield (1837), 2 Mood. & R. 34, N.P.; 19 Digest (Repl.) 132, 850.

A Rule Nisi obtained by the defendant to enter a nonsuit in an action for injury to a reversionary interest in land.

The plaintiff alleged injury to his reversion by the erection of a manufactory on the adjoining property and causing considerable volumes of smoke to issue from chimneys that the defendant had there erected. The plaintiff also complained of loud noises which prevented the occupants of his house adjoining from sleeping, and of fires that were made in the open air, which caused smoke and dirt with sparks to fly over his premises.

C The action was tried before LORD CAMPBELL, C.J., who ruled that the fires in the yard being of a temporary character only, would not be considered as an injury to the reversion, and that the action could not be maintained on that account, but with reference to the fires erected in the foundry, and the smoke that issued from the chimneys, he said that this was distinguishable from *Mumford v. Oxford, Worcester and Wolverhampton Rail. Co.* (1), and that there was evidence to go to the jury of an injury to the reversion, but he reserved leave to move to enter a nonsuit, if the court should think there was no injury to the reversion. On the argument it was insisted that the injury done by the defendant need not be of a permanent nature, and it was sufficient to show that it was of such a description as would cause the reversion in the premises to sell for a smaller sum if brought into the market.

Serjeant Byles and Couch for the plaintiff.

O'Malley, Q.C. (with him *Keane*), for the defendant.

Cur. adv. vult.

E Dec. 1, 1856. **CRESSWELL, J.**, delivered the following judgment of the court, in which after stating the facts as set out above and the arguments of counsel, he continued:—After considering the authorities, we are of opinion that since, in order to give the reversioner an action of this kind there must be some injury done to the inheritance, the necessity is involved of the injury being of a permanent character. The earliest instances of such an action are for cutting trees, subverting the soil, and erecting a dam across a stream, so as to cause it to flow over the plaintiff's land. In the two former cases the thing done was not removable during the term; in the third it was removable but being of a permanent character, it was assumed that it would remain and, therefore, it was treated as an injury to the reversion. The decision in *Jesser v. Gifford* (2), falls within the same principle. A window was obstructed; the obstruction was of a permanent character, and would remain unless something was done to remedy the evil. *Tucker v. Newman* (3) belongs to the same class.

H The buildings erected in this case did not injure the plaintiff's inheritance, and the real subject-matter of complaint, therefore, since the erection of the buildings, was causing smoke to issue from the chimneys. If the fires had not been made by the defendant he could not have sued for an injury either to the premises or to the inheritance, according to *Rich v. Basterfield* (4). The making of fires and causing smoke to issue was not an act of a permanent nature. It is very like *Baxter v. Taylor* (5), where a person trespassed asserting a right of way, and it is not distinguishable from *Mumford v. Oxford, Worcester and Wolverhampton Rail. Co.* (1), where the action was brought against the defendant, the occupier of certain sheds, for making engines, for noises there, which caused the tenants of the plaintiff to leave the premises and give notice to quit. The real complaint by the reversioner is, that he fears the defendant or some other occupier of the adjoining premises will continue to make fires and cause smoke to issue from the chimneys; and if the reversion would sell for less, it is not on account of anything that has been done, but the apprehension of something that would be done at a future time. According to the authorities we feel bound to say that this is not such an injury as will enable the reversioner to maintain an action; and, therefore, the rule to enter a nonsuit must be made absolute.

Rule absolute.

TUTTON v. DARKE

[COURT OF EXCHEQUER (Pollock, C.B., Martin, Bramwell and Channell, BB.),
November 15, May 8, 1860]

[Reported 5 H. & N. 647; 29 L.J.Ex. 271; 2 L.T.361;
6 Jur.N.S. 983; 157 E.R. 1338]

*Distress—For rent—Distress at night—"Night"—Between sunset and sunrise—
Legality.*

Distress for rent may not be made at night, which for this purpose is the interval between sunset and sunrise and not between dark and daybreak.

Notes. It has been held in *Werth v. London and Westminster Loan and Discount Co.* (1889), 5 T.L.R. 521 at p. 522, that levying distress after sunset is an irregularity which may be waived by the tenant, but this decision was criticised in *Perring & Co. v. Emerson*, [1904-7] All E.R.Rep. 641 at p. 643: per WILLS, J. (see 12 HALSBURY'S LAWS (3rd Edn.) 116 (g)).

Considered: *Nash v. Lucas* (1867), L.R. 2 Q.B. 590.

As to when distress may be made, see 12 HALSBURY'S LAWS (3rd Edn.) 115 et seq.; and for cases see 18 DIGEST 310 et seq.

Cases referred to in argument:

Aldenburgh v. Peaple (1834), 6 C. & P. 212, N.P.; 18 Digest (Repl.) 300, 459.

Lamb v. Wall (1859), 1 F. & F. 503, N.P.; 18 Digest (Repl.) 300, 461.

Tinckler v. Prentice (1812), 4 Taunt. 549; 128 E.R. 445; 31 Digest (Repl.) 325, 4607.

Rule Nisi obtained by the plaintiff to enter verdict in an action for wrongful distress.

At the trial before MARTIN, B., it appeared that the defendant had taken the plaintiff's goods as a distress for rent; that the distress was perfectly regular in all respects except that the entry was made shortly after sunset, but at a time when it was still perfectly light; it was contended that the distress was unlawful, as made after sunset. The judge directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for £15, at which amount damages were assessed by the jury. A rule to that effect was subsequently obtained.

Hawkins, Q.C., for the defendant, showed cause against the rule.

Lush, Q.C., and *C. E. Pollock* for the plaintiff, supported the rule.

Cur. adv. vult.

May 8, 1860. **MARTIN, B.**, delivered the following judgment of the court.—A distress was made for rent a short time after sunset, and it was alleged on behalf of the plaintiff that it was an illegal distress, and entitled the plaintiff to recover, notwithstanding that the rent was due, and the distress was otherwise properly conducted. A nonsuit was entered, with leave to move to enter the verdict for £15, the sum at which damages were assessed by the jury. A rule was obtained to enter the verdict for the plaintiff, and it was argued. However, the same point afterwards arose in *Nixon v. Freeman*, and the point has been not less than four times argued in this court. I am to give the judgment in *Tutton v. Darke*, and also on that other point as to *Nixon v. Freeman*.

It is perfectly plain on all the authorities that a distress must be taken in the daytime; and the only question is whether daytime is to be understood to be after sunrise and before sunset, or after daybreak and before dusk? We are of opinion that sunrise and sunset forms the true limit. A vast number of cases were cited, and a vast number of authorities on burglary and actions against the hundred, and a variety of other matters, and all the cases in which the words "day" and "night" seem to have occurred; but it is sufficient to say that in COKE UPON LITTLETON 142 a, it is laid down how that is to be understood. There I find: "The lord cannot distrain in the night, but in the daytime"; and the reference to that appears

A to be the *MIRROUR OF JUSTICES*, c. 2, s. 26, where it is expressly laid down that daytime is after sunrise and before sunset. It is to be observed that, as far as I can recollect, there was not a single case in contradiction of that. The words "day" and "night" were used, but there was not a single case or dictum to say that day and night meant any otherwise than sunrise and sunset.

B We are, therefore, of opinion that a distress must be made between sunrise and sunset for the purpose of making it legal. I may add, that *COKE UPON LITTLETON*, 202 a, in speaking of a demand of rent for the purpose of saving a condition, states that the demand is to be made at a convenient time before the last sun-setting of the last day of payment. There is no ambiguity at all; and I apprehend the true time for making a distress and making a demand is before sunset.

C The question may arise, what is sun-rising or sun-setting? We do not mean to give any opinion on that. In these cases two of them were clearly before the sun had made his appearance at all; one was in the morning, and the other at night.

Clearly the sun was in no sense up when this occurred; and, therefore the rule properly is for people to distrain in the day, and not absolutely to run it so very fine between sunrise and sunset.

D I may add, there were some doubts thrown on the *MIRROUR OF JUSTICES*; but it has existed from the time of King Alfred, and in the reports it is spoken of in the highest possible terms by *COKE* as an authority not to be treated lightly. In this case, therefore, the plaintiff is entitled to the judgment of the court, and the rule will be absolute for entering the verdict for £15. That will govern the main point in *Nixon v. Freeman*.

Rule absolute.

E

F

SPRYE v. PORTER

[COURT OF QUEEN'S BENCH (Lord Campbell, C.J., Coleridge, Wightman and Erle, JJ.), November 18, 25, 1856]

G [Reported 7 E. & B. 58; 26 L.J.Q.B. 64; 28 L.T.O.S. 229;
21 J.P. 55; 3 Jur.N.S. 330; 5 W.R. 81]

ChamPERTY—Agreement to give information to enable recipient to recover property—No proceedings contemplated—Share of property recovered payable to informant—Agreement to give information and evidence if proceedings taken.

H An agreement to give information and furnish documents to a person to enable him to recover property on the terms that the informant will receive a share of the property if and when it is recovered, there being no legal proceedings pending and no stipulation is made for the commencement of any proceedings, is legal. But an agreement to give information and evidence in the event of proceedings being taken to recover the property in consideration of receiving a share of the property recovered is champertous and illegal.

I

Notes. Distinguished: *Hilton v. Woods* (1867), L.R. 4 Eq. 432. Followed: *Hutley v. Hutley* (1873), L.R. 8 Q.B. 112. Applied: *Bradlaugh v. Newdegate* (1883), 11 Q.B.D. 1. Followed: *James v. Kerr* (1889), 40 Ch.D. 449; *Rees v. De Bernardy*, [1896] 2 Ch. 437. Applied: *Ford v. Radford* (1920), 36 T.L.R. 658. Referred to: *Earle v. Hopwood* (1861), 9 C.B.N.S. 566; *Ball v. Warwick* (1881), 50 L.J.Q.B. 382; *Savill v. Langman* (1898), 79 L.T. 44; *Glegg v. Bromley*, [1911–13] All E.R.Rep. 1138; *Neville v. London Express Newspaper, Ltd.*, [1918–19] All E.R.Rep. 61.

As to champerty, see 1 HALSBURY'S LAWS (3rd Edn.) 41-43; and for cases see A
1 DIGEST (Repl.) 85-88.

Case referred to :

- (1) *Stanley v. Jones* (1831), 7 Bing. 369; 5 Moo. & P. 193; 9 L.J.O.S.C.P. 51;
131 E.R. 143; 1 Digest (Repl.) 85, 645.

Also referred to in argument :

Wilkinson v. Oliveira (1835), 1 Bing.N.C. 490; 1 Scott, 461; 131 E.R. 1206; 1
Digest (Repl.) 86, 652.

Hartley v. Russell (1825), 2 Sim. & St. 244; 3 L.J.O.S.Ch. 146; 57 E.R. 339;
1 Digest (Repl.) 94, 702.

Findon (Finden) v. Parker (1843), 11 M. & W. 675; 12 L.J.Ex. 444; 1 L.T.O.S.
289; 7 J.P. 385; 7 Jur. 903; 152 E.R. 976; 1 Digest (Repl.) 81, 610.

Harrington v. Long (1833), 2 My. & K. 590; 39 E.R. 1069; 1 Digest (Repl.) 93,
693.

Cockell v. Taylor, Collett v. Preston, Preston v. Collett (1851), 15 Beav. 103;
21 L.J.Ch. 545; 51 E.R. 475; 1 Digest (Repl.) 94, 695.

Wood v. Downes (1811), 18 Ves. 120; 84 E.R. 263; 1 Digest (Repl.) 101, 770.

Stevens v. Bagwell (1808), 15 Ves. 139; 33 E.R. 707; 1 Digest (Repl.) 85, 647.

Strachan v. Brander (1759), 1 Eden, 303; 28 E.R. 701; 1 Digest (Repl.) 86, 659.

Jackson v. Burnham (1852), 8 Exch. 173; 22 L.J.Ex. 13; 20 L.T.O.S. 129; 155
E.R. 1307; 5 Digest (Repl.) 1069, 8609.

Herbert v. Sayer (1844), 5 Q.B. 965; 2 Dow. & L. 49; 1 Dav. & Mer. 723; 13
L.J.Q.B. 209; 8 Jur. 812; 114 E.R. 1512, Ex. Ch.; 5 Digest (Repl.) 796, 6736.

Skelton v. Mott (1850), 5 Exch. 231; 19 L.J.Ex. 243.

Evans v. Jones (1839), 5 M. & W. 77; 2 Horn & H. 67; 8 L.J.Ex. 173; 3 J.P.
274; 3 Jur. 318; 151 E.R. 34; 25 Digest (Repl.) 419, 29.

Bell v. Smith (1826), 5 B. & C. 188; 7 Dow. & Ry.K.B. 846; 4 L.J.O.S.K.B. 140;
108 E.R. 70; 1 Digest (Repl.) 91, 677.

Reynell v. Sprye, Sprye v. Reynell (1852), 1 De G.M. & G. 660; 21 L.J.Ch. 633;
42 E.R. 710; 1 Digest (Repl.) 86, 653.

Marquis of Cholmondeley v. Lord Clinton (1821), 4 Bli. 1; 4 E.R. 721, H.L.; 1
Digest (Repl.) 88, 667.

Collins v. Blantern (1767), 2 Wils.K.B. 342; 95 E.R. 847; 1 Digest (Repl.) 47,
353.

Demurrers in an action to enforce an agreement.

The first count of the declaration stated that the plaintiff and one Rosaz were in possession of certain documents and information to prove that the defendant was entitled to certain property of which he was not then aware: that they then proposed to give him, the defendant, all the documents and information in their possession on his agreeing to pay to each of them one-fifth of the value of such property if it should actually come into his possession, to which proposal he agreed; that thereupon an agreement in writing was entered into, whereby the defendant, in consideration of the premises, agreed that, if by the said documents and information he should actually become possessed of any property not then in his possession and control, and of which he was not then aware, he would pay to each of them, the plaintiff and Rosaz, one-fifth of the value of the property to be recovered and possessed by him as aforesaid. It was thereby further agreed that the defendant should not be compelled to take any proceedings at law or in equity to recover the said property; that the defendant would not make known to any person the documents or information so to be communicated to him without the consent of the plaintiffs in writing; that the defendant should execute all necessary deeds for assigning the one-fifth of the property so recovered; that if the defendant did not become possessed of any property he should not be called on to pay anything; that if the defendant did not think proper to proceed to recover the property, he would return the papers, and thereupon the agreement should be cancelled.

- A The declaration further stated that on the furnishing of the said documents and evidence certain legal proceedings had been taken by the defendant, and that he had recovered thereby property to the amount of £52,000; that the plaintiff had done all things to entitle him to the payment of the fifth, but that the defendant had not paid it. There were also counts for work and labour, for money lent, and on an account stated.
- B By the seventh plea to the first count the defendant pleaded that one Townley had died intestate, possessed of considerable personal property without any of his relations being known; that administration had been granted to the Treasury Solicitor for the benefit of her Majesty; that the defendant was ignorant of his being related to Townley, or in any manner entitled to the property; that the plaintiff and Rosaz then represented to the defendant that they would supply and
- C give certain existing information and evidence, in case it should become necessary that proceedings should be taken by the defendant at law or in equity for the recovery of the property; that through or by means of such information and evidence the defendant should and might successfully recover the property, provided the defendant would enter into an agreement with the plaintiff and Rosaz to pay to each of them one-fifth of the property so recovered; that it was thereupon unlaw-
- D fully agreed between the parties that the plaintiff and Rosaz should give and supply such information and evidence, in case of its being necessary to take proceedings at law or in equity for the recovery of the property; and, if by means of such information and evidence the defendant should succeed in recovering the property, he would pay each of them one-fifth of the amount. The plea then alleged that, for the purpose of carrying out this illegal agreement, the parties entered into the supposed
- E agreement set out in the first count.
- By the eleventh plea to the whole declaration the defendant stated that, after the making of the agreement, and after the accrual of the causes of action, the plaintiff petitioned the Insolvent Debtors Court; that a vesting order had been made, that a trade assignee had been appointed, and that all his property was vested in the assignee.
- F The plaintiff demurred to all the above pleas.
- Bovill, Q.C. (with him Lush), for the defendant.*
Hill, Q.C. (Montagu Chambers, Q.C., and Milward with him), for the plaintiff.

Cur. adv. vult.

- Nov. 25, 1856. **LORD CAMPBELL, C.J.**, delivered the following judgment of
- G the court.—In this case we must begin by considering the validity of the first count of the declaration. The defendant contends that the agreement on which it is framed is illegal, as being contrary to public policy and the laws against champerty and maintenance. But we are of opinion that nothing appears on the face of the declaration to support this objection.
- H The plaintiff alleges that Rosaz and he were in possession of certain documents and information to prove that the defendant was entitled to certain property of which the defendant was not aware, and proposed to give him all the documents and information in their possession, on defendant's agreeing to pay them each one-fifth of the value of the property if it should actually come into his possession; to that the defendant assented; and thereupon a written agreement was signed by the parties, whereby the defendant agreed that, if by the said documents and information
- I he should actually become possessed of any property, not then in his possession or control and of which he did not know, he would pay to each of the plaintiff and Rosaz one-fifth of the value of the property to be recovered and possessed by the defendant. It was also agreed that the defendant should not be compelled, for the purposes of that agreement, to take any proceedings at law or in equity to recover the property; that the defendant would not make known to any person the documents or information so communicated to him without the consent of plaintiff in writing; that the defendant would execute all necessary deeds for assigning the one-fifth of the property so recovered; that, if the defendant did not become

possessed of any property, he should not be called upon to pay anything; and that, if A
the defendant did not think proper to proceed to recover the property, he would
return the papers, and thereupon the agreement should be cancelled.

No statute, nor decided case, nor dictum, was cited at the Bar, showing that there
is any illegality in this agreement. No suit was depending; and there is no stipu-
lation for the commencement of any suit for the recovery of this property. The
plaintiff and Rosaz were merely to communicate certain documents and information B
then in their possession to the defendant; and, having done so, they were to do no
more. The documents and information must be presumed to be genuine and sin-
cere. The property might well be recovered without any litigation, the documents
and information communicated making out a clear and conclusive title in the defen-
dant to recover it. At any rate, the defendant was not to be forced into litigation;
and, if he did resort to litigation, the plaintiff and Rosaz were not to furnish him C
with money to carry it on, or to provide him with any further evidence, or in any
way to assist or to countenance him. There seems abundant consideration for the
defendant's promise, both in what the plaintiff and Rosaz did, and in the advantage
which the defendant was to derive therefrom. And his promise was merely to
make over a portion of that which was his own. We, therefore, do not think that
the agreement at all savours of maintenance or champerty, or is in any way contrary D
to public policy. It does not resemble any of the cases relied upon, in which
agreements have been held illegal; and there seems to be no occasion for our going
over those cases and distinguishing the present from them.

However, when we come to the pleas demurred to, we think it equally clear
that, giving credit to their allegations, they show the agreement to be illegal.
There can be no doubt that the defendant is at liberty to allege that the written E
agreement declared upon was merely colourable, and to disclose, as a defence, the
real nature of the transaction. Accordingly, the seventh plea, after stating the
defendant's ignorance of his being in any way entitled to the property, goes on to
allege that the plaintiff and Rosaz represented to the defendant that they would
supply and give such information and evidence in case it should become necessary
that proceedings should be had and taken by the defendant at law or in equity for F
the recovery of the property, so that, through and by means of such information
and evidence, the defendant should successfully recover the property, provided the
defendant would enter into an agreement with the plaintiff and Rosaz to pay each
of them one-fifth of the property so recovered; and it was thereupon unlawfully
agreed between the parties that the plaintiff and Rosaz should give and supply such
information and evidence, in case of proceedings being taken at law or in equity G
for the recovery of the property; and that, if by means of such information and
evidence the defendant should actually recover the property, he would pay each of
them one-fifth of the amount.

The plea then goes on to allege that, for the purpose of carrying this illegal agree-
ment into effect, the parties entered into the supposed agreement set out in the
first count of the declaration, and shows that it was under the illegal agreement H
that the property actually was recovered. Here we have maintenance in its worst
aspect. The plaintiff and Rosaz, entire strangers to the property which they say
the defendant has a title to, but which is in the possession of another claiming title
to it, agree with him that legal proceedings shall be instituted in his name for the
recovery of it, and that they will supply him, not with any specified or definite
documents or information, but with evidence that should be sufficient to enable him I
successfully to recover the property. Each of them is to have one-fifth of the
property, when so recovered; and, unless the evidence with which they supply him
is sufficient for this purpose, they are to receive nothing. They are not to employ
the attorney or to advance money to carry on the litigation; but they are to supply
that upon which the event of the suit must depend, evidence: and they are to supply
it of such a nature and in such quantity as to ensure success. The plaintiff pur-
chases an interest in the property in dispute, bargains for litigation to recover it,
and undertakes to maintain the defendant in the suit in a manner of all others the

A most likely to lead to perjury and to a perversion of justice. Upon principle such an agreement is clearly illegal: and *Stanley v. Jones* (1) is an express authority to that effect. The eighth plea, pleaded to the money counts, is substantially the same as the seventh, and is, we think, equally a bar. The ninth plea is still a little stronger, and is allowed by the plaintiff's counsel to be sufficient.

Judgment for defendant.

B

C

COURTNAY v. WILLIAMS

[LORD CHANCELLOR'S COURT (Lord Lyndhurst, L.C.), March 5, 6, 7, 1846]

[Reported 15 L.J.Ch. 204; 6 L.T.O.S. 517]

D *Administration of Estates—Legacy—Legacy to debtor of testator—Set-off of amount of debt—Statute-barred debt.*

An executor is entitled to set-off against a legacy a debt due from the legatee to the testator notwithstanding that the debt is statute-barred.

Notes. The Limitation Act, 1623, has been repealed: see now the Limitation Act, 1939.

E Followed: *Coates v. Coates* (1864), 33 Beav. 249. Considered: *Re Akerman, Akerman v. Akerman*, [1891-4] All E.R.Rep. 196; *Re Langham, Otway v. Langham* (1896), 74 L.T. 611; *Dingle v. Coppen, Coppen v. Dingle*, [1899] 1 Ch. 726. Distinguished: *Re Bruce, Lawford v. Bruce*, [1908] 2 Ch. 682. Considered: *Re Sewell, White v. Sewell*, [1909] 1 Ch. 806; *Re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields*, [1910] 1 Ch. 239. Referred to: *Harvey v. Palmer* (1851), 4 F De G. & Sm. 425; *Re Morley, Morley v. Saunders* (1869), L.R. 8 Eq. 594; *Re Stead's Settlement Trusts* (1876), 24 W.R. 698; *Re Milnes, Milnes v. Sherwin* (1885), 53 L.T. 534; *Re Taylor, Taylor v. Wade* (1894), 8 R. 186; *Re Watson, Turner v. Watson*, [1896] 1 Ch. 925; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385; *Re National Live Stock Insurance Co., Re National General Insurance Co.*, [1917] 1 Ch. 628; *Re Savage, Cull v. Howard*, [1918] 2 Ch. 146.

G As to legacies to debtors, see 16 HALSBURY'S LAWS (3rd Edn.) 321, 322; and for cases see 23 DIGEST (Repl.) 444, 445, 449, 450.

Cases referred to in argument:

Wekett v. Raby (1724), 2 Bro. Parl. Cas. 386; 1 E.R. 1014, H.L.; 20 Digest (Repl.) 306, 473.

H *Foley v. Hill* (1844), 1 Ph. 399, L.C.; affirmed (1848), ante p. 16; 2 H.L.Cas. 28; 9 E.R. 1002, H.L.; 20 Digest (Repl.) 286, 289.

Spears v. Hartly (1800), 3 Esp. 81, N.P.; 32 Digest (Repl.) 277, 228.

Field v. Bezant (1833), 5 B. & Ad. 357; 2 Nev. & M.K.B. 207; 2 L.J.K.B. 193; 110 E.R. 822; 42 Digest (Repl.) 40, 202.

Higgins v. Scott (1831), 2 B. & Ad. 413; 9 L.J.O.S.K.B. 262; 109 E.R. 1196; 32 Digest (Repl.) 255, 17.

I *Leche v. Lord Kilmorey* (1823), Turn. & R. 207; 37 E.R. 1076; 25 Digest (Repl.) 574, 181.

Eden v. Smyth (1800), 5 Ves. 341; 31 E.R. 620, L.C.; 44 Digest 618, 4468.

Flower v. Marten (1837), 2 My. & Cr. 459; 6 L.J.Ch. 167; 1 Jur. 233; 40 E.R. 714, L.C.; 20 Digest (Repl.) 306, 474.

Appeal by the plaintiff from a decision of WIGRAM, V.-C., in an action brought by the plaintiff, as assignee of a legacy, against the executors of the testator to obtain payment of the legacy out of the assets of the testator.

The testator, Aldborough Richardson, by his will dated May 16, 1825, bequeathed £2,500 to the defendant and three other trustees, on trust to pay the interest, dividends and annual produce from time to time, as the same should be received into the proper hands of Robert Hamilton for his own use and benefit, for and during his natural life. The testator thereby directed that Robert Hamilton's receipt alone from time to time should be sufficient discharges to the trustees for such dividends, etc., it being his, the testator's, desire and object that Robert Hamilton should be unable to sell or alienate his interest in the same; and from and after the decease of Robert Hamilton, in trust to transfer the principal to such person or persons as he, Robert Hamilton, should in and by his last will and testament or any codicil or codicils thereto, direct or appoint; and in default of such direction or appointment, or as to such part of the principal as should not be disposed of by any such direction or appointment, in trust for the executors or administrators of Robert Hamilton. The testator empowered the trustees to lay out the sum of £2,500 in the purchase of an annuity for the life of Robert Hamilton, to be made payable to them, the trustees, and directed that the annuity should be paid and disposed of by the trustees, in like manner and under the like restrictions as before directed concerning the dividends, etc., of the £2,500. The testator nominated the defendant and the other trustees his executors. By several codicils the testator changed the trustees and executors, and died on Dec. 26, 1831. The will and codicils were proved by the defendants.

Robert Hamilton was a first cousin of the testator's, had been in the army, and was an extravagant man, and had been greatly assisted by the testator with loans of money, for which Robert Hamilton's promissory notes had been taken by the testator; but no interest had ever been paid on the notes, and, with the exception of a sum of about £300 all the advances had been made more than six years before the testator's death. He had left the army under circumstances which induced him to seek to explain his conduct to the authorities at the Horse Guards, and for that purpose he printed a pamphlet, in which he referred to the sum of £1,100 (advanced to him by the testator, to purchase a captain's commission) as a debt due to the testator (who was then living), and which he, Hamilton, had solemnly engaged to pay. On leaving the army, he engaged in the wine trade and on Jan. 27, 1832, about a month after the testator's death, became bankrupt. The assignees applied to the executors for payment to them of his legacy, which the executors declined to pay except under the direction of the court. The assignees and creditors refused to take any proceedings against the executors, and an arrangement was then come to with Robert Hamilton, under which the fiat was annulled, and his creditors agreed to withdraw all claim to the legacy on securing to them 10s. in the pound upon the amount of their debts. In carrying out that arrangement, the legacy had, after some intermediate assignments, become vested in the plaintiff, who had filed her bill against the executors for payment of the legacy. Robert Hamilton was examined before the commissioner under his bankruptcy, and then stated that the sums advanced to him by the testator were loans and not gifts. In this suit, Sir John Hamilton, brother of Robert Hamilton, and a confidential servant of the testator, had been examined, who stated that the testator had declared that he never intended to require repayment of his advances from Robert Hamilton.

WIGRAM, V.-C., had referred it to the master to inquire whether Robert Hamilton was indebted to the testator at the time of his death. The master found the particulars of the debts, etc., of which the result is above stated. To that report the plaintiff excepted, and the cause on further directions and the exceptions were heard together. WIGRAM, V.-C., decreed that the total amount of Robert Hamilton's debt to the testator, amounting to £2,335 ought to be set off against the capital of the legacy of £2,500. From that decree the plaintiff appealed.

Malins and Rudall for the plaintiff.

Lowndes and Glasse for the defendants.

- A LORD LYNDHURST, L.C.**—Two questions have been raised in the course of the argument, one of fact and the other of law. The question of fact has also divided itself into two branches—whether the debt alleged to be due to the estate of the testator by the legatee was, according to the evidence, to be considered as a gift or as a loan; or whether that which was a loan originally, had by any subsequent circumstances been converted into a gift. It appears to be clear to me that the
- B** sums advanced were originally loans and not gifts. The legatee, Mr. Hamilton, was a relation of the testator and a person in whose prosperity in life he appeared to have taken an interest. Mr. Hamilton was also an extravagant and needy man, dependent in a great measure on the bounty of this relative. There was nothing, therefore, unnatural in the supposition that he should advance him sums of money by way of loan, never indeed expecting to be repaid, but nevertheless taking a
- C** security for payment, and reserving to himself the right of proceeding on that security if he thought fit to do so; or, if the altered circumstances of the debtor or a change in his feelings with respect to him gave him the inclination to insist on being repaid. That is the first point in the question of these advances not being gifts. The second and most material one is to be found in the conduct of the legatee himself. It was his obvious interest to make these advances appear to be
- D** gifts, and not loans; and yet they had his own admission that he considered them debts due to the testator. There was also a pamphlet published by Mr. Hamilton as a letter to Lord Fitzroy Somerset in justification of his conduct in the army; and in that letter he alleged as a defence against imputations which might have caused him to be compelled to sell his commission, that he was under a binding engagement to repay the testator the £1,100 advanced to him for the purchase of
- E** his commission. If the evidence of the intentions of the testator as gathered from the construction of the will and supported by the testimony of his brother, Sir J. Hamilton, stood alone, I should have little doubt in coming to the conclusion that the loans were converted into gifts; but when they had this clear evidence of the legatee's own view of the case, I think that the weight of evidence is against the assumption that the debt did not exist at the time of the death of the testator.
- F** The question then arises whether the remedy of this debt is barred by the Limitation Act, 1623; or, being so barred, whether it may not be set off against the claim for the legacy. It is quite clear that no action can be brought by the executors to recover the debt. They are expressly prohibited by the statute. The barring of the remedy for the recovery of debt does not, however, extinguish the debt. The debt remains, notwithstanding the legal obstacle to its recovery; and
- G** if any circumstance exists through which the party having the claim can make the debt available to the estate entitled to the benefit of it he is bound to avail himself of it. The executors in the present instance are the trustees of the estate of the testator. The debt due by the legatee is a part of the assets of the testator. The legatee claims to have the sum paid to him out of the assets in satisfaction of a legacy. The legatee had a part of the assets, out of which the payment was to be
- H** made, in his own hands. Are not the executors entitled to say: "Pay yourself as far as the money in your hands allows"? That is a payment *pro tanto*. That is the true principle on which such cases ought to proceed. The executors have a right to say to the legatee: "You have assets of the estate in your hands, apply them to the payment of your demand." That is the rule; and it is so set forth in a case cited in the course of the argument. In that case the debt had not been barred
- I** by the statute; but it was held that a payment made in that way by the executors was a payment *pro tanto*.

I am, therefore, of opinion, that WIGRAM, V.-C., has come to a right conclusion on the question; but inasmuch as that learned judge has expressly stated one of the points to be a new one, on which the court had hitherto avoided a decision, I shall dismiss the appeal but give no costs.

Appeal dismissed.

SMART *v.* SANDARS

[COURT OF COMMON PLEAS (Wilde, C.J., Coltman, Maule and Williams, JJ.), November 10, 12, 1847, May 12, 1848]

[Reported 5 C.B. 895; 17 L.J.C.P. 258; 11 L.T.O.S. 178;
12 Jur. 751; 136 E.R. 1132]

Agent—Mercantile agent—Goods entrusted to mercantile agent for sale—Instructions to sell at specified price—Advances made by factor for principal—Failure of principal to make repayment—Right of agent to sell goods at lower price to reimburse himself.

A factor, who had goods of his principal in his possession for sale, made advances on account of the principal by accepting certain bills of exchange. When the bills had become due the factor gave the principal notice that he required repayment of the money expended by him, but the principal failed to repay the sum due. The principal had instructed the factor not to sell the goods at a price below a specified figure, but the factor, in order to reimburse himself for the payments made by him on the principal's account, sold them at a lower price.

Held: the factor had no right to sell the goods in breach of the principal's orders.

Notes. Explained: *Taplin v. Florence* (1851), 10 C.B. 744; *The Margaret Mitchell* (1858), Sw. 382. Explained: *Siebel v. Springfield* (1863), 3 New Rep. 36. Approved and Applied: *De Comas v. Prost* (1865), 3 Moo.P.C.C.N.S. 158. Applied: *Read v. Anderson* (1882), 10 Q.B.D. 100. Distinguished: *Frith v. Frith*, [1906] A.C. 254. Referred to: *Yates v. Hoppe* (1850), 14 Jur. 372; *Campanari v. Woodburn* (1854), 15 C.B. 400; *Donald v. Suckling* (1866), 7 B. & S. 783; *Sinfra Akt. v. Sinfra, Ltd.*, [1939] 2 All E.R. 675.

As to irrevocable authority of agents, see 1 HALSBURY'S LAWS (3rd Edn.) 238 et seq.; and for cases see 1 DIGEST (Repl.) 798 et seq.

Cases referred to:

- (1) *Graham v. Dyster* (1817), 6 M. & S. 1; 105 E.R. 1143; 1 Digest (Repl.) 396, 571.
- (2) *Raleigh v. Atkinson* (1840), 6 M. & W. 670; 9 L.J.Ex. 206; 151 E.R. 581; 1 Digest (Repl.) 800, 3268.
- (3) *Vynior's Case* (1609), 8 Co. Rep. 81 b; 77 E.R. 597; 1 Digest (Repl.) 790, 3182.
- (4) *Walsh v. Whitcomb* (1797), 2 Esp. 565; 1 Digest (Repl.) 790, 3187.
- (5) *Gaussen v. Morton* (1830), 10 B. & C. 731; 5 Man. & Ry.K.B. 613; 8 L.J.O.S.K.B. 313; 109 E.R. 622; 1 Digest (Repl.) 799, 3255.
- (6) *Watson v. King* (1815), 4 Camp. 272; 1 Stark. 121; 1 Digest (Repl.) 798, 3251.

Also referred to in argument:

- Dufresne v. Hutchinson* (1810), 3 Taunt. 117; 128 E.R. 48; 1 Digest (Repl.) 481, 1247.
- Pothonier v. Dawson* (1816), Holt, N.P. 388; 1 Digest (Repl.) 694, 2492.
- Parker v. Brancher* (1839), 2 Law Reporter (June), 46.
- Brown v. M'Gran*, 14 Peter's Reports, 480.
- Warner v. McKay* (1836), 1 M. & W. 591; 2 Gale, 86; Tyr. & Gr. 965; 5 L.J.Ex. 276; 1 Digest (Repl.) 667, 2345.
- Smart v. Hyde* (1841), 8 M. & W. 723; 1 Dowl.N.S. 60; 10 L.J.Ex. 479; 151 E.R. 1231; 1 Digest (Repl.) 356, 390.
- Smith v. Dixon* (1837), 7 Ad. & El. 1.
- Whittaker v. Mason* (1835), 2 Bing.N.C. 359.
- Nash v. Breeze* (1843), 11 M. & W. 352.

A **Demurrer** in an action of assumpsit for breach of contract.

The first count of the declaration stated that the defendant was a corn-factor at Liverpool, and in consideration that the plaintiff delivered to him a cargo consisting of 8,000 bushels of wheat to be sold and disposed of by the defendant for and on account of the plaintiff, for a reasonable commission and reward to be paid by the plaintiff to the defendant, he promised to obey the directions of the plaintiff in regard to the sale and disposal of the wheat. It was stated that the defendant sold a small portion of the cargo at 6s. 4d. per bushel and that the plaintiff thereupon ordered him not to sell any more at less than 7s. a bushel, but that the defendant sold the wheat at lower prices. There was also a second count in the same form respecting another cargo.

To the first count the defendant, by his third plea, stated that after the cargo of wheat had been consigned to him, and before the committing of the alleged breach of contract, he became and was under advances to the plaintiff in respect of the consignment of wheat to a larger amount than the value of the cargo. The sum so advanced to the plaintiff by the defendant was then due and payable, the defendant having accepted divers bills of exchange for the plaintiff on the security of the cargo before the giving of any of the orders mentioned. Before the committing of the breach of contract, the defendant gave notice to the plaintiff that he required the sum of money advanced by him to be repaid, and that, if the plaintiff did not repay him, he would sell the whole of the residue of the wheat and out of the money produced by such sale would repay himself the money advanced. A reasonable time for the repayment elapsed, but the plaintiff did not repay the advances and it was absolutely necessary for the defendant to sell the whole of the residue of the wheat to repay to himself the sum advanced, and, therefore, he sold the residue of the wheat for the prices in the count mentioned by the plaintiff, the same being the best prices he could obtain for the wheat, and that the proceeds were not sufficient to repay him the whole of the money advanced. By his fourth plea the defendant alleged that the plaintiff was indebted to him for advances on other consignments, and that he had a lien on the wheat in question for such advances, and a right to have them repaid out of the proceeds of the wheat.

Serjeant Channell (with him *Taprell*) for the plaintiff.

Serjeant Byles (with him *Crompton*) for the defendant.

Cur. adv. vult.

May 12, 1848. **WILDE, C.J.**, delivered the following judgment of the court.—
G The substantial question in this case is whether a factor who has made advances on account of his principal, has the right to sell the goods in his hands contrary to orders of his principal, on the principal making default in repaying the advances. It is now settled law that a factor has a lien for his advances; but the defendant claimed more than a lien; he claims the right, if the principal when called on to repay the advances makes default in doing so, to sell the goods at such prices and times, in the exercise of a sound discretion, as he thinks best for his principal. No case in any English court can be produced in support of this doctrine. If it is a right, one would expect to find it enforced every day, if it existed; and the silence of our law books is a strong argument against the existence of such a right. It is true that in *Graham v. Dyster* (1), **BAYLEY, J.**, in considering whether a factor, in the circumstances of that case, had authority to pledge, is reported to have said
I (6 M. & S. at p. 5):

“The fact that the plaintiff had drawn bills against the consignment, and had also drawn in like manner against other consignments, made no difference in respect to the raising an implied authority to pledge. The only difference which the practice makes, is, that it conveys to the factor the right to reimburse himself. He may sell on credit, and discount bills.”

These remarks, however, were made with reference to the factor who had express authority, which had never been revoked, to sell at his discretion; and they furnish

no authority for maintaining that in a case where the principal has prohibited the sale under prescribed limits, he may notwithstanding sell. A

It is said, however, that a factor for sale has an authority as such, in the absence of all special orders to sell; and when he afterwards comes under advances, he thereby acquires an interest, and having thus an authority and an interest, the authority becomes irrevocable. The doctrine here implied—that whenever there is in the same person an authority and an interest, the authority is irrevocable—is not to be admitted without qualification. In *Raleigh v. Atkinson* (2), the goods had been consigned to a factor to sell, with a limit as to price; the factor had a lien on the goods for advances, and the principal, in consideration of those advances, agreed with the factor that he should sell the goods at the best market-price, and realise thereon against his advances. The court held that this authority was revocable on the ground that there was no consideration for the agreement. In that case, there was authority given and one which the principal was fully at liberty to give; and the party to whom it was given had an interest in it, yet the authority was held to be revocable. The effect of the decision was attempted in argument before us to be eluded by referring to the circumstance that the factor received the goods originally with a limit as to the price of sale; but we do not think that circumstance material, since the limit originally imposed was done away with by the authority afterwards given to sell at the best price. Such an authority requires no consideration to support it, as an authority is, in its nature, revocable by the donors of it: *Vynior's Case* (3). It is only when it is sought to make it irrevocable that a consideration is required to give it that effect. B C D

On the subject of an authority being rendered irrevocable, when accompanied by an interest, there is not much to be found. In *Walsh v. Whitcomb* (4), LORD KENYON is reported to have said (2 Esp. at p. 566): E

“There is a difference in cases of powers of attorney; in general they are revocable from their nature; but there are these exceptions: Where a power of attorney is part of a security for money, there it is not revocable; where a power of attorney was made to levy a fine as part of the security, it was held not to be revocable. The principle is applicable to every case where a power of attorney is necessary to effectuate any security, such is not revocable.” F

Gausson v. Morton (5) and *Watson v. King* (6), were decided in conformity to *Walsh v. Whitcomb* (4), and the result appears to be, that when an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest which is commonly said to be irrevocable. But we think this doctrine applies only to cases where the authority is given for the purpose of being a security, or, as LORD KENYON expresses it, part of the security; not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards, and is incidental only. As, for instance, in the present case, the goods were consigned to the factor for sale; that confers an implied authority to sell. Afterwards, the factor makes an advance; this is not an authority coupled with an interest, but an independent authority, and an interest subsequently arising. The making of such an advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable; but such an effect will not, we think, arise independent of the agreement. There is no authority or principle in our law, that we are aware of, which leads us to think it may. G H I

If such be the law, where is it to be found? It was said in argument that it was the common practice of factors to sell in order to repay advances; if it be true that there is a well understood practice with factors to sell, that practice would furnish a ground for inferring that the advance was made on the footing of such an agreement, that the factor should have an irrevocable authority to sell, in case the principal made default. Such an inference would be a very reasonable and proper

A one; but it would be an inference of fact, and not a conclusion of law. These pleas, therefore, in which the right to sell for advances on default by the principal to repay them is treated as a conclusion of law, cannot be supported. There will, therefore, be judgment for the plaintiff on the pleas demurred to.

Judgment for plaintiff.

B

C

FOLLIT v. KOETZOW

[COURT OF QUEEN'S BENCH (Sir Alexander Cockburn, C.J., Crompton, Hill and Blackburn, JJ.), April 25, 1860]

[Reported 2 E. & E. 730; 29 L.J.M.C. 128; 2 L.T. 178; 24 J.P. 612; 6 Jur.N.S. 651; 8 W.R. 432; 121 E.R. 274]

D

Bastardy—Affiliation order—Application—Competency—Prior agreement by mother to accept sum from putative father in satisfaction of future claims.

E

A putative father, before an application by the mother of a bastard child for an affiliation order under the Poor Law Amendment Act, 1844 [see now Affiliation Proceedings Act, 1957], agreed with the mother to pay her 5s. a week for the support of the child, and paid two years' amount in advance. Afterwards he paid her £10 to release him from all future payments.

Held: this was no bar to the mother's applying for, and the magistrate's making, an affiliation order, but the magistrate was bound to consider the agreement along with all the other circumstances to guide his discretion in adjudicating.

F

Notes. The provisions in the Poor Law Amendment Act, 1844, relating to affiliation proceedings have been repealed, and replaced by the Affiliation Proceedings Act, 1957. By s. 4 (2) of this latter Act, if the evidence of the mother is corroborated in some material particular by other evidence to the court's satisfaction, the court may adjudge the defendant to be the putative father of the child and "may also, if it thinks fit in all the circumstances of the case" proceed to make against him an affiliation order.

G

Applied: *Griffith v. Evans* (1882), 46 L.T. 417.

As to maintenance of an illegitimate child by father, see 3 HALSBURY'S LAWS (3rd Edn.) 108 et seq.; and for cases see 3 DIGEST (Repl.) 438-441; 451-461. For the Affiliation Proceedings Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 36.

H

Cases referred to in argument:

Pope v. Sale (1831), 7 Bing. 477; 5 Moo. & P. 336; 1 Nev. & M.M.C. 240; 9 L.J.O.S.C.P. 150; 131 E.R. 185; 3 Digest (Repl.) 438, 313.

Middleham v. Bellarby (1813), 1 M. & S. 310; 105 E.R. 116; 3 Digest (Repl.) 438, 311.

I

Crowhurst v. Laverack (1852), 8 Exch. 208; 22 L.J.Ex. 57; 20 L.T.O.S. 102; 17 J.P. 249; 1 W.R. 56; 155 E.R. 1322; 3 Digest (Repl.) 439, 326.

Jennings v. Brown (1842), 9 M. & W. 496; 12 L.J.Ex. 86; 152 E.R. 210; 3 Digest (Repl.) 439, 322.

Case Stated by a Metropolitan Police Magistrate under the Summary Jurisdiction Act, 1857, on an application made by Susannah Koetzow for an order under the Poor Law Amendment Act, 1844, to compel George Follit to maintain a bastard child, of which Susannah Koetzow had been delivered on Jan. 24, 1856, and of which child George Follit was alleged by her to be the putative father.

Upon the hearing of a summons issued by the magistrate on May 28, 1859, calling upon George Politt to show cause why he should not be adjudged the putative father of such child, the complainant Susannah Koetzow swore that he was the father of such child, and that the defendant had made payments to her for the maintenance of such child within twelve months of its birth, which facts were admitted by the defendant. The magistrate thereupon made the usual order to pay 2s. 6d. per week for the maintenance of such child. The defendant's attorney then contended that the defendant was not liable to maintain such bastard child, and that no order could be made for the maintenance of such child, for the reason that the defendant had previously to Oct. 23, 1858, contracted to pay to the complainant the sum of 5s. per week for the support of the child, which contract he alleged he had performed up to Oct. 23, 1858, and paid her in advance sufficient to maintain the child for two years then to come, and also that the defendant had on such last-mentioned day paid to the complainant the further sum of £10 in consideration of which the complainant had, as he stated, agreed to release the defendant from all future payments in respect of the child. The magistrate was of opinion that such contract was void as against public policy, and that he could not entertain it. He promised to consider the point, and give judgment on June 14, 1859.

On June 14, 1859, the defendant's attorney again appeared before the magistrate and urged that, even if such contract was not binding between the parties, yet the magistrate could exercise his own discretion in the matter, inasmuch as the Act of Parliament required him to decide "after considering all the circumstances of the case," and, that he might be influenced by the fact that the father had paid more than double what the magistrate had power to order for the next four or five years. Being of opinion that he had no discretion in the matter, as the defendant was proved to be the father of the said child, the magistrate refused to alter his determination. He felt strengthened in that determination by it seeming to him clear that all the clauses relating to bastards in the Poor Law Amendment Act, 1844, had but one object, namely, the maintenance and protection of the child; and, therefore, this contract to pay, or having paid, a sum of money to the mother, which may be expended or lost long before the child reaches the age when the weekly payment under a magistrate's order cease, was of no avail. The mother was only the guardian of the child, and, under circumstances, another guardian may be appointed. It seemed to him that the child and the parish to which it might become chargeable ought to be his first consideration, and that the payment of a sum of money to the mother was no answer to his assuming jurisdiction. He, therefore, made the order.

The question for the opinion of the court was whether the justice had any discretion under the Act of Parliament to entertain the contract attempted to be set up by the defendant, as aforesaid, the paternity of the child having been proved.

By the Poor Law Amendment Act, 1844, s. 3:

"After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode, six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father; and if the evidence of the mother be corroborated in some material particular by other testimony, to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child; and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child, or to any person who may be appointed to have the custody of such child under the provisions of this Act, of a sum of money weekly and of such costs as may have been incurred in the obtaining of such order . . ."

Coleridge for the mother.

Serjeant Parry (*Gibbons* with him) for the putative father.

- A SIR ALEXANDER COCKBURN, C.J.**—As regards the main question, I am of opinion that what took place between the mother and the putative father was not sufficient to oust the magistrate of his jurisdiction to make the order under the Poor Law Amendment Act, 1844, s. 3. The statutable right given to the mother to apply for the order, and to the magistrate to make it, is of a peculiar character. No doubt it is entirely in the choice and discretion of the mother to apply for the order, and if she does not choose to apply, neither the parish officers nor any other person can compel her to do so. At first sight it would seem to be a personal right for her own benefit, but when the object of the legislature and the language of the statute are looked at, that view cannot prevail. The intention of the legislature was, that when once the application has been made and the order obtained, the weekly payment is to be not merely for the relief of the mother, but the main object was to be the maintenance of the child. The first section of the statute speaks of it as an order for the maintenance of the bastard child, showing that something was intended beyond the mere relief of the mother. The magistrate held that the agreement between the mother and the putative father was void; but he was going too far in determining that, for the question now to be decided is whether the agreement takes from the magistrate his discretionary power, "having regard to all the circumstances of the case," to make an order on the putative father. Looking at the policy of the statute, I do not think that a bargain of this sort between the mother of a bastard child and the putative father ousts the magistrate of his discretionary power to make an order. If by such an agreement before making an application the mother can oust the jurisdiction of the magistrate, she may also by such an agreement annul the effect of such an order after it has been made. I am, however, of opinion that she cannot do so, and under all the circumstances I think the Case should go back to the magistrate to exercise his discretionary power, taking this very material agreement into his consideration along with the other facts to guide him.

- F CROMPTON, J.**—I am of the same opinion. First, was this agreement a bar to the magistrate's proceeding to make an order on the putative father? and, secondly, had the magistrate a discretion to consider this agreement in making the order? There are no words in the statute that meet a case like this. The magistrate is to look at all the circumstances of the case. The order is to be for weekly payments by the putative father. He is to consider whether an arrangement of this kind would not defeat that. The case is put on the maxim *quilibet potest renunciare juri pro se introducto*, and it was urged that this was given as relief to the mother, and she might release it. But is this a mere right of the mother, and is it not also for the benefit of the child? The words of the statute are for the support and maintenance of the child, and s. 7 shows that this is clearly not the right of the mother merely, for after the mother's death or incapacity, as enacted, the payment is to be enforced by the board of guardians, and made to some person appointed by the justices. The object of the statute, then, might be defeated if the mother, for an insufficient, or what perhaps is worse, a lump sum, might contract with the putative father to oust the discretion of the magistrate under the statute. I, therefore, think that this agreement was no bar to the magistrate's proceeding, and that the case must go back to him.

- I HILL, J.**—It is admitted that the agreement by which the mother agreed to take upon herself the maintenance of the child, and to forbear to apply for an order on the putative father, is a good agreement, but the question is whether it takes away the power of the magistrate to make an order on him. It is necessary to see what power the magistrate has for this purpose. He has a power, first, absolutely and without any discretion to adjudicate the man to be the putative father; and, secondly, to make an order, if he sees fit, having regard to all the circumstances of the case, on the putative father for the payment to the mother of a sum of money weekly, etc. The statute treats it as a matter entirely for the discretion

of the magistrate under all the circumstances. Therefore, the utmost such an agreement as this can come to is, that it is to be treated as a strong fact for the consideration of the magistrate in adjudicating as to making an order. I think that there has been a miscarriage in this case, and that the agreement is a valid one, and that the magistrate ought to have taken it into his discretion and exercised his discretion upon all the circumstances as to making an order. A

BLACKBURN, J.—I am of the same opinion. There is no enactment that the mother may release or bar her right to apply for such an order. If the order had been for her sole exclusive benefit, I should have inclined to act on the maxim *quilibet potest renunciare juri pro se introducto*, and to hold that, as she had released her right, she was precluded from applying for the order. But the order is not for her sole personal benefit at all: it is partly for her benefit and partly for the benefit of the child. Section 5 shows that it is not for her personal benefit, but as a means to enable her to maintain the child. It is called an order for the maintenance of the child. That being so, the mother ought not to be able to renounce the right given by the statute. The justices may in every case, if they see fit, proceed to make an order on the putative father. That is what the legislature intended, and what it has said. The Case must go back to be reconsidered. B

Case remitted. D

NOTTIDGE v. PRINCE

[VICE-CHANCELLOR'S COURT (Stuart, V.-C.), June 4, 5, 6, 7, 8, July 25, 1860]

[Reported 2 Giff. 246; 29 L.J.Ch. 857; 2 L.T. 720; 24 J.P. 726;
6 Jur.N.S. 1066; 8 W.R. 742; 66 E.R. 103] E

Undue Influence—Religion—Influence of minister over person under direct spiritual charge—Right to have gift set aside—Guardian and ward—Parent and child—Solicitor and client—Right to have gifts by ward, child, or client set aside. F

No person who stands in the relation of special confidence to another so as to acquire habitual influence over his mind can accept any gift or benefit from the person who is under the dominion of that influence without danger of having the gift set aside. If it can be shown that a sufficient protection has been interposed against the exercise of this influence, there may be a case to sustain the gift, but the principle prevails where there exists a relation which naturally creates influence over the mind. Therefore, the doctrine extends to the relation of attorney and client, of guardian and ward, of parent and child. But there does not arise from any of these relations an influence so strong as that of a minister of religion over a person under his direct spiritual charge. The strength of religious influence is far beyond that of gratitude to a guardian, trustee, or attorney, and the same ground of public utility which requires the court to guard against such influences has its most important application to that influence which is the strongest. G

Gift—Delusion or deception—Gift made under influence of deceit and spiritual domination—Invalidity—Right of recovery. H

Where a gift is made under the influence of delusion or deception it cannot be valid. Whether the delusion or deception relates to matters spiritual or matters temporal is immaterial, for, if the gift be made under the influence of a delusion, the right of restoration in either case is clear. I

- A** The court taking the view that a gift had been obtained by the defendant "by imposing a belief on the mind of a weak woman that he sustained a supernatural character,"
- Held:** the gift was invalid, and the plaintiff, the personal representative of the deceased donor, was entitled to recover it.
- B** **Notes.** Referred to: *Allcard v. Skinner*, [1886-90] All E.R.Rep. 90.
As to undue influence and setting aside gifts for fraud, see 17 HALSBURY'S LAWS (3rd Edn.) 672 et seq., and *ibid.*, vol. 18, p. 394. For cases see 12 DIGEST (Repl.) 110 et seq.
- Case referred to:
(1) *Norton v. Relly* (1764), 2 Eden, 286; 28 E.R. 908; 12 Digest (Repl.) 118, 695.
- C** Also referred to in argument:
Thomas v. Roberts (1850), 3 De G. & Sm. 758; 19 L.J.Ch. 506; 14 Jur. 639; 64 E.R. 693; 28 Digest (Repl.) 620, 1236.
Huquenin v. Baseley (1807), 14 Ves. 273; 33 E.R. 526, L.C.; 12 Digest (Repl.) 111, 657.
Bridgman v. Green (1757), 2 Ves. Sen. 627; Wilm. 58; 28 E.R. 399, L.C.; 35 Digest (Repl.) 87, 797.
Gibson v. Jeyes (1801), 6 Ves. 266; 31 E.R. 1044, L.C.; 33 Digest (Repl.) 626, 513.
Dent v. Bennett (1835), 7 Sim. 539; 5 L.J.Ch. 58; 58 E.R. 944; 12 Digest (Repl.) 120, 713.
Cooke v. Lamotte (1851), 15 Beav. 234; 21 L.J.Ch. 371; 51 E.R. 527; 25 Digest (Repl.) 279, 856.
Hoghton v. Hoghton (1852), 15 Beav. 278; 21 L.J.Ch. 482; 17 Jur. 99; 51 E.R. 545; 12 Digest (Repl.) 112, 662.
Billage v. Southee (1852), 9 Hare, 534; 21 L.J.Ch. 472; 16 Jur. 188; 68 E.R. 623; 12 Digest (Repl.) 121, 719.
Kirwan v. Cullen, 4 I.Ch.R. 322.
- F** *Gordon v. Gordon* (1819), 3 Swan. 400; 36 E.R. 910, L.C.; 35 Digest (Repl.) 120, 184.
Austin v. Chambers (1837-8), 6 Cl. & Fin. 1; 7 E.R. 598; 1 Digest (Repl.) 521, 1547.
Attwood v. Small (1838), 6 Cl. & Fin. 232; 7 E.R. 684; sub nom. *Small v. Attwood*, 2 Jur. 226, 246, H.L.; 35 Digest (Repl.) 42, 369.
- G** *Langley v. Fisher* (1845), 9 Beav. 90; 15 L.J.Ch. 73.
Cooth v. Jackson (1801), 6 Ves. 12; 31 E.R. 913; 2 Digest (Repl.) 552, 872.
Evans v. Bicknell (1801), 6 Ves. 174; 31 E.R. 998, L.C.; 35 Digest (Repl.) 34, 253.
Benbow v. Townsend (1833), 1 My. & K. 506; 2 L.J.Ch. 215; 39 E.R. 772; 43 Digest 659, 924.
- H** *Hunter v. Atkins* (1834), 3 My. & K. 113; Coop. temp. Brough. 464; 40 E.R. 43, L.C.; 43 Digest 778, 2188.
Lomax v. Ripley (1855), 3 Sm. & G. 48; 3 Eq. Rep. 301; 24 L.J.Ch. 254; 24 L.T.O.S. 323; 1 Jur.N.S. 272; 3 W.R. 269; 65 E.R. 558; 8 Digest (Repl.) 385, 788.
Wallgrave v. Tebbs (1855), 2 K. & J. 313; 25 L.J.Ch. 241; 26 L.T.O.S. 147; 20 J.P. 84; 2 Jur.N.S. 83; 4 W.R. 194; 69 E.R. 800; 20 Digest (Repl.) 273, 190.
- I** **Action** in which the plaintiff, Ralph Clarke Nottidge claimed, as the administrator of his deceased sister, Louisa Jane Nottidge, against the defendant, Henry James Prince, the transfer from the defendant to the plaintiff of two sums of three per cent. annuities, amounting together to the sum of £5,728 7s. 7d., formerly the property of Miss Nottidge.
In December, 1845, Miss Nottidge, who was then about forty-one years of age, went to reside in the neighbourhood of Weymouth, in order to be near the defen-

dant, who was the head of an institution known as the Agapemone, in Somerset, and to place herself under his religious teaching and guidance. After some difficulties, her brother succeeded in taking her to her mother's, and, as she appeared to her friends to exhibit symptoms of insanity, in November, 1846, she was, upon the usual medical certificate, placed in confinement. She remained in confinement till May 15, 1848, when she was released by order of the Lunacy Commissioners. In 1847, the defendant and his followers had taken up their abode at the Agapemone. The transfer of stock by Miss Nottidge was made in May, 1848, immediately after her release from confinement. On Aug. 21, 1858, she died at the Agapemone intestate. The plaintiff alleged that this fund had been transferred by Miss Nottidge into the defendant's name as a result of the exercise of undue influence on his part over her, when she was under his spiritual ascendancy and in a state of religious delusion with respect to him, believing him to be the tabernacle of God upon earth, and that the Spirit of God dwelt therein, the defendant's original spirit being extinct.

Henry James Prince was educated at Lampeter College, in Wales, with the view of becoming a minister of the Church of England, and he had been ordained deacon and priest. In 1840 he became the curate of Mr. Starkey, then rector of Charlwich, in Somersetshire, and continued such for about two years, when, in consequence of his interference with the neighbouring parishes, he was deprived by the bishop of the diocese of his licence. He then obtained a curacy at Stoke, near Clare, in Suffolk, in the neighbourhood of which place Mr. Josias Nottidge, since deceased, the father of Miss Louisa Nottidge, lived. Prince became acquainted with that gentleman and his family, which consisted of his wife and four daughters, and he succeeded in acquiring great influence over the daughters. Of that curacy likewise Prince was deprived by the Bishop of Ely at the end of 1842 or early in 1843. From Stoke, Prince went to Brighton, where he took a chapel, which he called Adullam. Thither he was followed by the four Misses Nottidge, Louisa Jane, Harriet, Clara and Agnes, with whom he had in the meantime kept up his influence by means of letters written as well to them as to servants of his own whom he had left at Stoke, the letters to his servants having been written by him with the express view of their being read to the Misses Nottidge. He remained at Brighton until May, 1845, when he persuaded the young ladies, whose father had in the meantime died, leaving them sums of between £5,000 and £6,000 apiece, to leave Brighton for the purpose of accompanying him to Charlwich, where he contemplated opening a new chapel. Subsequently, at his suggestion Harriet, Clara and Agnes married three of Prince's followers. On the day of Miss Louisa Nottidge's release from confinement in 1848, she was met by Thomas, who was Harriet's husband, and he took her on the same or the following day to Prince's broker, with a view of her making a transfer to Prince of the stock then standing in her name, about £5,728 three per cent. annuities. Not knowing the amount of stock standing in her name she was then unable to make the proposed transfer, and went with Thomas to the Agapemone, on May 16 or 17, 1848. About a fortnight later she made the transfer of the above amount to Prince, having in the meantime ascertained the amount of stock to which she was entitled. By their report the Lunacy Commissioners certified that Miss Nottidge admitted she did not now pray to God, for there was no use in it. She acknowledged she believed the tabernacle of God to be upon the earth, that Prince was that tabernacle, and that the Spirit of God dwelt therein, Prince's original spirit being extinct. She said she was satisfied that there was no such person as Prince, but that the Spirit of God dwelt in his body. The commissioners said that, although no material improvement had taken place in Miss Nottidge's mental condition, and her extraordinary and irregular notions on the subject of religion, which they regarded as delusions irreconcilable with soundness of mind, were unabated, yet beyond those delusions she had exhibited no other indication of insanity. They also found that her bodily health was giving way, and there was reason to apprehend it might be seriously injured by a prolongation of her confinement.

A The defendant, in his answer, admitted that other persons besides Miss Nottidge had given him large sums of money. With respect to the transfer by Miss Nottidge, he said that she had frequently, prior to her confinement in the asylum, offered to give him this stock, but that he had always refused it; that she made the transfer to him without any solicitation on his part, and without his knowledge; that she was under no delusion with respect to him; that the gift was purely voluntary on her part, as were also the numerous other gifts he had received; that Miss Nottidge never made any payment in respect of her board during her residence at the Agapemone; that the persons who resided at the Agapemone were under no obligation to make any payment to the defendant; that everything in that respect was voluntary; that those who made no payment were not treated differently from those who did pay; that he fed and clothed many poor in the neighbourhood of the Agapemone, and gave sums varying from £1 to £100 in charity; and he claimed to be entitled to the stock transferred to his name by Miss Nottidge for his own benefit.

C With reference to the Agapemone itself, the inmates of which were between fifty and sixty in number, the defendant, in his evidence, described it as follows:

D "The establishment of the Agapemone consists of a large mansion-house having attached thereto extensive gardens, conservatories, hothouse, pleasure-grounds, and a farm, of which the defendant is the proprietor in fee-simple, consisting of about 200 acres of land, occupied by a person who cultivates and manages the same for the benefit of the members of the Agapemone. The produce of the garden, hothouses, and farm are applied to the purposes of maintaining the table and other occasions of the members of the Agapemone, and the residents in the establishment enjoy every kind of comfort which such an establishment can afford. In addition thereto carriages and horses are kept. There are numerous horses of great value, both for riding and driving, kept for the use of those resident at the Agapemone, and they occasionally ride out in a carriage drawn by four horses."

E *Malins, Q.C.*, and *Knox Wigram* for the plaintiff.
F *Bacon, Q.C.*, and *Smale* for the defendant.

Cur. adv. vult.

July 25, 1860. **STUART, V.-C.**, read the following judgment.—In June, 1848, the defendant, Henry James Prince, obtained from Miss Louisa Jane Nottidge the transfer into his own name of two sums, making together the sum of £5,728 7s. 7d. three per cent bank annuities. This stock was the whole of her remaining fortune and her whole means of subsistence. The defendant claims to be entitled to retain it for his own use as a free gift made to him by this lady. She died intestate in 1858. Her brother, who is the plaintiff, has instituted this suit as her legal personal representative to recover the property as her personal estate. The bill avers that the alleged gift to the defendant was obtained by misrepresentation and deception, and was made under the influence of a gross delusion, inculcated and encouraged by himself for his own purposes when she was incompetent to manage her own pecuniary affairs or effectually to apply her mind to business of any description.

H If these allegations were sufficiently proved, the defendant cannot be allowed to retain the property. Where a gift is made under the influence of delusion or deception it cannot be valid. Whether the delusion or deception relates to matters spiritual or matters temporal is immaterial, for, if the gift be made under the influence of a delusion, the right to restoration in either case is clear. There is ample evidence that the defendant exercised a powerful and undue dominion over the mind of Miss Nottidge and his other followers by assuming a false character. The character which he assumed and which he induced this lady to believe that he really sustained he has himself described in his cross-examination in the following terms:

I "God has developed through me his counsel and purpose which I have made known to others. I have declared that the Holy Ghost by me did close the

day of grace and introduce the judgment. I have declared and mean that the Holy Ghost spake by me." A

To rational minds it may seem surprising that any human being could be found with an understanding so weak and degraded as to submit to the influence and guidance of a person who thus speaks of himself. But it appears that the lady in question, Miss Louisa Jane Nottidge, and three of her sisters, the daughters of a respectable country gentleman of considerable fortune, submitted themselves entirely to his dictation. He says : B

"The Nottidges called to see me after they had heard of my ministry. . . . Three of the Miss Nottidges married. They all married after I became acquainted with them. They all married persons who were associated with me, and whose opinions were the same as mine. I suppose I must say they married through my instrumentality, inasmuch as they married through my telling them that it was the will of God that they should so marry. . . . Their husbands procured their money with their consent, and they gave it to me. I think they gave me between £5,000 and £6,000 each, or thereabouts." C

These passages, from the defendant's depositions, are only a very small part of the evidence, which shows beyond all doubt that, by falsely and blasphemously pretending that he had a direct Divine mission, he imposed on these weak women and obtained a gift of the whole of their fortunes. D

As to the gift of £5,728 by Miss Louisa Nottidge, which it is the object of this suit to set aside, the case is very clear. This unfortunate lady escaped the degradation of such a marriage as had been made the means of conveying all the money of her sisters into the pocket of the defendant. Her complying disposition to part with her money under the influence of the defendant and at his bidding without recourse to marriage is shown by the fact that he at once obtained from her £50 merely by writing and sending to her a letter in these words : E

"The Lord hath need of £50 to be used for a special purpose unto His glory. The Spirit would have this made known unto you. Amen." F

His own definition as to the gift to him of the £5,728 stock is in these terms :

"Louisa, at the end of 1845, or beginning of 1846, requested me more than once to accept her money. She believed that I had special revelations upon particular subjects. She gave me all her money after she came out of the lunatic asylum." G

These statements from the defendant's own mouth prove the case of a gift obtained by imposing a belief on the mind of a weak woman that he sustained a supernatural character. This successful imposture was the influencing motive of the gift, and, therefore, vitiates it entirely. It is needless to inquire or speculate whether the defendant was himself also the victim of his own imposture. The most favourable view of his conduct would be that, under the influence of a disordered imagination, he really fancied himself to be such a supernatural being as he made these ladies believe. Even if it were possible to take this lenient view of the defendant's conduct, when the question is as to the validity of the gift, it is only necessary to show that it was bestowed under the influence of a delusion. H

A great deal of the arguments of counsel on both sides consisted in discussing the doctrine of the court as to the validity of gifts obtained under the influence of a religious or spiritual ascendancy. The grossness of the imposture in the present case has put it far beyond mere spiritual influence. But this gift must have been set aside as obtained under the influence of spiritual dominion, even if the false character assumed by the defendant had not been a part of the case. No person who stands in the relation of special confidence to another so as to acquire habitual influence over his mind can accept any gift or benefit from the person who is under the dominion of that influence without danger of having the gift set aside. If it can be shown that a sufficient protection has been interposed against the exercise I

A of this influence, there may be a case to sustain the gift, but the principle prevails where there exists a relation which naturally creates influence over the mind. Therefore, the doctrine extends to the relation of attorney and client, of guardian and ward, of parent and child. But there does not arise from any of these relations an influence so strong as that of a minister of religion over a person under his direct spiritual charge. Fortunately the exalted character of Christian ministers in this country makes the occurrence of such questions extremely rare. When LORD NORTHINGTON, in *Norton v. Relly* (1), set aside a gift made by a lady to a dissenting minister, he noticed that such questions seldom occur. But the principle is clearly established in this court. The strength of religious influence is far beyond that of gratitude to a guardian, trustee, or attorney, and the same ground of public utility which requires this court to guard against such influences has its most important application to that influence which is the strongest. In Roman Catholic countries, where spiritual influence has its highest dominion, public feeling has required the interposition of an absolute and imperative check. The law of France, as stated by M. POTHIER, absolutely prohibits not only all gifts by a penitent to his confessor, but all gifts to that religious community of which the confessor is a member.

D In the present case the grossness of the imposture and the weakness of the person who was imposed upon make the right of the plaintiff very clear. It is impossible to overlook one of the results of the decree, which must be made in favour of the plaintiff. He sues as legal personal representative, and when the money is restored it will be distributed among the next-of-kin. Two of the next-of-kin are still under the dominion of the defendant's influence and victims of his imposture. Another is Mrs. Thomas, the wife of one of the defendant's associates, whose marriage was effected under the defendant's influence. The disgraceful conduct pursued towards her is detailed in the evidence. It is needless now to consider what her rights are as one of the next-of-kin. When the money is restored to the plaintiff as legal personal representative, there will be sufficient means of asserting the rights of all the next-of-kin. In the meantime the duty of the court is to declare that the transfer into the name of the defendant of the several sums of stock mentioned in the bill was improperly obtained and must be set aside. The stock must be transferred to the plaintiff as legal personal representative of Miss Louisa Jane Nottidge, and all the dividends which have accrued due on it since her death paid to the plaintiff. The defendant must pay to the plaintiff all the costs of the suit.

Judgment for plaintiff.

MANGLES AND OTHERS *v.* DIXON AND OTHERS

[HOUSE OF LORDS (Lord St. Leonards, L.C., Lord Brougham, Lord Truro, Lord Devon, Lord Pomfret, and other Peers), June 17, 18, 22, 1852]

[Reported 3 H.L.Cas. 702; 19 L.T.O.S. 260; 10 E.R. 278]

Chose in Action—Assignment—Assignee's liability—Chose taken subject to all equities of assignor—Duty to make inquiries as to transaction between himself and assignor.

The assignee of a chose in action, where there has been no fraud, stands in exactly the same situation as the assignor as to the equities arising upon it, and takes it subject to all the equities of the assignor and the liabilities to which he was subject. He must be taken to be cognisant of them. It is his duty to make inquiries, and, as a general rule, the creator of the chose assigned is not bound, on receiving a simple notice of the assignment, to volunteer information. If a loss arises, it falls upon him whose duty it is to make the inquiries and who has not made them. But if the notice given by the assignee discloses that which induces the belief that he has been deceived in accepting the assignment, the person receiving the notice is bound to inform the assignee of the real circumstances, and, if he should not do so, he cannot be allowed to take advantage of the equities existing as between the assignor and himself.

Notes. Considered: *Rodger v. Comptoir D'Escompte de Paris* (1869), L.R. 2 P.C. 393. Explained and Distinguished: *Leask v. Scott Bros.*, [1874-80] All E.R.Rep. 722. Referred to: *Rolt v. White* (1862), 3 De G.J. & Sm. 360; *Watson v. Mid Wales Rail. Co.* (1867), L.R. 2 C.P. 593; *Higgs v. Northern Assam Tea Co.* (1869), L.R. 4 Exch. 387; *Watts v. Driscoll*, [1901] 1 Ch. 294; *Stoddart v. Union Trust* (1911), 81 L.J.K.B. 140.

As to the liability of the assignee of a chose in action, see 4 HALSBURY'S LAWS (3rd Edn.) 507-511; and for cases see 8 DIGEST (Repl.) 620 et seq.

Cases referred to:

- (1) *Cator v. Burke* (1785), 1 Bro.C.C. 434; 28 E.R. 1222, L.C.; 7 Digest (Repl.) 230, 680.
- (2) *Turton v. Benson* (1719), 10 Mod. Rep. 445; 1 P.Wms. 496; Prec. Ch. 522; 1 Stra. 240; 2 Vern. 764; 88 E.R. 803, L.C.; 7 Digest (Repl.) 230, 676.
- (3) *Matthews v. Wallwyn* (1798), 4 Ves. 118; 31 E.R. 62, L.C.; 35 Digest (Repl.) 302, 230.
- (4) *Chambers v. Goldwin* (1804), 9 Ves. 254; 1 Smith, K.B. 252; 32 E.R. 600; 35 Digest (Repl.) 420, 1127.
- (5) *Duke of Beaufort v. Neeld* (1845), 12 Cl. & Fin. 248; 9 Jur. 813; 8 E.R. 1399, H.L.; 1 Digest (Repl.) 439, 923.
- (6) *Coles v. Jones* (1715), 2 Vern. 692; 23 E.R. 1048, L.C.; 7 Digest (Repl.) 230, 674.
- (7) *Ibbotson v. Rhodes* (1706), 2 Vern. 554; 1 Eq. Cas. Abr. 321; 23 E.R. 958; 35 Digest (Repl.) 536, 2165.
- (8) *Beckett v. Cordley* (1784), 1 Bro.C.C. 353; 28 E.R. 1174; 35 Digest (Repl.) 512, 2004.
- (9) *Priddy v. Rose* (1817), 3 Mer. 86; 36 E.R. 33; 8 Digest (Repl.) 564, 171.
- (10) *Rawson v. Samuel* (1841), Cr. & Ph. 161; 10 L.J.Ch. 214; 41 E.R. 451, L.C.; 21 Digest (Repl.) 538, 376.
- (11) *Steed v. Whitaker* (1740), Barn. Ch. 220; 27 E.R. 621; 35 Digest (Repl.) 532, 2133.
- (12) *Troughton v. Gitley* (1766), Amb. 630; 27 E.R. 408, L.C.; 5 Digest (Repl.) 791, 6706.

- A (13) *Joyce v. De Moleyns* (1845), 8 I.Eq.R. 215; 2 Jo. & Lat. 374; 35 Digest 303, *118.
(14) *Hill v. Caillovel* (1748), 1 Ves. Sen. 122; 27 E.R. 931, L.C.; 7 Digest (Repl.) 181, 137.

Appeal against a decree of LORD COTTENHAM, L.C., reversing a decree of KNIGHT-BRUCE, V.-C., in an action for an account and declaration.

B The appellants were merchants in the city of London, and in April, 1845, through their agent, they entered into a charterparty with the agent of Messrs. Boyd & Co., shipowners, for the use of a vessel called the *Fifeshire*, of 463 tons burden, for a voyage to bring home a cargo of guano. The charterparty, which was dated April 23, 1845, but was executed on April 24, declared that the

C "charterers agree to hire the said vessel for the term of six calendar months from the time of the ship being ready to sail,"

and for such further term as the charterers should think proper, not exceeding eighteen months in the whole. There was the following stipulation :

D "In consideration of the foregoing, the charterers agree to pay, or cause to be paid, to the captain or owner of the said vessel, at and after the rate of 16s. per ton, old register measurement, per calendar month, and in like proportion for any fractional parts thereof, until the final discharge at a port in the United Kingdom; the payment for victualling the men is to continue as long as they are on board; the freight to be paid as follows—say, £400 by the owners' draft on the charterers, payable at four months' date from the time of the vessel being ready to proceed from Liverpool; the further sum of £600 at the expiration of four months from the date of the ship sailing, by a like draft of the owners on the charterers at four months' date; a further sum of £150 in cash at the expiration of eight months' from the time of sailing; a like payment of £150 at the expiration of every succeeding month until the termination of the employment of the ship; and the remainder, on unloading and right delivery of the cargo in the United Kingdom, by a good and approved bill on London at ninety days' date, or cash equal thereto."

F The charterers were to pay all port charges, etc.

Two other instruments were executed at the same time, the first of which was a memorandum, in the following terms :

G "Memorandum, that Messrs. Mangles, Price, and Moore, having, by a charterparty dated April 23 instant, hired the ship *Fifeshire* for the term and at the freight therein mentioned, it is hereby agreed between them and Mr. G. J. Ashton, that the trading which shall be carried on, and all cargo and produce which shall be sent on board the said ship in pursuance of the said charterparty, and all benefits and advantages which shall be derived therefrom, shall be for and upon the joint account and risk of the said Mangles, Price, and Moore, of the one part, and the said G. J. Ashton of the other part, in equal proportions, and that after payment or deduction of the freight and all incidental expenses, the profits or loss which shall arise shall be borne and received or paid by the said parties in equal moieties."

I This memorandum was signed by G. J. Ashton, who was the servant and nominee of Boyd & Co.

The second of these papers, dated on the same day, was a guarantee given by Boyd & Co. for the due performance of the memorandum of agreement thus entered into by Ashton, that agreement being, in fact, entered into by him on their behalf. The guarantee was in the following terms :

"To Messrs. Mangles & Co. Gentlemen—In consideration of your having agreed with Mr. George Joseph Ashton that he shall be entitled to one moiety of the profits to be earned by you in trading with the ship *Fifeshire*, in pursuance of the charterparty entered into between you and ourselves (Mr. George Joseph

Ashton also bearing one moiety of the expenses and loss, if any, attending the same), we hereby jointly and severally guarantee and undertake and agree, from time to time, and at all times hereafter, to save you harmless, and indemnify you and each of you from and against the part or share of all such charges, expenses, and loss, as may be sustained or happen in the course of such trading, which Mr. George Joseph Ashton, by virtue of your agreement with him, would be liable and ought to pay; and also undertake and agree, from time to time, when required, to repay and reimburse to you and each of you all and every sums and sum of money which you or either of you may pay or be liable to pay for or by reason of the non-payment by Mr. George Joseph Ashton of his moiety or share of all such charges and expenses and loss, or any part thereof."

This guarantee was signed by Boyd, on behalf of himself and partners.

The appellants paid the sums of money stipulated in the charterparty and accruing due before Mar. 14, 1846, on which day they received a notice from the respondents, who were Boyd & Co.'s bankers, that, on Dec. 1, 1845, the charterparty had been deposited with them by Boyd & Co.

"for a valuable consideration in money, and the said Boyd & Co. did on that day authorize you to pay us the amount of all moneys then due, or thereafter to become due, on the said charterparty."

The respondents thereby required the appellants to pay the same. This notice was accompanied by a copy of an order dated Dec. 1, 1845, made on the margin of the charterparty, and signed by Boyd & Co., which order was in the following terms:

"Messrs. Mangles & Co. Please pay the amount of what is due from this date to Messrs. Dixon & Co., or their order."

A monthly instalment became due on May 1, 1846. It was duly demanded by the respondents' solicitor, and after some hesitation in paying it, on the ground that Boyd & Co. were then insolvent, and that the money might be demanded from the appellants by the assignees, it was paid, and a stamped receipt asked for and given. The June and July instalments were voluntarily paid. On Aug. 17, 1846, the *Fifeshire* arrived in London, and was taken possession of by the appellants, who sold the cargo. It was then discovered that the adventure had terminated in a loss; the appellants delivered the accounts showing the loss, contended that Boyd & Co. were liable for a moiety thereof, and offered to make up the accounts with the respondents on that footing. The respondents refused to accede to this arrangement of the business, and brought an action in the Court of Exchequer in the name of Boyd & Co. to recover the balance of the whole freight due upon the charterparty. In this action a verdict and judgment were recovered.

On Feb. 24, 1847, the appellants filed their bill in Chancery against the respondents and Boyd & Co. and their assignees in bankruptcy in which they set forth the whole of these matters, and prayed that the accounts might be taken in respect of the partnership or joint adventure between the appellants and Boyd & Co., and that it might be declared that Dixon & Co., in respect of their assignment of the charterparty, were only entitled to stand in the place of Boyd & Co. upon the footing of the agreement between the appellants and that firm, and for an injunction as to the action and the judgment thereon. The respondents in their answer denied all knowledge and notice of the agreement of Ashton and the guarantee of Boyd & Co., and insisted that, by virtue of the charterparty, the assignment thereof to them, and the order written in the margin thereof, they were entitled to the whole freight. They set forth that on May 29, 1845, they advanced to Boyd & Co. the sum of £12,000 on their promissory note of that date, payable with interest on demand; that, there being on Dec. 1, 1845, a balance of £11,000 and interest due, Boyd & Co., as a security to them, assigned the charterparty to them, and that on Mar. 14, 1846, they gave to Mangles and Co. notice of such assignment. On June

A 28, 1848, the cause was heard before KNIGHT-BRUCE, V.-C., who made a decree in favour of the appellants. An appeal was thereupon taken to LORD COTTENHAM, L.C., who reversed the decree, and ordered that the appellants' bill should be dismissed with costs. The appellants appealed to this House.

B *Rolt and J. Bailey (Josiah Smith with them)* for the appellants.—It is plain that the assignee of a chose in action takes it subject to all existing equities: *Coles v. Jones* (6). That is the case of the assignee of a bond, and yet a bond is a positive and absolute stipulation to do an act, or to pay a sum of money, apparently subject to no condition but what is stated on the face of the bond. *Turton v. Benson* (2) is to the same effect. It is for the assignee to show any special circumstances which take him out of the operation of that rule. None such exists here. The giving to the appellants notice of the assignment did not impose on them the obligation to give notice of their existing equities. If the respondents wanted information, they were bound to make the inquiry—they had ample materials to put them on making the inquiry. [LORD ST. LEONARDS, L.C.—Have they not a right to say that you ought to have informed them of the equities?] That might be so if any new liability was sought to be imposed on them. But that is not so here. D The respondents ought to have inquired, and their rights, to some degree, depend on the particularity of their inquiry: *Ibbotson v. Rhodes* (7), where an issue was directed to try what was the information given when the inquiry was made. In the court below LORD COTTENHAM said:

E “It is a well-known rule, that a party, having a secret equity, who stands by and permits the apparent owner to deal with others as if he was absolute owner, and as if there was no such secret equity, shall not be permitted to assert such secret equity against a title founded upon such apparent ownership.”

F This rule is not applicable here, for the appellants did not stand by and allow the respondents to advance their money on any such supposed ownership. The appellants knew nothing of the transactions between Boyd & Co. and the respondents, until the latter gave notice that they stood in the situation of Boyd & Co. with respect to the money due from the appellants. The freight was not assigned to the respondents independently of the equities to which the assignors were liable. The circumstances of this case resemble those of *Cator v. Burke* (1), where the attempt to do what is done here was met by LORD LOUGHBOROUGH with the remark that it was “turning an unassignable into an assignable security.” In *Beckett v. Cordley* G (8) LORD THURLOW, reviewing the cases upon this subject, said (1 Bro.C.C. at p. 357):

“There is no case in the books but where the party to whom the fraud is imputed was consant of the treaty in which the fraud was practised.”

H That was not the case here, nor is there the least proof of any intention to commit a fraud, or even to do anything in a secret manner. *Priddy v. Rose* (9) very much resembles the present in many circumstances, and there SIR WILLIAM GRANT said (3 Mer. at p. 107):

I “Why is a third person, who asked no question on the subject, and gave no notice of his having any interest in the matter, to tell the trustees that it was their duty towards him to have called in the debt sooner? . . . The person proposing to take the assignment could ask the trustees whether that money was paid; but the trustees had no opportunity of apprising him that it was not paid, for they knew nothing of the transaction. They have been guilty of no bad faith towards the plaintiffs; but the plaintiffs have been wanting in common prudence in not consulting the trustees before they took the assignment.”

There is no rule of law which lays it down that a person merely receiving notice of an assignment is bound to communicate to the assignee all the transactions relating to it between himself and the assignor. The assignor ought to inquire, and if he

does not, then, in a case like this, where there is no pretence for imputing fraud, he must suffer the consequence of his own negligence.

Purton Cooper and *Daniell* for the respondents.—It is clear that Messrs. Dixon are entitled at law to the whole freight. Then arises the question whether there is any equity stated in the bill to induce the Court of Chancery to interfere and prevent them from obtaining the benefit of their legal rights. There are two equities stated in the bill. The first is that, if the effect of this instrument was to entitle Boyd & Co., or their assignees, or the persons claiming under them, to recover the whole of the freight, or more than half, that was a mistake as to the intentions of the parties which equity could correct, but equity will not correct such a mistake if the appellants have acquiesced in Boyd & Co. so dealing with the instrument, especially as regards persons who have had no notice of the mistake, and if the instrument itself has been assigned for a valuable consideration. The other equity is that this was a joint adventure both as to profit and freight, and that Boyd & Co. might, on a settlement of accounts, have to refund, but to that the answer is, that Dixons cannot be affected with a possible liability of Boyds of which they had no notice, and which was not in accordance with the terms of the instrument assigned to them. This equity could not arise until after the sale of the cargo, and the title to the payment of freight arose immediately upon the ship's arrival. In such a case, on a bill filed stating the joint speculation and the loss, equity would not recognise that loss, which, in fact, might constitute a cross-demand, but would not be a set-off in equity against a clear demand at law; and a court of equity would not interfere: *Rawson v. Samuel* (10). A court of equity will not interfere, on the ground of an equitable set-off, to prevent a party from recovering on a breach of contract, though such cross-demand may arise out of the contract, the breach of which is the subject of the action. Here the appellants, by allowing Boyd & Co. to hold a charterparty which apparently gave them a right to the whole of the freight, permitted them to appear to have a legal title and to deal on the footing of that legal title, and having so acted, and in that way "permitted or encouraged" the respondents to accept this charterparty as a security for the whole freight, they cannot now escape from the consequences of their own act. In *Steed v. Whitaker* (11), LORD HARDWICKE refused to set up an encumbrance against a settlement, because the encumbrancer, a mortgagee, had lain by and allowed the party entitled under the settlement to build upon the land without giving him notice of the mortgage. A similar principle was acted on in *Troughton v. Gitley* (12). In *Joyce v. De Moleyns* (13), it was held, that if a man advanced money, and without notice accepted as security the deeds of an estate, though the person who so gave them to him had no title thus to dispose of them, yet, having the apparent ownership, and the other bona fide taking them, the possession of them by the person so bona fide taking them as security for his advances would be protected by the court. These cases apply to and furnish the principle which must govern the decision of the present case. Whatever might be the equity in this respect between Mangles and Boyds, no notice of this secret partnership having been given to Dixons, it cannot be insisted on as against them. Under such circumstances the general rule as to the equities arising on the transfer of a chose in action do not apply. This case was properly decided on the principle laid down by this House in *Duke of Beaufort v. Neeld* (5), to which LORD COTTENHAM referred. There was here, as there, a representation on which third parties were induced to act, and which, therefore, gave them rights that could not afterwards be contested by those who made the representation. In that case LORD COTTENHAM would not admit a party to say that his undisclosed authority had been exceeded; nor ought the party here to be allowed to set up an undisclosed agreement in order to affect a valid instrument disclosed to third parties, and acted on by them. In *Hill v. Caillovel* (14), which was a strong case, for it was one of a post obit given by a young heir, LORD HARDWICKE said (1 Ves. Sen. at p. 123):

A “The rule is right, that whoever takes the assignment of a bond being a chose in action, takes it subject to all the equity in the hands of the original obligee; but length of time and circumstances may vary that, and make the case of the assignee stronger.”

B Undisclosed agreements, such as existed in this case, would certainly not weaken, but strengthen, the title of the assignee. The authority of any case may therefore be admitted which merely states the general and well-known rule, that an assignee takes subject to the equities which affect the assignor, but where special circumstances exist, as they do in this case, that general rule, though of unquestionable authority in itself, receives a modified application.

Rolt replied.

C **LORD ST. LEONARDS, L.C.**—This case is not so important with respect to the amount of property involved in it as it is with regard to the principle of equity which your Lordships are called upon to decide. There have been divided opinions in the court below, and your Lordships are now called upon finally to determine what is the true construction of the different instruments which have been executed, and what is the rule of equity properly applicable to the case. There are two important subjects to be considered. First, what is the real construction of the different instruments as between the parties to those instruments? And, secondly, what is the construction and operation of those instruments as between the charterers and the bankers to whom the shipowners had mortgaged, or rather made, an equitable assignment of the charterparty?

E [His Lordship dealt with the effect of the instruments as between the parties mentioned, said that there was no fraud or secrecy in the arrangement embodied in the agreement and guarantee of April 23, 1845, and continued:] If there is one rule more perfectly established in a court of equity than another, it is that whoever takes an assignment of a chose in action—which this charterparty was, for though it is not assignable in law, it is in equity—takes it subject to all the equities of the person who made the assignment. No barrister would presume to deny in any court of equity that at the time that assignment was taken, and down to the time when the notice was given, during all these months, the bankers took precisely the same interest, and were subject to the same liabilities, namely, those under the agreement and the guarantee of April 23, 1845, as were Messrs. Boyd themselves. If Messrs. Dixon had notice, it only introduced a new head of equity against them which is that they are bound by the notice which they had, for equity will not permit a man to shut his eyes to a fact of which he has been informed, and, therefore, if he has notice, he is bound by the knowledge he has thus acquired. But the rule to which I have referred applies where there is no notice, and although one may suppose Messrs. Dixon to be utterly unacquainted and uninformed of either the agreement or the guarantee, they were bound by those documents and the charterparty as forming one agreement, precisely to the same extent as Messrs. H Boyd themselves were bound at the time of the execution of the agreement. They do not ask any question of Messrs. Mangles when they do give the notice, as they had asked none when they took the security. It was not a security given for money then advanced, it was for money which had already been advanced, and in their notice they intimate that fact, for they say “for valuable consideration.” I It was, therefore, as they state it truly, for a past consideration, and this security was taken, as many such securities are daily taken in the city of London. No doubt, at the time, they thought it prudent to make themselves as secure as they could, and they took the best security which their debtor had to offer, but they took it with all the liabilities to which he was subject upon it, and your Lordships must fix them, in point of law, as being cognisant of those liabilities under the rule to which I have drawn your attention.

The important question then is this. When the notice was given, was it incumbent upon Messrs. Mangles to write back to Messrs. Dixon and to tell them that

there were, besides the charterparty, the agreement and the guarantee? In the first place, who is to inquire and to take the trouble in these cases?—Who ought to do that? The person who ought to do it is undoubtedly he who is fixed with the liability. Messrs. Dixon were fixed with the liability. If they desired to remove that liability, they ought to have made due inquiry, and therefore, *prima facie* at least, the loss ought to fall upon him who, having the duty to inquire, has not thought proper to inquire. He has no right to speculate whether he shall obtain an answer which may disclose circumstances that he is not desirous to know, and if there is to be a loss, the loss ought to fall upon him who, being subject to the liability, and having to remove that liability if he can remove it, ought to inquire and does not inquire. I must take care and guard myself upon this important point as not for a moment meaning to say that if that notice of the bankers had shown that they had been deceived, that they were advancing money upon a ground which they misunderstood, and if the charterers, Messrs. Mangles & Co., had stood by, well knowing that circumstance, and had been silent, the result would have been the same. I agree that the case would then be altogether different. It would have been incumbent upon the Messrs. Mangles to disclose the real circumstances of the case to Messrs. Dixon; and if they did not do so, they would be just as much bound as it is now contended they ought to be bound.

Let us see how the case stands in that respect. The dealing, remember, was between Messrs. Boyd and Messrs. Dixon, without any intervention in any manner, directly or indirectly, or any inquiry of Messrs. Mangles. What was there to induce Messrs. Mangles when they received that notice to suppose that Messrs. Boyd had been committing a fraud upon Messrs. Dixon, their bankers? “Pay what is due,” they say. Messrs. Mangles, of course, intended to pay what was due. Why were they to suppose that the existence of the agreement and the guarantee had not been communicated to Messrs. Dixon, who had put trust and credit in the statement of Messrs. Boyd, advanced this sum of £12,000 upon their mere promissory note, and remained content with it for months. They subsequently take an assignment, but they do not communicate that assignment even to Messrs. Mangles for two or three months afterwards. Then they give the notice, and say: “We have told you of this transaction now, and you shall be liable to everything which we have neglected for our own security. We have neglected to inquire, we have dealt behind your back with Messrs. Boyd. We, the bankers, have dealt with our own customers without your intervention; they have incurred a great debt with us, and we have taken an assignment of this, which is not an instrument assignable, except in equity, and which imposes all the liability upon us. We did not for a long time communicate that fact to you; we have never made any inquiry whether you have had any dealings with them; but now that we give you notice of the assignment, we throw upon you at once the whole liability, and desire you to indemnify us for our own negligence, our own want of care and caution, which, duly exercised, would have prevented this.”

Certainly that is a new point. I admit the books do not establish the rule, but I think the principle is perfectly clear that where there is no fraud, nothing to lead to the conclusion in the mind of the party who receives the notice that the party who gives it has been deceived and is likely to sustain a loss, the party receiving the notice is not bound to volunteer information. I conceive that equity will not require the party who receives the notice, impertinently almost, to interfere between two parties who have dealt behind his back, and who have never made any communication to him, or even seen him, on that subject. Had Messrs. Mangles done so, they must have begun by supposing that Messrs. Boyd had cheated Messrs. Dixon, and they must have had the hardihood to say: “We are afraid that Messrs. Boyd have been committing a fraud upon you, for we do not see that you mention the agreement and the guarantee. Therefore, we are forced to tell you of them.” Suppose that Messrs. Boyd had, as the probability was, really stated the facts, it would have been a very disagreeable answer, I imagine, that would have been received by Messrs. Mangles to that communication. Your Lordships were asked

A by the learned counsel at the Bar who appeared for Messrs. Mangles—and upon the subject of character it was put as a very fair question—whether, after the turn this case has taken, the House would say that there was anything fraudulent in the transaction as between Messrs. Mangles and Messrs. Dixon, and I cannot help stating to your Lordships that my clear impression is that there is no trace of any such fraud, or any fraudulent intention, on the part of the Messrs. Mangles.

B Another view is this. It did not follow that upon the result of the transaction there would not be enough to pay Messrs. Dixon. That depended upon the success or failure of the adventure, as to which nobody knew what would take place. The adventure did not turn out successful, but nobody could anticipate that, and there is no doubt, as between Messrs. Boyd, on the one hand, and their own bankers, Messrs. Dixon, on the other, that Messrs. Dixon would have been entitled to the whole extent of the freight earned, to the whole 16s. a ton, during the whole voyage.

C The authorities upon this subject, as to liabilities, show that if a man does take an assignment of a chose in action he must take his chance as to the exact position in which the party giving it stands. *Cator v. Burke* (1) very strongly illustrates that. There the defendants, the Burkes, had entered into a bond of £500 to the other defendant, Hargrave, for securing £250, and Hargrave had given to them a counter bond. Hargrave then deposited the first bond with a man of the name of Dator, and Dator filed his bill in order to prevent the parties at law from setting up their counter bond. Nothing could appear more fraudulent upon the face of it than a bond and a counter bond, because there you do enable the party to deal with the bond you give him, when you know that you have a defence in your hand, namely, a counter bond, to set up as a defence to the legal obligation. Dator does not appear to have had notice. The Lords Commissioners held that there was no equity, and LORD THURLOW, on the re-hearing of the case, seemed to think that it was not satisfactory, but he decided it upon the ground that a special purpose appearing for the bond to Hargrave and it not being to give a general credit, the plaintiff was not entitled to the remedy prayed, and, therefore, he affirmed the Lords Commissioners' order of dismissal. I understand that decision to amount

F to this—that, there being no general claim, but there being a special purpose, which was properly provided for by the counter bond, the man who took an assignment of the original bond was not entitled to have any remedy against the counter bond, though he knew nothing at all of it. That is certainly the strongest case that can be upon the subject.

G In *Turton v. Benson* (2), Benson, upon the marriage of his daughter, advanced a sum of money and took a bond, which equity always holds as void, from the son-in-law, to return part of the marriage-portion. The bond was deposited with one Sir Theodore Janssen as an additional security for money due. Mr. Benson died. Sir Theodore's demands were afterwards paid, and then the administrator assigned the bond for the benefit of the general creditors of the deceased. SIR JOSEPH JEKYLL, M.R., declared (1 P.Wms. at p. 497):

H “that the creditors of Benson could not be in a better condition than Benson himself, and as to Sir Theodore Janssen, it was to be considered that he had no legal title to this bond, but only an equitable assignment, and, therefore, having a security which was not good in equity, he could not be in a better condition than Benson himself was; that supposing a man should assign over a satisfied bond as a security for a just debt, the assignee could not set up the bond in equity, which, being satisfied before, could receive no new force from the assignment. That it was incumbent on any one who took an assignment of a bond to be informed by the obligor concerning the quantum due upon such bond, which if he neglected to do, it was his own fault, and he should not take advantage of his own laches.”

I There are other passages to the same effect when it afterwards came on before LORD PARKER, L.C. That shows clearly, what has never been disputed, that whatever may be the state of the account, although not even one single shilling is due,

the man who takes an assignment of the bond must take it just as he finds it, and he cannot insist on the legal obligation that remains; the liability at law remains just as good as ever, but there is no obligation in equity. The man who took the assignment ought to have inquired. This is the doctrine laid down in *Matthews v. Wallwyn* (3) and in *Chambers v. Goldwin* (4), which is still stronger. Where a man takes an assignment of a mortgage and gets the legal estate, even in that case he has not done sufficient for his perfect security to take it without having communication with, and obtaining the concurrence of, the mortgagor, for, whatever be the state of the account, although he gets a transfer of the legal estate, he is bound by the state of the account, and he cannot recover a shilling beyond what is actually due, although there is no endorsement of payments upon the mortgage-deed, and although he has no notice of a single shilling of the money having been paid off. The rule, therefore, is perfectly clear.

The only question that remains to be considered is the conduct of the parties in this case after the notice. The notice spoke, as I told your Lordships, of past consideration. It is admitted, as I have stated, by the Messrs. Boyd and by the bankers, that no advance was made upon the charterparty, nor after its assignment; that they made no inquiry; and the question is whether the mere payment of the monthly instalments of freight by Messrs. Mangles can or can not affect their right to have an account taken. It appears to me, for the grounds and reasons I have already stated that no question could arise from that circumstance, because they were under an absolute legal liability to pay, and not simply a legal liability between the original parties, but an equitable liability between themselves and the assignees of the charterparty. It was not merely a charterparty by which they were bound by law, but it was a true and real agreement in equity that they should pay, pending the voyage, that monthly sum of £150. And as in equity the charterparty was assignable, the assignee became in equity entitled to that £150. Therefore, it was an act done in obedience to the charterparty, and in consequence of the liability to pay what sum was due from "this date"—for those are the words used in the assignment, and, therefore, they were merely performing properly, legally, and equitably their part of the agreement. The due performance of an agreement never can be considered as the ground for fixing parties with a liability to something beyond that by which they are equitably bound.

I have paid very great attention to this case, which I am especially bound to do differing as I do from the decision of the Lord Chancellor, believing the true rule in equity to be that which I have stated. The only ground on which I understand the decision was rested was that where a man having an interest in property stands by and sees another man dealing with that property, as owner, with another person who is ignorant of the want of title in the person with whom he is dealing, equity will bind the man who stands by. Nobody denies that proposition. The Lord Chancellor referred to *Duke of Beaufort v. Neeld* (5). There the duke's agent, with a power to act, had instructions not to act except under certain circumstances, but he exercised the authority without disclosing those instructions, and it was held that the principal was bound. How does that apply to this case? The agent was there in the place of the principal, the instructions given to him were not disclosed; he was, therefore, an agent with full authority, and nothing could be more dangerous to the dealings of mankind than to hold that a man was not bound by the act of his agent to whom he had given full authority because the agent had secret and private instructions not to exercise his power, except in a particular case. I cannot see, my Lords, how that bears upon this case, for the facts are not identical, nor even similar. There was no standing by on the part of Messrs. Mangles when they saw Messrs. Boyd dealing with Messrs. Dixon, the bankers. They did not even know that the transaction had taken place. There cannot be a doubt that, under such circumstances, in a court of equity, Messrs. Dixon cannot, at the last moment, turn round upon Messrs. Mangles and say: "When you received notice of this, you did not tell us that there was an agreement and a guarantee of which we did not know." They could have no reason to suppose that those papers had

A not been communicated. I have come to a very clear opinion that there is no equity on the part of Messrs. Dixon as against Messrs. Mangles. The appeal must, therefore, be allowed, and the case will stand upon the decree of the vice-chancellor.

Appeal allowed.

B

HUMPHRIES v. BROGDEN

C

[COURT OF QUEEN'S BENCH (Lord Campbell, C.J., Patteson, Coleridge and Erle, JJ.), May 23, 24, November 21, 1850]

[Reported 12 Q.B. 739; 20 L.J.Q.B. 10; 16 L.T.O.S. 457;
15 Jur. 124; 116 E.R. 1048]

D

Land—Right to support—Subjacent minerals—Damage to surface land through removal of minerals—Removal not done negligently or contrary to custom of country.

Where the surface of land and the minerals under it belong to different owners the owner of the surface is entitled to have it supported by the subjacent mineral strata. Those strata may be removed by their owner, provided that a sufficient support of the surface is left, but, if the surface subsides and is damaged by the removal of those strata, although the operation has not been conducted negligently or contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface be entitled to support from the minerals underneath, it cannot be enjoyed as property, and in certain circumstances, as where the mineral strata approach the surface and are of great thickness, it might be entirely destroyed.

F

Notes. Considered: *Smart v. Morton* (1855), 5 E. & B. 30; *Caledonian Rail. Co. v. Sprot* (1856), ante p. 109; *Roberts v. Haines* (1856), 6 E. & B. 643; *Rowbotham v. Wilson* (1857), 8 E. & B. 123; *Rogers v. Taylor* (1858), 2 H. & N. 828; *Bonomi v. Backhouse* (1859), E.B. & E. 646; *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585; *Hunt v. Peake* (1860), John. 705; *Wakefield v. Buccleuch* (1867), L.R. 4 Eq. 613; *Richards v. Jenkins* (1868), 18 L.T. 437; *Eadon v. Jeffcock* (1872), L.R. 7 Exch. 379; *Dalton v. Angus & Co.*, [1881-5] All E.R.Rep. 1; *Mundy v. Rutland* (1883), 23 Ch.D. 81; *Butterley Co. v. New Hucknall Colliery Co.*, [1908] 2 Ch. 475; *Howley Park Coal and Cannel Co. v. London and North Western Rail. Co.*, [1911-13] All E.R.Rep. 432; *Davies v. Powell Duffryn Steam Coal Co.* (1920), 36 T.L.R. 358. Referred to: *Keyse v. Powell* (1853), 2 E. & B. 132; *Allaway v. Wagstaff* (1859), 4 H. & N. 681; *North Eastern Rail. Co. v. Elliott* (1860), 2 De G.F. & J. 423; *Rowbotham v. Wilson* (1860), ante p. 601; *Webb v. Bird* (1861), 10 C.B.N.S. 268; *Re Williams v. Groucott* (1863), 4 B. & S. 149; *Smith v. Darby* (1872), L.R. 7 Q.B. 716; *Lamb v. Walker* (1878), 3 Q.B.D. 389; *Pountney v. Clayton*, [1881-5] All E.R.Rep. 280; *Jordeson v. Sutton, Southcoates and Drypool Gas Co.* (1899), 80 L.T. 815; *Trinidad Asphalt Co. v. Ambard*, [1899] A.C. 594; *Elliott v. Burn*, [1934] 1 K.B. 109.

I

As to the right of support from subjacent mines, see 26 HALSBURY'S LAWS (3rd Edn.) 339 et seq.; and for cases see 33 DIGEST (Repl.) 840 et seq.

Cases referred to:

- (1) *Earl of Lonsdale v. Littledale* (1793), 2 Anst. 356; 2 Hy. Bl. 267; 145 E.R. 901; affirmed, 5 Bro. Parl. Cas. 519, H.L.; 36 Digest (Repl.) 396, 440.
- (2) *Wyatt v. Harrison* (1832), 3 B. & Ad. 871; 1 L.J.K.B. 237; 110 E.R. 320; 19 Digest (Repl.) 178, 1200.

- (3) *Bateson v. Green* (1793), 5 Term Rep. 411; 101 E.R. 230; 11 Digest (Repl.) 43, 584. A
- (4) *Peyton v. London Corpn.* (1829), 9 B. & C. 725; 109 E.R. 269; sub nom. *Peyton v. St. Thomas's Hospital (Governors)*, 7 L.J.O.S.K.B. 322; 19 Digest (Repl.) 185, 1247.
- (5) *Dodd v. Holme* (1834), 1 Ad. & El. 493; 3 Nev. & M.K.B. 739; 110 E.R. 1296; 19 Digest (Repl.) 183, 1234. B
- (6) *Partridge v. Scott* (1838), 3 M. & W. 220; 1 Horn. & H. 31; 7 L.J.Ex. 101; 150 E.R. 1124; 19 Digest (Repl.) 74, 420.
- (7) *Chadwick v. Trower* (1839), 6 Bing.N.C. 1; 8 Scott, 1; 8 L.J.Ex. 286; 133 E.R. 1, Ex. Ch.; 19 Digest (Repl.) 185, 1250.
- (8) *Harris v. Ryding* (1839), 5 M. & W. 60; 8 L.J.Ex. 181; 151 E.R. 27; 33 Digest (Repl.) 848, 1024. C
- (9) *Acton v. Blundell* (1843), 12 M. & W. 324; 13 L.J.Ex. 289; 1 L.T.O.S. 207; 152 E.R. 1223, Ex. Ch.; 33 Digest (Repl.) 865, 1139.
- (10) *Hilton v. Lord Granville* (1844), ante p. 597; 5 Q.B. 701; 1 Dav. & Mer. 614; 13 L.J.Q.B. 193; 2 L.T.O.S. 419; 8 Jur. 311; 114 E.R. 1414; 33 Digest (Repl.) 844, 1001.
- (11) *Smith v. Kenrick* (1849), 7 C.B. 515; 18 L.J.C.P. 172; 12 L.T.O.S. 556; 13 Jur. 362; 137 E.R. 205; 33 Digest (Repl.) 866, 1150. D

Rule Nisi obtained by the defendant, the secretary of the Durham Coal Co., to enter a verdict for himself in an action on the case for injury to the plaintiff's closes by working the mines below them without leaving sufficient support, tried before COLERIDGE, J., at the Lent Assizes, 1849, for the county of Durham, when a verdict was taken for the plaintiff, leave being reserved to the defendant to move to enter the verdict for himself. A rule was, accordingly, obtained by the defendant. E

Watson and *J. Addison* for the plaintiff, showed cause against the rule.

Knowles and *H. Hill* for the defendant supported the rule. F

Cur. adv. vult.

Nov. 21, 1850. **LORD CAMPBELL, C.J.**, read the following judgment of the court.—This is an action upon the case. The declaration alleges that the plaintiff was possessed of divers closes of pasture and arable land, situate, etc., yet that the Durham Coal Co. wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient pillars or supports in that behalf, and contrary to the custom and course of practice of mining used and approved of in the country where the mines thereafter mentioned are situate, worked certain coalmines, under and contiguous to the said closes, and dug for and got and moved the coals, minerals, earth, and soil of and in the said mines, so that by reason thereof the soil and surface of the said closes sunk in, cracked, swagged, and gave way, and thereby were greatly damaged. The only material plea was Not Guilty. The cause coming on to be tried before COLERIDGE, J., at the Spring Assizes for the county of Durham in 1849, it appeared that the plaintiff was possessed of the closes described in the declaration, and that the Durham Coal Co. (who may sue and be sued by their secretary) were lessees under the Bishop of Durham of the coalmines mentioned; but there was no other evidence whatever as to the tenure or title either of the surface or of the minerals. It appeared that the company had taken the coals under the plaintiff's closes without leaving any sufficient pillars to support the surface, whereby the closes had swagged and sunk, and had been considerably injured, but that, supposing the surface and the minerals to have belonged to the same person, these operations had not been conducted carelessly or negligently, or contrary to the custom of the country. The jury found that the company had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports; and a verdict was entered for the plaintiff for £110 damages. G H I

A with leave to move to enter a verdict for the defendants if the court should be of opinion that under these circumstances the action was not maintainable.

The case was very learnedly and ably argued before us in Trinity Term last, and on account of the great importance of the question, we took time to consider our judgment. For the defendants, it was contended that, after the special finding of the jury, the declaration is defective in not alleging that the plaintiff was entitled to have his closes supported by the subjacent strata. But we are of opinion that such an allegation is unnecessary to raise the question in this action whether the company, although they did not work the mines negligently or contrary to the custom of the country, were bound to leave props to support the surface. If the easement which the plaintiff claims exists, it does not arise from any special grant or reservation, but is of common right created by the law, so that we are bound to take notice of its existence. In pleading it is enough to state the facts from which a right or a duty arises. The carefully prepared declaration in *Earl of Lonsdale v. Littleddale* (1), for disturbing the right of the owner of the surface of lands to the support of the mineral strata belonging to another contains no express allegation of the right, and if the omission had been considered important, it probably would have been relied upon rather than the objection that a peer of Parliament was not liable to be sued in the Court of King's Bench by bill.

We have, therefore, to consider whether, when the surface of land (by which is here meant the soil lying over the minerals) belongs to one man and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owners of the minerals may remove them without leaving support sufficient to maintain the surface in its natural state. This case is entirely relieved from the consideration how far the rights and liabilities of the owners of adjoining tenements are affected by the erection of buildings, for the plaintiff claims no greater degree of support for his lands than they must have required and enjoyed since the glebe subsisted in its present form. Where portions of the freehold, lying one over another, perpendicularly belong to different individuals and constitute, as it were, separate closes, the degree of support to which the upper is entitled from the lower has, as yet, by no means been distinctly defined, but in the case of adjoining closes, which belong to different persons from the surface to the centre of the earth, the law of England has long settled the degree of lateral support which each may claim from the other, and the principle upon which this rests may guide us to a safe solution of the question now before us.

In 2 ROLLE'S ABRIDGMENT, tit. "Trespas" (I.) pl. 1, p. 564, it is said :

G "If A. seised in fee of copyhold next adjoining land of B. erect a new house on his copyhold land and part of the house is erected on the confines of his land next adjoining the land of B. if B. afterwards digs his land near to the foundation of the house of A. but not touching the land of A. whereby the foundation of the house and the house itself fall into the pit, still no action lies at the suit of A. against B.; because this was the fault of A. himself, that he built his house so near to the land of B.; for he could not by his act hinder B. from making the most profitable use of B.'s own land. But, semble, that a man who has land next adjoining to my land cannot dig his land so near to my land, that thereby my land shall fall into his pit; and for this, if an action be brought, it would lie."

I (I may remark that the circumstance that A.'s land was copyhold is immaterial, and nothing turns on that). This doctrine is recognised by LORD CHIEF BARON COMYN'S in COMYNS' DIGEST, tit. "Action on the case for a nuisance" (A.); by LORD TENTERDEN, in *Wyatt v. Harrison* (2); and by other great authorities. It stands on natural justice, and is essential to the protection and enjoyment of property in the soil. Although it places a restraint on what a man may do with his own property, it is in accordance with the precept, sic utere tuo ut alienum non lædas. As is well observed by a modern writer in GALE ON EASEMENTS :

"If the neighbouring owners might excavate their soil on every side up to their

boundary-line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone."

This right to lateral support from the adjoining soil is not like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil.

If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for the purpose, is entitled to the lateral support of the other close the very instant the conveyance is executed as much as after the expiration of twenty years or any longer period. *Pari ratione*, where there are separate freeholds, from the surface of the land and the minerals belonging to different owners, we are of opinion that the owner of the surface, while unencumbered by buildings, and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support is left, but if the surface subsides and is injured by the removal of those strata, although (on the supposition that the surface and the minerals belong to the same owner) the operation may not have been conducted negligently or contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface-close be entitled to the support from the close underneath, corresponding to the lateral support to which it is entitled from the adjoining surface-close, it cannot be securely enjoyed as property, and under certain circumstances, as where the mineral strata approach the surface, and are of great thickness, it might be entirely destroyed.

We likewise think that the rule giving the right of support to the surface which is above the minerals, in the absence of any express grant, reservation, or covenant, must be laid down generally, without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals. We are not aware of any principle upon which qualifications could be added to the rule, and the attempt to introduce them would lead to uncertainty and litigation. Greater inconvenience cannot arise from this rule in any case than that which may be experienced where the surface belongs to one owner and the minerals to another who cannot take any portion of them without the consent of the owner of the surface. In such cases, a hope of reciprocal advantage will bring about a compromise, advantageous to the parties and to the public. Something has been said of a right of "reasonable support" for the surface; but we cannot measure out degrees to which the right may extend, and the only reasonable support is that which will protect the surface from subsidence and keep it securely at its ancient and natural level.

The defendant's counsel have argued that the analogy of the support to which one superficial close is entitled from the adjoining superficial close cannot apply where the surface and the minerals are separate tenements belonging to different owners, because there must have been unity of title of the surface and the minerals, and the rights of the parties must depend upon the contents of the deeds by which they were severed. But in contemplation of law, all property in land having been in the Crown, it is easy to conceive that at the same time the original grant of the surface was made to one and of the minerals under it to another, without an express grant or reservation of any easement. Suppose (what has generally been the fact) that there has been in a subject unity of title from the surface to the centre, if the surface and the minerals are vested in different owners without any deeds appearing to regulate their respective rights, we see no difficulty in presuming that the severance took place in a manner which would confer upon the owner of the surface a right to the support of the minerals. If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of the grant, the power of removing all the minerals without leaving a support for the surface; and if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have

A parted with the right to that support for the surface by the minerals which it had ever before enjoyed. Perhaps it may be said that if the grantor of minerals, reserving the surface, seeks to limit the right of the grantee to remove them, he is acting in derogation of his grant, and is seeking to hinder the grantee from doing what he likes with his own.

B But, generally speaking, mines may be profitably worked, leaving a support to the surface by pillars or ribs of the minerals, although not so profitably as if the whole of the minerals be removed, and a man must so use his own as not to injure his neighbour. The books of law reports abound with decisions restraining a man's acting upon his own property where the necessary or probable consequence of such acts is to do damage to others. The case of common occurrence nearest to the present is where the upper storey of a house belongs to one man and the lower to another. The owner of the upper storey, without any express grant or enjoyment for any given time, has a right to the support of the lower storey. If this arises, as has been said, from an implied grant or covenant, why is not a similar grant or covenant to be implied in favour of the owner of the surface of land against the owner of the minerals? If the owner of an entire house, conveying away the lower storey only, is, without any express reservation, entitled to the support of the lower storey for the benefit of the upper storey, why should not an owner of land, who conveys away the minerals only, be entitled to the support of the minerals for the benefit of the surface?

I will now refer to the cases which were cited in the argument, and I think that none of them will be found in any degree to impugn the doctrine on which our decision rests. In *Bateson v. Green* (3), BULLER, J., says (5 Term Rep. at p. 416):

E "Where there are two distinct rights claimed by different parties, which encroach on each other in the enjoyment of them, the question is, which of the two rights is subservient to the other?"

It was held, that the lord may dig clay-pits on a common, or empower others to do so, without leaving sufficient herbage for the commoners if such right can be proved to have been always exercised by the lord. So here, the right of the owner of the minerals to remove them may be subservient to the right of the owner of the surface to have it supported by them. *Peyton v. London Corpn.* (4), was cited, to show the necessity of introducing into the declaration an averment that the plaintiff was entitled to the easement or right which is the foundation of the action. But the easement there claimed was a right of support of one building upon another which could only arise from a grant actual or implied, and there LORD TENTERDEN says (9 B. & C. at p. 735):

G "The declaration in this case does not allege as a fact that the plaintiffs were entitled to have their house supported by the defendant's house; nor does it, in our opinion, contain any allegation from which a title to such support can be inferred as matter of law."

H In the case at Bar, we are of opinion that the declaration alleges facts from which the law infers the right to support which the plaintiff claims.

Wyatt v. Harrison (2) decided that the owner of a house recently erected on the extremity of his land could not maintain an action against the owner of the adjoining land for digging in his own land so near to the plaintiff's house that the house fell down, but the reason given is that the plaintiff could not, by putting an additional weight upon his land and so increasing the lateral pressure upon the defendant's land, render unlawful any operation in the defendant's land which before would have caused no damage; and the court intimated an opinion that the action would have been maintainable, not only if the defendant's digging would have made the plaintiff's land crumble down unloaded by any building, but even if the house had stood twenty years. Where a house has been supported more than twenty years by land belonging to another proprietor with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house. Although there may be some difficulty in

distinguishing whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favours the preservation of enjoyments acquired by the labour of one man and acquiesced in by another who has the power to interrupt them; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle. A B

In *Dodd v. Holme* (5), where there was a good deal of discussion respecting the rights of owners of adjoining lands or houses, no point of law was determined, as the case turned upon the allegation in the declaration that

“the defendant dug carelessly, negligently, unskilfully, and improperly, whereby the foundations of the walls of the plaintiff's house gave way.” C

The plaintiff's house was proved to have been in a very bad condition; but LORD DENMAN said that the defendant had no right to accelerate its fall. The Court of Exchequer, in *Partridge v. Scott* (6), concurred in the law before laid down in this court, that a right to the support of the foundation of a house from the adjoining land belonging to another proprietor can only be acquired by grant, and that where a house was built on excavated land, a grant is not to be presumed till the house has stood twenty years after notice of the excavation to the person supposed to have made the grant, but nothing fell from any of the judges questioning the right to support which land, while it remains in its natural state, has been said to be entitled to from the adjoining land of another proprietor. Some land of the plaintiff's not covered by buildings had likewise sunk, in consequence of the defendant's operations in his own land, but the court, in directing the verdict to be entered for the defendant on the whole declaration, seems to have thought that the sinking of the plaintiff's land was consequential upon the fall of the houses, or would not have taken place if his own land had not been excavated. The judges in the Exchequer Chamber held, upon a writ of error from the Court of Common Pleas in *Chadwick v. Trower* (7), that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall which rests upon it, and that he is not even liable for carelessly pulling down his wall if he had not notice of the existence of the adjoining wall. But this decision proceeds upon the want of any allegation or proof of a right of the plaintiff to have his wall supported by the defendant's, and does not touch the rights or obligations of contemporaneous proprietors, where the tenement to be supported remains in its natural condition. D E F G

Next comes the valuable case of *Harris v. Ryding* (8), which would be a direct authority in favour of the present plaintiff if it did not leave some uncertainty as to the effect of the averment in the declaration of the working “carelessly, negligently, and improperly,” and whether the plaintiff was considered absolutely entitled to have his land supported by the subjacent strata to whatever degree the affording of this support might interfere with the defendant's right to work the minerals. There, one seised in fee of land conveyed away the surface, reserving to himself the minerals, with power to enter upon the surface to work them, and it is said that the court held that, under this reservation, he was not entitled to take all the minerals, but only so much as he could get, leaving a reasonable support to the surface. The case was decided upon the demurrer to certain pleas justifying under the reservation, and the declaration alleged “careless, negligent, and improper working,” which there must be considered as admitted, whereas here it is negatived by the verdict. But the barons, in the very comprehensive and masterly judgments which they delivered seriatim, seem all to have thought that the reservation of the minerals would not have justified the defendant in depriving the surface of a complete support, however carefully he might have proceeded in removing them. LORD ABINGER says (5 M. & W. at p. 67): H I

A "The plea is no answer; because it does not set forth any sufficient ground to justify the defendant in working the mines in such a manner as not to leave sufficient support for the land above, which is alleged by the declaration to be a careless, negligent, and improper mode of working them."

PARKE, B., observes (*ibid.* at p. 71):

B "It never could have been in the contemplation of the parties, that by virtue of this reservation of the mines the grantor should be entitled to take the whole of the coal, and let down the surface, or injure the enjoyment of it. . . . The plea is clearly bad, because the defendants do not assign that, in taking away the coal, they did leave a sufficient support for the surface in its then state."

ALDERSON, B., said (*ibid.* at p. 73):

C "The question is whether the grantor is not to get the minerals which belong to him, and which he has reserved to himself the right of getting in that reasonable and ordinary mode in which he would be authorised to get them, provided he leaves a proper support for the land which the other party is to enjoy."

D My brother MAULE, then a judge of the Court of Exchequer, says, in the course of his luminous judgment (*ibid.* at p. 76):

"The right of the defendant to get the mines is the right of the mineowner as against the owner of the land which is above it; that right appears to me to be very analogous to that of a person having a room in a house over another man's room, or an acre of land adjoining another man's acre of land."

E Then PARKE, B., that he might not be misunderstood as to the right of the owner of the surface, added (*ibid.*):

"I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support."

F It seems to have been the unanimous opinion of the court that there existed the natural easement of support for the upper soil from the lower soil beneath, and that the entire removal of the interior strata, however skilfully done, would be actionable if productive of damage by withdrawing that degree of support to which the owner of the surface was entitled, the duty of the owner of the servient tenements forbidding him to do any act whereby the enjoyment of the easement could be disturbed.

G Counsel for the defendants relied much upon *Acton v. Blundell* (9), in which it was held that the landowner who, by mining operations in his own land, diverts the subterraneous current of water, is not liable to an action at the suit of the owner of adjoining land whose well is thereby left dry, but the right to running water and the right to have land supported are so totally distinct, and depend upon such different principles, that there can be no occasion to show at greater length how the decision is inapplicable.

H I have now to mention *Hilton v. Lord Granville* (10). If well decided, the plaintiff is justified in relying upon it, for it is strongly in point. This court there held that a prescription, or a custom within a manor, for the lord who is seised in fee of the mines and collieries therein to work them under any dwelling-houses, buildings and lands, portions of the manor, doing no unnecessary damage and paying to the tenants and occupiers of the surface of the land damaged thereby a reasonable compensation for the use of the surface of the land, "but without making compensation for any damage occasioned to any dwelling-houses or other buildings," within or parcel of the manor, by or for the purpose of working the said mines and collieries, is void as being unreasonable. LORD DENMAN said:

"A claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive the grantee of the enjoyment of the thing granted, such a clause must be rejected, as repugnant and absurd. That the prescription or

custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument."

The most recent case referred to was *Smith v. Kenrick* (11), in which the Court of Common Pleas, after great deliberation, held that it is the right of each of the owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his whole mine, as far as the flow of water is concerned, in the manner which he deems most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so that such prejudice does not arise from the negligent or malicious conduct of his neighbour. But no question arose there respecting any right to support, the controversy being only respecting the obligation to protect the adjoining mine from water, which may flow into it by the force of gravitation, and in the very learned judgment of the court delivered by my brother CRESSWELL, there is nothing laid down to countenance the doctrine that in a case circumstanced like this which we have to determine the owner of the minerals may, if not chargeable with malice or negligence, remove them so as not to destroy or damage the surface, which belongs to another.

We have attempted, without success, to obtain from the codes or jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil divided horizontally belong as separate properties. This penury, where the subject of servitudes is so copiously and discriminately treated, probably proceeds from the subdivision of the surface of land and the minerals under it into separate holdings being peculiar to England. Had such subdivision been known in countries under the jurisdiction of the Roman civil law, its incidental rights and duties must have been exactly defined when we discover the right of adjoining proprietors of land to support from lateral pressure leading to such minute regulations as the following :

"Si quis sepem ad alienum prædium fixerit infoderitque, terminum ne excedito; si maceriam, pedem relinquito; si vero domum, pedes duos; si sepulchrum aut scrobem foderit quantum profunditatis habuerint, tantum spatii relinquito, si puteum, passûs latitudinem." (L. 15, H. Fin. reg.)

The Code Napoléon likewise recognises the support to which the owners of adjoining lands are reciprocally entitled, but contains nothing which touches the question for our decision more closely than the following article on Natural Servitudes :

"Les fondes inférieurs sont assujettis envers ceux qui sont plus élevés à recevoir les eaux qui en découlent naturellement sans que la main de l'homme y ait contribué. Le propriétaire supérieur ne peut rien faire qui aggrave la servitude du fond inférieur." (Book II, tit. iv, ch. 1, art. 640.)

But reference is here made to adjoining fields on a declivity, not to the surface of land and the minerals being held by different proprietors. The American lawyers write learnedly on the support which may be claimed for land from lateral pressure and for buildings which have long rested against each other, but are silent as to the support which the owner of the surface of land may claim from the subjacent strata when possessed by another, see KENT'S COMMENTARIES, part VI, lecture iii, vol. 3, p. 434, Ed. 1840. However, in ERSKINE'S INSTITUTES OF THE LAW OF SCOTLAND, treating of the servitude oneris ferendi, that very learned author has the following passage, which well illustrates the principle on which our decision is founded :

"Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the proprietor of the ground-floor is bound, by the nature and condition of his property, without any servitude, not only to bear the weight of the upper storey but to repair his own property, that it may be capable of bearing the weight. The proprietor of the ground-storey is obliged to uphold it for the support of

A the upper, and the owner of the upper must uphold that as a roof or cover to the lower."

For these reasons, we are all of opinion that the present action is maintainable, notwithstanding the negation of negligence in the working of the mines, and that the rule to enter a verdict for the defendant must be discharged. I need hardly say that we do not mean to lay down any rule applicable to a case where the prima facie rights and liabilities of the owner of the surface of the land and of the subjacent strata are varied by the production of title deeds or by other evidence.

Rule discharged.

BAKER v. BRADLEY AND OTHERS

D [COURT OF APPEAL IN CHANCERY (Knight-Bruce and Turner, L.JJ.), July 25, November 5, 6, 7, 20, 1855]

[Reported 7 De G.M. & G. 597; 25 L.J.Ch. 7; 26 L.T.O.S. 160;
2 Jur.N.S. 98; 4 W.R. 78; 44 E.R. 233]

Family Arrangement—Transaction regarded with favour by court—Considerations on either side not weighed minutely.

E *Undue Influence—Parent and child—Bounty from son to father—Transaction viewed by court with jealousy—Child guarded from parental influence—Need for independent advice—Claim in respect of sums paid for son's maintenance, education, and advancement, and expenditure on trust property.*

Transactions between parent and child may proceed upon arrangements between them for the settlement of property or of rights of property in which they are interested. The court regards such transactions with favour. It does not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction. If, however, the transaction is one of bounty from the child to the parent, soon after the child has attained the age of twenty-one, the court views it with jealousy, and anxiously interposes its protection to guard the child from the exercise of parental influence. It is essential that in any such transaction the child should have received independent advice. It would be attended with the greatest danger to allow debts of the father to be charged on the estate of the son in respect of sums spent by the father on the maintenance, education, and advancement of the son, or of expenditure on the trust property, however much that property had benefited thereby. A father could have no claim against his son in respect of such matters.

Notes. Applied: *Berdie v. Dawson* (1865), 34 Beav. 603. Considered: *London and Westminster Loan and Discount Co. v. Bilton* (1911), 27 T.L.R. 184. Referred to: *Wright v. Vanderplank* (1856), 8 De G.M. & G. 133; *Jenner v. Jenner* (1860), 2 De G.F. & J. 359; *Chambers v. Crabbe* (1865), 11 Jur.N.S. 277; *Turner v. Collins* (1871), 7 Ch. App. 334, n.; *Lovell v. Wallis* (No. 2) (1884), 50 L.T. 681; *De Witte v. Addison* (1899), 80 L.T. 207; *Barron v. Willis*, [1899] 2 Ch. 578.

As to family arrangements and undue influence, see 17 HALSBURY'S LAWS (3rd Edn.) 215 and 672; and for cases see 24 DIGEST (Repl.) 1117 and 12 DIGEST (Repl.) 110, respectively.

Cases referred to:

(1) *Field v. Evans* (1846), 15 Sim. 375; 27 Digest (Repl.) 112, 837.

(2) *Pullen v. Ready* (1743), 2 Atk. 587; 26 E.R. 751, L.C.; 24 Digest (Repl.) 1133, 147.

- (3) *Gordon v. Gordon* (1821), 3 Swan. 400; 36 E.R. 910, L.C.; 24 Digest (Repl.) 1130, 121. A
- (4) *Tweddell v. Tweddell* (1822), Turn. & R. 1; 37 E.R. 992, L.C.; 24 Digest (Repl.) 1133, 153.
- (5) *Palmer v. Wheeler* (1811), 2 Ball & B. 27. 29, 30; 37 Digest (Repl.) 391, *198.
- (6) *Harvey v. Cooke* (1827), 4 Russ. 34; 6 L.J.O.S.Ch. 84; 38 E.R. 717; 24 Digest (Repl.) 1130, 122. B
- (7) *Davis v. Uphill* (1818), 1 Swan. 129; 36 E.R. 326; 24 Digest (Repl.) 1127, 98.
- (8) *Dunnage v. White* (1818), 1 Swan. 137; 1 Wils. Ch. 67; 36 E.R. 329; 24 Digest (Repl.) 1128, 103.

Also referred to in argument :

Hatch v. Hatch (1804), 9 Ves. 292; 1 Smith, K.B. 226; 32 E.R. 615, L.C.; 12 Digest (Repl.) 119, 705. C

Huquenin v. Baseley (1807), 14 Ves. 273; 33 E.R. 526, L.C.; 12 Digest (Repl.) 111, 657.

Wood v. Downes (1811), 18 Ves. 120; 34 E.R. 263, L.C.; 12 Digest (Repl.) 125, 777.

Carpenter v. Heriot (1759), 1 Eden, 338; 2 Keny. 533; 28 E.R. 715; 12 Digest (Repl.) 113, 665. D

Archer v. Hudson (1844), 7 Beav. 551; 13 L.J.Ch. 380; 3 L.T.O.S. 320; 8 Jur. 701; 49 E.R. 1180; affirmed (1846), 15 L.J.Ch. 211, L.C.

Thorner v. Sheard (1850), 12 Beav. 589; 50 E.R. 1186; 12 Digest (Repl.) 113, 667.

Hoghton v. Hoghton (1852), 15 Beav. 278; 21 L.J.Ch. 482; 17 Jur. 99; 51 E.R. 545. E

Bellamy v. Sabine (1847), 2 Ph. 425; 17 L.J.Ch. 105; 10 L.T.O.S. 181; 41 E.R. 1007, L.C.; 24 Digest (Repl.) 1123, 59.

Wallace v. Wallace (1842), 2 Dr. & War. 452; 40 Digest (Repl.) 532, *93.

Kennedy v. Green (1834), 3 My. & K. 699; 40 E.R. 266; 1 Digest (Repl.) 709, 2601.

Maitland v. Irving (1846), 15 Sim. 437; 16 L.J.Ch. 95; 8 L.T.O.S. 312; 10 Jur. 1025; 60 E.R. 688; 12 Digest (Repl.) 119, 706. F

Maitland v. Backhouse (1848), 16 Sim. 58; 17 L.J.Ch. 121; 10 L.T.O.S. 243; 11 L.T.O.S. 237; 11 Jur. 1000; 60 E.R. 794, L.C.; 12 Digest (Repl.) 119, 707.

Hewitt v. Loosemore (1851), 9 Hare, 449; 21 L.J.Ch. 69; 18 L.T.O.S. 133; 15 Jur. 1097; 68 E.R. 586; 35 Digest (Repl.) 541, 2208.

Wright v. Vanderplank (1856), 8 De G.M. & G. 133; 25 L.J.Ch. 753; 27 L.T.O.S. 91; 2 Jur.N.S. 599; 4 W.R. 410; 44 E.R. 340, L.J.J.; 12 Digest (Repl.) 113, 668. G

Appeal by the plaintiff, William Baylis Baker, from an order of STUART, V.-C., dismissing a bill filed by him for the purpose of having a mortgage, dated Sept. 2, 1848, to the defendant J. Bradley, for securing the sum of £1,300 and interest, and another mortgage of the same date to John Lovegrove (now vested in the defendants Thomas Cuff Adams, Joseph Lovegrove and William Cottier, his representatives) for securing the sum of £500 and interest, declared to be absolutely void as against him, and delivered up to be cancelled. He also sought a declaration that another mortgage, dated Oct. 28, 1850, to the defendant Joseph Lovegrove, for securing the sum of £700 and interest, ought to stand as a security against him for so much only of the £700 as was due from him to the defendant Joseph Lovegrove at the date of that mortgage. Charles Baker and Ann his wife, the father and mother of the plaintiff, were also made defendants to the suit. H

By his will dated Aug. 25, 1835, William Baylis gave certain messuages and hereditaments of which he was seised to Thomas Clutterbuck Croome, as follows : I

"To hold the same to the said Thomas Clutterbuck Croome, his heirs and assigns for ever, to the use of and in trust for my said daughter Ann Baker and her assigns for and during the term of her natural life, and to permit and suffer

A her to receive the rents and income to arise therefrom during the term of her natural life separate and apart from her present or any future husband, and not subject to his debts, engagements or control; and I declare that the receipts of my said daughter Ann Baker alone, or of some person or persons authorised by her to receive any payment of the said rents and income, after such payment shall have become due, notwithstanding her said present or any future marriage, shall alone be good discharges for the said rents and income, or for so much thereof as shall be thereby acknowledged to have been received. And from and immediately after the determination of the estate hereinbefore limited to the use of and in trust for the said Ann Baker for her life as aforesaid, then to the said Thomas Clutterbuck Croome and his heirs during the natural life of my said daughter, in trust to support the contingent uses and estates hereinafter limited, yet to permit and suffer the said Ann Baker to receive and take the rents and income to arise from the said hereditaments during the term of her natural life as aforesaid, and from and immediately after the decease of the said Ann Baker, then to the use of and in trust for the said Charles Baker, if he shall survive the said Ann Baker, for and during the term of his natural life, to enable him to support himself and to support and bring up the children of the said Ann Baker; and in case the said Charles Baker should die in the lifetime of the said Ann Baker, and if she should marry any future husband who should happen to survive her, then to the use of and in trust for any future husband of the said Ann Baker who may happen to survive her, for and during the term of his natural life; and from and immediately after the decease of the survivor of them the said Ann Baker and the said Charles Baker, and of any future husband of the said Ann Baker, if such future husband shall survive her, then to the use of all and every or any one or more of the children, grandchildren or other issue of the said Ann Baker by the said Charles Baker, or by any future husband (such grandchildren, issue to be born before any appointment shall be made to them respectively) in such manner and form, and, if more than one, in such parts, shares and proportions, and with such limitations over, or substitutions in favour of any one of the others of the said children, grandchildren and issue respectively, and at such time or times, age or ages, day or days, and in such contingencies, and under and subject to such directions and regulations for maintenance, education and advancement, and to such conditions as the said Ann Baker, notwithstanding her present or any future husband, at any time or times and from time to time by any deed or deeds to be signed, sealed and delivered by her in the presence of two or more credible witnesses, to be with or without power of revocation and new appointment, or by her last will and testament in writing or any writing in the nature of a last will and testament, or any codicil or codicils to be respectively signed and published by her in the presence of and attested by three or more credible witnesses, shall direct, limit or appoint, or give and devise the same; and from and until default of and from time to time, and subject to such direction, limitation and appointment, gift or devise, then to the use of and in trust for the child of the said Ann Baker, if only one, whether male or female, and for all the children of the said Ann Baker, both male and female, if more than one, and whether by her present or any future husband, to be equally divided between or among them, share and share alike as tenants in common and not as joint tenants, and the heirs of the body and several and respective bodies of the same children respectively lawfully issuing, with cross remainders in tail between and among such children of the said Ann Baker; and in default of such issue, then to the same uses, upon the same trusts, and for the same estates as are hereinafter devised to the said Thomas Clutterbuck Croome, to the use of and in trust for my daughter Mary Baylis and her children, and the issue of such children; and in default of issue of all the children of the said Ann Baker and of the said Mary Baylis, then to the use of and in trust for the said Ann Baker, her heirs and assigns absolutely."

The testator then devised other estates to his daughter Mary Baylis upon similar trusts, and in default of children of the said Mary Baylis, then on the same trusts in favour of Ann Baker and her children, and failing children of Ann Baker, to Mary Baylis absolutely. He appointed Ann Baker and Mary Baylis executrixes of his will. A

The testator died soon after the date of his will. The plaintiff William Baylis Baker was the only child of the testator's daughter, the defendant Ann, the wife of the defendant C. Baker. He was an infant at the time of the testator's death, and attained twenty-one on May 25, 1848. His mother, the defendant Ann Baker, was at this time about fifty-three years of age; and his aunt, Mary Baylis, who had been married to Mr. Holder, was then a widow without children, and about forty-six years old. During the minority of the plaintiff the defendants C. Baker and Ann his wife borrowed the sum of £1,000 from the defendant J. Bradley, and the sum of £500 from John Lovegrove, a solicitor at Gloucester, upon mortgages of Mr. and Mrs. Baker's life interests in the estates devised by the will of William Baylis, the defendant Ann Baker conveying her life estate as if she was not restricted from anticipating and the recitals of the will of William Baylis contained in the mortgages not referring to the receipt clause following the limitations to the separate use of the defendant Ann Baker and Mary Baylis. Part of the sum of £1,000 secured by Bradley's mortgage was (together with a further sum of £100 advanced by him to the defendant Baker) further secured by an assignment of the defendant Baker's furniture, and both the sums of £1,000 and £500 were also secured by policies of insurance upon Baker's life. From the evidence it appeared that in 1844 the defendant C. Baker suggested to the defendant Bradley that his policy might be dropped in case the plaintiff, upon attaining twenty-one, would charge the £1,000 upon his interest in the estates, and that the defendant Bradley agreed to the suggestion. B C D E

John Lovegrove died in March, 1848, and it appeared that both shortly before and after his death, and before the plaintiff attained twenty-one, the defendant Joseph Lovegrove (who was a solicitor and one of the executors of John Lovegrove) on behalf of himself and his co-executors, and of the defendant Bradley, entered into communication with the defendant C. Baker upon the subject of the plaintiff's charging the mortgage monies due to Bradley and John Lovegrove's estate on his interest in the mortgaged premises. There did not appear, however, to have been any direct communication between the plaintiff and Lovegrove until May 30, 1848, five days after the plaintiff had attained twenty-one. On that day the plaintiff went with the defendant C. Baker, his father, with whom he was then living, to the office of Joseph Lovegrove, and there signed a memorandum, which recited that the plaintiff, under the will of the testator, after the decease of his mother and any husband she might leave surviving, subject to a power of appointment, was entitled to certain hereditaments therein comprised, and also to those devised to Mary Baylis. The memorandum also recited Lovegrove's mortgage and Bradley's deed. It recited the loan of £1,000 upon the bill of sale, and that £500 was now due to the executors of Lovegrove and £1,100 to Bradley, and that a large proportion of the above sums had been applied by the father and mother of the plaintiff in his maintenance, education and advancement in life, as he did thereby admit and acknowledge. The memorandum then proceeded as follows: F G H

"Now he the said William Baylis Baker doth hereby undertake, promise and agree to and with the said T. C. Adams, Joseph Lovegrove and William Cother the younger, and the said J. Bradley respectively, that he the said W. B. Baker will, whenever thereunto requested by them the said T. C. Adams, J. Lovegrove and W. Cother the younger, and J. Bradley, or any or either of them, at his own costs and charges, make, do, execute and perfect all such acts, deeds and assurances as may be deemed necessary for securing to them respectively, or their respective executors, administrators and assigns, the repayment of the said several principal sums so respectively due as aforesaid, together with I

- A all interest now or hereafter to become due upon the same sums respectively, and for such purpose to convey and assure to them respectively, and to their respective heirs, executors, administrators and assigns, all his estate and interest whatsoever under the said will, and under any demise, limitation or appointment which has already been made or may hereafter be made by his said mother under or by virtue of the power or authority to her for that purpose
- B given in and by the said will, and also all the estate and interest which he the said W. B. Baker may hereafter become entitled to under the said will by reason of survivorship or otherwise, the said T. C. Adams, J. Lovegrove and W. Cother the younger, and the said J. Bradley, to take as to priority according to the dates of their several mortgages; and the said W. B. Baker doth hereby further undertake, promise and agree that, in case the said T. C. Adams, J. Lovegrove and W. Cother the younger, and the said J. Bradley, should desire it, he the said W. B. Baker will, at his own costs and charges, and as soon as may be, raise, borrow or make, do and execute all necessary acts, deeds and assurances for the purpose of raising or borrowing upon security of the hereditaments and premises aforesaid such sum or sums of money as shall be requisite and necessary for paying to the said T. C. Adams, J. Lovegrove, W. Cother the younger and J. Bradley respectively all principal and interest monies which may be due to them respectively on the before-mentioned securities."
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- After the plaintiff had signed this memorandum application was made to the defendant Bradley to advance the further sum of £200, which he agreed to do, and a deed of appointment by the plaintiff's mother, in his favour, of the fee of the estates and two of the mortgage deeds in question, viz., those of Sept. 2, 1848, were prepared. On Aug. 24, 1848, the engrossments of these deeds were read over to the plaintiff and his father at the office of Mr. Joseph Lovegrove. The plaintiff had no other adviser, and it was not alleged that any advice was given to him as to any claims which his father had upon him, and no suggestion was made to him that his mother's life estate was subject to any restriction against anticipation, the case of the defendants being that up to this time, at least, it was not supposed
- E by any of the parties that the will operated any such restriction. On Sept. 1 and 2, 1848, the above-mentioned deed of appointment and the mortgage deeds were executed, and the £200 was advanced by Bradley. The mortgage deeds were both dated Sept. 2, 1848. One was made between Charles Baker and Ann his wife, of the first part, the plaintiff, of the second part, and John Bradley, of the third part. It recited the will and the memorandum of May 30, 1848, the plaintiff admitting
- F that the sum of £1,000 was then due to Bradley, and £500 to the executors of John Lovegrove, from Charles Baker and Ann his wife, together with a further sum of £100 lent by J. Bradley to Charles Baker. By the first witnessing part of the deed (in consideration of £200 paid by Bradley to Charles Baker and to the plaintiff) Charles Baker covenanted for the repayment of the same, and also that the estate of himself and his wife under the will should be charged therewith. By a
- G further witnessing part it was expressed that, in pursuance of the agreement and in consideration of the premises, the plaintiff thereby granted, conveyed, assigned and confirmed unto Bradley, his heirs and assigns, all and singular the estates devised under the testator's will, including those firstly given to Ann Baker, and those secondly given to Mary Baylis, and all the estate and interest of the plaintiff comprised in the deed of appointment of Sept. 1, 1848, as a security for the sums of £1,000, £100 and £200, making together £1,300. The deed contained a covenant on the part of the plaintiff to pay the above sums and interest, and a power of sale. The other mortgage deed of even date was executed by Mr. and Mrs. Baker and the plaintiff in favour of the executors of Joseph Lovegrove to secure £500. The receipt clause by Mrs. Baker was omitted in the recitals of both the mortgage deeds. The policies of insurance for securing the mortgage moneys were then allowed to drop. The plaintiff afterwards, in November, 1848, borrowed from a lady of the name of Mary Taylor a further sum of £300 upon mortgage of his reversionary
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interest, and this mortgage was approved by a separate solicitor on the part of the plaintiff. It was dated Nov. 4, 1848. A

In December, 1849, the defendant Joseph Lovegrove applied to Croome, the devisee under the will who had possession of the title-deeds of the estates, for the delivery of them to the mortgagees, and in consequence of this application counsel was consulted on the will and advised that the life interest of Mary Baker was subject to a restriction against anticipation. The fact of counsel having thus advised appeared upon the evidence to have become known to the plaintiff in June, 1850. In consequence of this opinion of counsel, the delivery of the deeds by Croome was not further pressed. Pending and subsequent to the application for the deeds, the plaintiff attempted to raise further moneys upon the security of his reversionary interest through the medium of another solicitor, Mr. Howard, and ultimately of Mr. Lovegrove, but these attempts failed. It appeared that the plaintiff had at this time a copy of the will in his possession. The plaintiff having failed in his attempt to raise further moneys, he and his father borrowed small sums from time to time of the defendant Joseph Lovegrove, some of which appeared to have been advanced to the father at the instigation of the plaintiff. Ultimately, having become embarrassed in their affairs, the plaintiff and his father applied to the defendant Lovegrove for an advance of £700 to extricate them from their difficulties, and he agreed to make the advance upon the security of a mortgage and upon the assurance of the plaintiff and his father that no advantage should be taken of the supposed defect pointed out by the opinion of counsel arising from the provision against anticipation. A mortgage, dated Oct. 28, 1850, was thereupon prepared and executed. At the time of the execution of this mortgage it had not been ascertained what payments were to be made on account of the plaintiff and his father, and the account as to the application of the £700 was not, therefore, then settled. In December, 1850, it was settled between the plaintiff's father and the defendant Lovegrove, and the balance paid to the plaintiff's father. The account was subsequently sent to the plaintiff and acknowledged by him to be correct, with the exception of a very small item. B C D E

On May 18, 1852, the plaintiff filed his bill in the present suit, alleging that in the abstracts of the will of William Baylis, made with a view to the deeds of September, 1848, the proviso against anticipation by the said Ann Baker, as well as the similar proviso against anticipation by Mary Baylis, were entirely omitted, and that there was nothing on the face of such abstract to cause any suspicion that the original will of the said William Baylis did in fact contain any such proviso against anticipation, or that Ann Baker was in any way restrained and prevented from executing valid and effectual charges upon her life estate under the said will. The bill stated that the F G

"Plaintiff was advised that such omission was a fraud upon the plaintiff, and that by reason of the youth and inexperience and want of legal advice, and also of the parental control exercised over him, with the full knowledge and concurrence of the defendants, and also by reason of such fraud, the two indentures of Sept. 2, 1848, ought to be declared null and void, and decreed to be delivered up to be cancelled, so far as the plaintiff might be affected thereby." H

The bill did not set out the agreement of May 30, 1848.

The vice-chancellor held that the agreement was good as a family arrangement, and, doubting the correctness of the report of *Field v. Evans* (1) that the omission in the recitals in the securities of the clause in the will was immaterial, as that clause did not, in his Honour's opinion, operate as a restraint upon anticipation. I
The plaintiff appealed.

Elmsley and Hoare for the plaintiff.

Elderton for Mr. and Mrs. Baker.

Wigram and Selwyn for the defendant Bradley.

Malins and Forster for the defendant Lovegrove.

Bacon and Rogers for the other defendants.

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Cur. adv. vult.

Nov. 20, 1855. The following judgments were read.

KNIGHT-BRUCE, L.J.—The bill in this case was filed in May, 1852, the plaintiff, who attained his majority on May 24 or 25, 1848, having soon afterwards in that year and in the year 1850 signed an agreement and executed certain deeds which, by way of suretyship for his father, professed to make, and (if equitably as well as legally valid) made the person and property of the plaintiff liable for certain debts of his father (one of the defendants).

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The main question in the cause is whether, so far, these instruments bind the plaintiff legally and equitably, or are in equity void against him—a question in considering which it was right to endeavour to form an opinion as to the true construction of the will of his maternal grandfather, Mr. Baylis, with respect to the life interest of the plaintiff's mother in the property in which her life interest and his interest by way of remainder under the will were, by the instruments that I have mentioned, professed to be charged. For if the life interest of the plaintiff's mother under the will was alienable by her during her coverture, it is obvious, when we look at what had occurred before 1848, that her position and that of her family, so far as it was liable to be affected by hers, were very different in and after April and May, 1848, from what a contrary state of things known to exist would have rendered them; and this, independently of the not unimportant consideration that her life interest if alienable was made liable to exonerate the plaintiff and his property partially at least from the debts of her involved and embarrassed husband, but, if otherwise, of course not. It is undisputed and unquestionable on the evidence that the plaintiff became a party to each of the instruments of 1848 in the belief that her life interest under the will was alienable by her during her coverture, and, therefore, that she and her property and family were affected accordingly.

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Having attentively considered Mr. Baylis's will, the view that I take of it is that, as to the life interest which it gave to Mrs. Baker, the plaintiff's mother, it restrained her from anticipation during her coverture. So reading the will of Mr. Baylis, I consider it to be established that the plaintiff became a party to the instruments of 1848 under a misapprehension, material and important in its nature. Another view of the will, which I think erroneous, was, perhaps, taken—and perhaps honestly taken—in 1848 by some or all of the other parties to those instruments. But the defendant Mr. Joseph Lovegrove, the mortgagee of 1850, and one of the mortgagees of 1848, is a solicitor, and was in that character professionally concerned for the other mortgagees in the transaction of 1848. Nor can any one of the parties to this suit, I conceive, deny that in and before September, 1848, they all had at least constructive notice of the whole contents of the will. But the plaintiff, who, if in any part of the transactions of 1848 and 1850, he had any solicitor or adviser, had not any other than Mr. Joseph Lovegrove, and was not before the year 1850 apprised that the restraint on alienation existed, or might be reasonably contended to exist, according to the correct construction of the will, was in 1848 caused or allowed to sign and execute the instruments of that year under the erroneous impression which I have mentioned.

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There are, however, other circumstances damaging to the instruments, so far as they purport to make the plaintiff a surety. The deeds proceed on the notion of the clear validity of the appointment of Sept. 1, 1848, made by Mrs. Baker in the plaintiff's favour, an appointment which, if its validity or invalidity could and ought to be determined on the materials before the court in the present suit, must, in my opinion, be deemed bad and worthless, for its motive and object seem to me to have been to make the inheritance of the property comprised in it subservient to the purposes of the father and his creditors in a transaction in which the mother and the son seem merely to have been used as the father's instruments under the guidance of Mr. Joseph Lovegrove, the lawyer of the father's creditors. The power under which the appointment was made extends to grandchildren, and, if it has

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not been well exercised, may be exercised hereafter so as to exclude the plaintiff. Again, the almost indescribable document of May 30, 1848, prepared and attested by Mr. Lovegrove in that month, was gravely treated in the following September as if it bound the plaintiff, or been anything more than waste paper as against him and his property. He executed the deeds of September, 1848, under the false impression that the instrument of May was effectual against him, and I am not sure that any one of the parties to the eccentric arrangement of that year was in that year of a different opinion. But it seems impossible to suppose that Mr. Joseph Lovegrove could have believed in the truth of the strange suggestion that the father had a demand on the son or his property for his maintenance, education, and advancement, nor, of course, is there, or was there, any pretence for saying that the father's expenditure on the property (however beneficial to it) created any demand between them. Assuredly neither the father nor Mr. Joseph Lovegrove ought to have endeavoured to induce the plaintiff to sign or execute, or ought indeed to have abstained from recommending him not to sign or execute, any one of the deeds of 1848. Of course, the astonishing agreement of May is not a matter to be dealt with except as a thing prejudicing the case of the mortgagees of 1848, from whom it seems to me to take away such chance, if any, as they might otherwise have had, of retaining the plaintiff or his property in the position of surety for his father.

Upon the whole, if not independently of that agreement, yet certainly that agreement being taken into account, the plaintiff has, in my opinion, with respect to the disputed mortgage deeds of 1848, established a case, on his part, of misapprehension, imprudence, inexperience, unadvisedness, ignorance and subjection to unduly exercised influence, in all which Mr. Joseph Lovegrove's participation, and to all which his privity, must prevent the other mortgagees from effectually contending that they were not throughout apprised of the true circumstances—a case, I say, sufficient on these grounds, in my opinion, to render it incumbent on a court of equity to relieve the plaintiff and his property from all the obligations of suretyship for his father which were with such a remarkable want of propriety imposed on the plaintiff in 1848.

The same observations apply with equal force, or not importantly less strongly, to the security for £700 of October, 1850. It was the duty of the defendant, Mr. Lovegrove, who at least after 1848, if not in and after 1848, had been acting as solicitor for the plaintiff, not to take that security from the plaintiff without affording him more information and better advice than he had, and so far as it affects him or his property by way of suretyship for his father, it cannot, in my judgment, be allowed to stand. It is true that counsel's opinion upon the construction of Mr. Baylis's will was known to the plaintiff before July, 1850, and, therefore, before he gave the defendant, Mr. Lovegrove, the security of October, 1850, for £700, but the defendant Mr. Lovegrove, who made the plaintiff's mother a party to the security, and in the transaction treated her as not restrained from anticipation, cannot, in my opinion, support it against the plaintiff, on the ground that he then had notice either that she was so restrained or that the point was doubtful.

It was suggested in the argument that the transaction of 1848, impeached by the bill, might be supported against the plaintiff as amounting to a family arrangement. If, in the French language, he were described as having been well arranged in those operations, I should probably not dissent from the phrase, but I cannot agree that, according to the sense ascribed by English courts of equity to the term "family arrangement," or that according to *Pullen v. Ready* (2), *Gordon v. Gordon* (3), *Tweddell v. Tweddell* (4), or any of the authorities cited in *Palmer v. Wheeler* (5) and *Harvey v. Cooke* (6), and in Mr. SWANSTON's notes to *Davis v. Uphill* (7) and *Dunnage v. White* (8), there was in the present instance, in 1848, a family arrangement, or an arrangement binding on the plaintiff, a witless lad, who in those transactions appears to me to have been a mere prey ensnared and plundered by hands from which he ought to have received guidance and protection.

[HIS LORDSHIP dealt with a point of pleading and one of fact, which do not call

A for report, and concluded:] The result appears to me to be that we should discharge the order dismissing the bill and declare the several instruments of mortgage or security of September, 1848, and October, 1850, void in equity against the plaintiff, save as concerning the indenture of Sept. 2, 1848, to which the defendant Bradley is a party, so far, if at all, as that indenture is a security to the defendant Bradley for such, if any, part of the £1,300 as was bona fide advanced to and
B received by the plaintiff, and, save as concerning the indenture of October 1850, so far as that indenture is a security to the defendant Mr. Lovegrove, for so much of the sum of £700 mentioned in it as, independently of that indenture, formed a bona fide debt from the plaintiff to the defendant Mr. Lovegrove or was advanced by him upon the plaintiff's express request.

C **TURNER, L.J.**, stated the facts and continued: Upon these facts, which are mainly, if not wholly, taken from the statements of the defendants themselves, two questions appear to me to arise—(i) whether the mortgages of September, 1848, and October, 1850, were originally valid in equity as against the plaintiff, and (ii) if they were originally invalid against him, has there been any such confirmation or acquiescence on his part as precludes his title to relief?

D In considering the first of these questions it is, I think, necessary in the first place to inquire what was the nature and character of the transactions out of which these mortgages arose, for upon the answer to that inquiry it must, as I apprehend, depend what are the principles which ought to be applied to the determination of the case. Transactions between parent and child may proceed upon arrangements
E between them for the settlement of property, or of their rights in property in which they are interested. In such cases this court regards the transactions with favour. It does not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction. On the other hand, the transaction may be one of bounty from the child to the parent, soon after the child has attained twenty-one. In such cases this court views the transaction with jealousy, and anxiously interposes its protection to guard the
F child from the exercise of parental influence.

What, then, was the true character of the deeds of Sept. 2, 1848? The vice-chancellor seems to have considered them as in the nature of a family arrangement, but with great respect to his Honour's judgment I cannot so regard them. They were, as I view them, deeds contrived for the purpose of charging the debts of the father upon the estate of the son, and unless the alleged outlay by the father upon the property, or his expenditure in the maintenance and education of his son, could be made the ground of claim by the father against the son, there was not, so far as I can see, any subject of bargain between them. It would, I think, be attended with the greatest danger to permit claims of this description to be made the subject of bargain between parent and child, or to treat arrangements founded on such claims as entitled to the same favourable consideration as the court extends to family
G arrangements. I am not prepared to go that length. I think these deeds can be looked at in no other light than as deeds of gift from the plaintiff to his father. Were they originally valid if viewed in that light? The plaintiff attained twenty-one on May 25, 1848. On May 30 he signs the undertaking of that date (*infra*). It is true that some material interval elapses before the deeds are executed, but during that interval he is fettered by the undertaking. He has no independent advice. The
H father's solicitor, and the father's solicitor alone, acts in the transaction. If the case had even rested here, I think it would have been sufficiently difficult to maintain these deeds, but there are considerations of still greater importance affecting their validity. They proceed upon the assumption that the plaintiff's mother had the power of alienating her life interest, and if she had that power her interest was by the deeds made liable for the sums secured, and would, as between the plaintiff and his mother, have been bound to contribute, if not have been primarily liable for the payment of the sums secured. It is not even pretended that the plaintiff was advised upon this question. On the contrary, the case of the defendants is that
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up to this period it was assumed by all parties that the life estate of the mother A
was alienable.

The case, perhaps, might well be disposed of upon the single ground that the alienability of the life estate upon the faith of which the plaintiff executed these deeds was open to doubt, and that the plaintiff was not duly advised upon that doubt, but the question of the alienability of the life estate has been fully argued before us, and I shall not, therefore, hesitate to give my opinion upon it. I concur B
with my learned brother in the opinion that, upon the true construction of this will, the plaintiff's mother was restrained from anticipation. [His LORDSHIP gave the reasons for his decision on this point which it is not necessary to deal with here.] Upon the whole, looking to the age and position of this plaintiff when the deeds of September, 1848, were executed, to the undertaking of May 30, which, though not alleged by the bill, is in evidence before us and cannot be disregarded as part of the C
case, to the want of legal advice, to the doubt upon the construction of the will, and to the construction itself, I am of opinion that, without reference to any question of confirmation, the deeds of Sept. 2, 1848, cannot be maintained. An additional sum of £200, however, was advanced by the defendant Bradley upon the mortgage of this date in his favour being executed, and it does not appear that the plaintiff did not receive some part of this sum. He cannot of course get back his estate without D
refunding what, if anything, he so received. There must be an inquiry, therefore, upon this point if the defendants desire it.

We come then to the question as to the original validity of the deed of Oct. 24, 1850. This deed is not disputed by the plaintiff as to so much of the £700 as was due from him to the defendant Joseph Lovegrove. The question is whether it can be maintained against the plaintiff as to so much of the £700 as was due from his father. This is a transaction, not between father and son, but between solicitor and client. The deed is prepared by Mr. Joseph Lovegrove. The plaintiff had no independent advice upon it. His estate is made liable for the debt due to Mr. Lovegrove from the father. The undertaking of May 30 is, as I collect from the answer, recited in the deed. No advice is given as to that instrument, or the nature of the claims upon which it is founded. A strong case would, I think, be required E
to support such a deed, even if there was nothing more to impeach it. But by this deed the mother's estate also purports to be conveyed as a security for the debt, and we are of opinion that the deed was inoperative as to her. It is true that the plaintiff must be taken to have been at this time aware that counsel had advised that the mother was restricted from alienation, but how can this deed be considered otherwise than as a representation by Mr. Lovegrove that, notwithstanding that G
opinion, the mother's estate could be bound. That representation proves to be unfounded, and under such circumstances and between such parties I think that, apart from any question of confirmation, this deed cannot be supported beyond the extent to which the plaintiff has submitted to be bound by it, and any further advances which may have been made to the father upon the plaintiff's request.

[His LORDSHIP added that no case of acquiescence or confirmation had been made H
out on the facts which would preclude the plaintiffs from relief.]

Appeal allowed.

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HARRISON AND ANOTHER v. GUEST

[HOUSE OF LORDS (Lord Campbell, L.C., Lord Brougham, Lord Wensleydale and Lord Cranworth), July 6, 9, 1860]

[Reported 8 H.L.Cas. 481; 11 E.R. 517]

B

Sale of Land—Conveyance—Setting aside—Inadequacy of consideration—Irrregularity of statement of consideration—Amendment of conveyance.

Where no fiduciary relation exists between two parties dealing for the sale and purchase of an estate, mere inadequacy of consideration or irregularity in the statement of it in the conveyance is not sufficient to impeach the contract.

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It would, however, be a ground for amending the conveyance.

Undue Influence—Guardian and ward—Parent and child—Purchase by guardian or parent of property from ward or child—Right of vendor to have legal protection—Setting aside conveyance—Burden of proof.

If persons standing in a fiduciary relation to one another deal as vendor and purchaser, the court expects the purchaser, if the purchase is complained of by the vendor, to show that the vendor had due protection afforded him—thus, if a guardian purchases of his ward, though that relation may have ceased only for a short time so that the influence of the guardian may be supposed to exist, or a parent purchases of his child, the burden of proof is upon him to show that his quondam ward, or the child, was protected. In such a case the court throws the burden of proof upon him who sets up the transaction against the person whom he was bound to protect, but where no such relation exists the burden of proof is upon the vendor to show that he was imposed upon. He cannot be heard to say that he had no professional adviser, but must show a contrivance or management on the part of the purchaser to prevent his having that advice.

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Notes. Considered: *Denton v. Donner* (1856), 23 Beav. 285. Distinguished: *Baker v. Monk* (1864), 4 De G.J. & Sm. 388. Applied: *Rosher v. Williams* (1875), L.R. 20 Eq. 210. Referred to: *Clark v. Malpas* (1862), 31 Beav. 80; *Summers v. Griffiths* (1866), 35 Beav. 27; *Baker v. Loader* (1872), L.R. 16 Eq. 49; *Hilliard v. Eiffe* (1874), L.R. 7 H.L. 39; *Re Fry, Fry v. Lane, Whittet v. Bush*, [1886–90] All E.R.Rep. 1084.

As to repudiation of a conveyance, see 34 HALSBURY'S LAWS (3rd Edn.) 320, 324; and for cases see 40 DIGEST (Repl.) 235, 262. As to undue influence, see 17 HALSBURY'S LAWS (3rd Edn.) 672 et seq.; and for cases see 25 DIGEST (Repl.) 273 et seq.

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Cases referred to in argument:

Wood v. Abrey (1818), 3 Madd. 417; 56 E.R. 558; 40 Digest (Repl.) 392, 3131. *Maitland v. Irving* (1846), 15 Sim. 437; 16 L.J.Ch. 95; 8 L.T.O.S. 312; 10 Jur. 1025; 60 E.R. 688; 12 Digest (Repl.) 119, 706.

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Billage v. Southee (1852), 9 Hare, 584; 21 L.J.Ch. 472; 16 Jur. 188; 68 E.R. 623; 12 Digest (Repl.) 121, 719.

Salter v. Bradshaw, Bradshaw v. Salter (1858), 26 Beav. 161; 28 L.J.Ch. 426; 5 Jur.N.S. 831; 53 E.R. 858; 25 Digest (Repl.) 294, 994.

Watt v. Grove (1805), 2 Sch. & Lef. 501, 502, 503; 17 Digest (Repl.) 345, *843. *Bowen v. Kirwan* (1835), L. & G. temp. Sugd. 47.

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Ahearne v. Hogan (1844), Drury temp. Sug. 310; 25 Digest (Repl.) 285, *856.

Gibson v. Russell (1843), 2 Y. & C.Ch. Cas. 104; 7 Jur. 875; 63 E.R. 46; 25 Digest (Repl.) 285, 909.

Lawley v. Hooper (1745), 3 Atk. 278; 26 E.R. 962, L.C.; 35 Digest (Repl.) 312, 286.

Evans v. Llewellyn (1787), 1 Cox, Eq. Cas. 333; 2 Bro.C.C. 150; 29 E.R. 1191; 25 Digest (Repl.) 288, 939.

Archbold v. Charitable Bequests for Ireland Comrs. (1849), 2 H.L.Cas. 440; 13 L.T.O.S. 249; 9 E.R. 1159, H.L.; 35 Digest (Repl.) 73, 663.

Espey v. Lake (1852), 10 Hare, 260; 22 L.J.Ch. 336; 20 L.T.O.S. 203; 16 Jur. 1106; 1 W.R. 59; 68 E.R. 923; 12 Digest (Repl.) 117, 692. A

Baker v. Bradley (1855), 7 De G.M. & G. 597; 25 L.J.Ch. 7; 26 L.T.O.S. 160; 2 Jur.N.S. 98; 4 W.R. 78; 44 E.R. 233, L.J.J.; 12 Digest (Repl.) 114, 669.

Hunter v. Atkins (1834), 3 My. & K. 113; Coop. temp. Brough. 464; 40 E.R. 43, L.C.; 25 Digest (Repl.) 286, 914.

Willis v. Childe (1851), 13 Beav. 117; 20 L.J.Ch. 113; 17 L.T.O.S. 12; 15 Jur. 303; 51 E.R. 46; 19 Digest (Repl.) 640, 258. B

Appeal from an order of LORD CRANWORTH, L.C., in an action to set aside the sale and conveyance of a property which, it is alleged, the respondent had by fraud procured from one John Hunt, a predecessor in title of the appellants.

John Hunt, a man in a humble situation and without education, was the owner of a small copyhold property, situated at Broadwas, in the county of Worcester, consisting of thirteen acres of land, and having a small house, stable, and shed erected thereon. It had been mortgaged in 1819 to secure to Mary Ann, the wife of S. B. Butler, the repayment of a principal sum of £300, with interest at five per cent. per annum. In 1828 Hunt made a will devising the property to the two appellants. Up to September, 1849, Hunt lived in the house and farmed the land, but, illness having then rendered him incapable of continuing to labour, he let the house and land at the rent of £35 a year to one Harper, with whom he became a lodger. In the course of 1853, being then seventy-one years of age, finding himself getting worse, and requiring more attention than he could receive from his tenant, he made an offer first to a Mr. Evans, and afterwards to the respondent, a man of fortune in that parish and neighbourhood, respecting the property. The offer in substance was that Hunt should be installed as an inmate in the Yew Tree farmhouse, occupied by Ballard, a tenant of Guest's, should have his lodging, washing, and attendance there, and should have his dinners from Mr. Guest's table. Some years before that time the respondent had offered to purchase the property from Hunt, but Hunt, who was then working it, declined to sell, and no further negotiations took place between them till this offer in July, 1853. C
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The appellants in their bill alleged, in substance, that the respondent urged Hunt to go and live at Ballard's house and promised to support him there, to pay off the mortgage debt and take the security of the copyhold estate for that debt and for what should be advanced for the maintenance of Hunt; that Hunt consented to this arrangement, and was, on Sept. 30 removed to Ballard's house; that on the same day the mortgage debt of £300 (together with £6 5s. for interest then due, and £7 10s. for six months' interest in advance) was paid off; that on Oct. 6 following the mortgagees were called on to execute, and did execute, as parties with Hunt, the deed by which the property was conveyed to the respondent. That deed recited the payment of £313 15s. to the mortgagees, and that Hunt had contracted to assign the property to the respondent upon such payment, and upon his entering into the covenants thereafter contained, "for the lodging, maintenance, and support of the said John Hunt during his life." It alleged the assignment by the mortgagees, and witnessed that, in consideration of the payment of the further sum of £10 by Guest to Hunt, and of the covenants to be performed by Guest, Hunt assigned to Guest. It then set forth the covenants in these terms, that: F
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"he [Guest] shall and will henceforth from time to time, and at all times during the continuance of the natural life of the said John Hunt, provide the said John Hunt with good, sufficient, and suitable meat, drink, board, and lodging, and the washing of his clothes, and bedding, and attendance. And, moreover, that in case the said E. B. Guest shall at any time hereafter neglect or refuse to provide the said John Hunt with sufficient and suitable meat, drink, board, lodging, washing, and attendance, then and in such case the said E. B. Guest shall and will pay or allow unto the said John Hunt the sum of 12s. per week in lieu of providing him the said John Hunt with meat, drink, board, lodging, washing, and attendance as aforesaid." I

A There was then a proviso that Guest was not bound to supply Hunt with "medicine or any other extra attendance in the case of sickness, or with wine or spirits," nor to be "liable for funeral expenses."

The bill alleged that in these transactions Hunt was entirely without professional advice; that the deed was not read over or explained to him; that he was charged £9 18s. 4d. for costs as if he had been a mortgagor and not a vendor; and that the
B business was hurried over with extraordinary haste and no abstract of title was prepared as was usual in the purchase of landed property, but that Guest, in his eagerness to get possession of the title-deeds, never inspected them, but paid off the mortgage at once. The bill also alleged, that at the time of executing the indentures, Hunt did not know nor understand that he was selling the estate; that the respondent asserted that he was to give £600 as the consideration for the estate,
C £100 of which (after payment of the mortgage) were to be paid to Hunt in money, and the surplus retained to answer the covenant as to board and lodging, but that the £100 never were paid to Hunt; that he never received any other consideration for the indenture than maintenance and lodging for a few weeks; and that the property, at the date of the indenture, was of the full value of £700. The bill, after alleging that the respondent had taken possession of certain personal property
D of Hunt, prayed that the indenture of Oct. 6, 1853, might be declared null and void, or only stand as a security for the advances made by Guest to Hunt, and that accounts might be directed, and for further relief.

The respondent, by his answer, as to the imputed haste, said that Hunt pressed for the immediate execution of the arrangement as he was very uncomfortable where he then was; that the respondent's offer had been to purchase the estate
E out-and-out; that that was refused by Hunt, who was urgent about his own personal comforts being provided for, and who insisted upon the arrangement as to board and lodging. The respondent admitted that Hunt was without professional advice, but alleged that he had been recommended to have a solicitor of his own, which he declined. The respondent denied all fraud or that he had hurried or pressed on the arrangement. He denied that he had ever said that Hunt was to have £100 in
F money, or that Hunt had been charged with anything but what was usually paid by vendors, and he declared that Hunt well knew he was parting with the estate. The respondent alleged that he was :

"to give £600 as the consideration for the estate, and that, after paying off the £300 mortgage, the surplus of the said sum of £600 was to be retained by me to answer the covenant in the bill mentioned."

G He further alleged that John Hunt, up to the time of his death, was fully lodged and maintained according to the terms of the arrangement. Evidence was taken in the cause, and there was a great deal of conflicting testimony as to the state of Hunt's mental faculties.

The cause was heard before KINDERSLEY, V.-C., who pronounced a decree declaring the indenture of Oct. 6 fraudulent and void as an absolute conveyance, but
H directed it to stand as a security for the amount advanced by the respondent in satisfaction of the mortgage, with interest, and accounts were directed. On appeal, in May, 1855, LORD CRANWORTH, L.C., reversed the decree of the vice-chancellor. In the course of his judgment the learned Lord Chancellor said: The bill in this case is filed to set aside a conveyance of a small copyhold property upon the ground
I that it was obtained by what this court considers as a fraudulent contrivance. The main fraud suggested in the bill is that Mr. Hunt thought what he was executing was a mortgage, and not an absolute conveyance. That is alleged twice in the bill, for I take the allegation at the beginning to amount to the same thing. It is said in the fourth paragraph :

"And at the same time the defendant represented to the said John Hunt that he, the said defendant, would pay off the said mortgage-debt and be satisfied with the security of the said copyhold estate for the mortgage-debt, and what he, the defendant, should advance for the maintenance of the said John Hunt."

I think that was meant substantially to amount to an allegation that Mr. Hunt thought it was a mortgage he was executing, and that is put beyond doubt by the subsequent allegation :

“that the said John Hunt was not aware that he was thereby making an absolute conveyance of the said copyhold estate, or at least he did not know that he was selling the estate for the consideration mentioned in the said indenture.”

It is said further that this is a fraud because Mr. Hunt was a man of imbecile mind; and not only that he had no professional adviser, but the absence of professional advice was, if not caused, encouraged and promoted by the act of Mr. Guest, who is represented to have forced the transaction upon him. Then it is said he had not that which he was to have, namely, £100 in money, and that the consideration which he in point of fact had or had secured to him, was not properly secured, because it was not an absolute covenant to maintain him, but that which amounted, either in terms to an absolute covenant to maintain him, or if that should not be done, there was a covenant to pay a certain small weekly sum. The learned vice-chancellor proceeded upon the ground that the transaction was fraudulent, and one which ought to be set aside.

Since this case was commenced, I have looked, as far as I could in a cursory way, to the judgment of the vice-chancellor, and I think I collect the ground on which he proceeded, but not having quite satisfied myself that I have fully comprehended his view of the case, I will not finally dispose of it without attentively considering it. At the same time I am bound to say that in some of the propositions on which I think I have collected he acted, I cannot concur. If persons standing in a certain relation to one another deal as vendor and purchaser, if there is a particular relation subsisting between them, the court expects the person who is the purchaser, if the purchase is complained of by the seller, to show that the seller had due protection afforded him. Thus if a guardian purchases of a young man—his ward—though that relation may have ceased only for a short time, so that the influence the guardian may be supposed to have may be thought to continue—and when I say “guardian” it extends to a parent and if he purchases from his ward, the court expects that the guardian so purchasing will be able to show that due protection was given to the ward. The burden of proof is on him, and it is no answer to say: “I have obtained the conveyance, now show me that it was wrongfully obtained.” This court says that he must show that it was rightly obtained. That is one illustration, and many others may be stated, such as an attorney buying of, or selling to, his client. Where there is a fiduciary relation subsisting, the court throws the burden of proof upon him who sets up the transaction against the person whom he was bound to protect. But I do not think that extends to the case of one person purchasing from another when they are at arms’ length or where no such relation subsists. There, if a purchase has been obtained, and the person from whom it has been obtained seeks to set it aside, the burden of proof is upon him to show that he has been imposed upon. It is not for him to say: “I had no professional advice,” unless he can show there has been some contrivance or management on the part of the person who was dealing with him, to prevent him having that advice. The affairs of mankind could not go on if we were not to act upon that doctrine.

What I take it influenced a good deal the mind of the vice-chancellor was that a person selling his property sold it for a consideration which turned out to be, and I should have thought from the very beginning upon the face of it was, a very meagre and inadequate consideration. The property sold was a small copyhold estate, which was represented as being of the value of between £600 and £700, and it was subject to a mortgage for £300, on which a small arrear of interest was due. The seller was a person who, in point of fact, did not live for more than a couple of months after the sale—not three months after the commencement of the treaty—not six weeks after the actual conveyance; and what he took as the consideration was merely a covenant or agreement on the part of the vendor—the squire of the parish, he being a yeoman living in the parish—that he (Hunt) should have board

A and lodging and a person to attend him. He was in a very infirm state of health, and he said to the squire: "I find myself very old, and all I care about is, that I should have comfort for the rest of my life, and I will let you have the property if you afford that to me." It seems that the squire had been endeavouring often to purchase the property of him, I take it, at a fair price. There is no suggestion that he wanted to get it at an unfair price, and Hunt said: "I will not sell it to you upon
B any terms for a pecuniary consideration, but you shall have it if you will agree to take care that I shall have a parlour (as he calls it, in a particular house) for the rest of my life, that I have a woman to attend adequately to my wants in my unfortunate state of health, and that I shall be well kept, and that everything I have shall come from your own table during the rest of my life." We know he only lived a few weeks after this, and that was a consideration, in truth, only of the
C value of a very few pounds, perhaps £10 or £20. Even if we looked to the chance of the life of a healthy man, he could not have lived many years. The estate, cleared of the mortgage, would yield a rent of £15 a year, and even making an allowance for repairs, the consideration would seem to be very inadequate. That, however, is nothing if the parties were in a situation to judge for themselves; and that makes very material the question in what state of mind Hunt was at the time
D he entered into this bargain? I think, after looking at the evidence, I cannot entertain any very serious doubt in my mind that he perfectly understood all that he was about. Indeed, I think the vice-chancellor said he did not attribute to him anything like an imbecile state of mind; on the contrary, he said he was rather a keen and cunning old man, and that is the impression on my mind.

[His LORDSHIP referred to the evidence and said that he found no want of mental
E ability on the part of Hunt to enter into a contract, said it appeared that the fact that he had no legal adviser of his own was due to his own act, and continued:] All he wanted was security. There may be a doubt whether the terms of the deed were perfectly well adapted for securing all that he was intended to have, but I agree that that is no ground for setting aside the transaction, and still less for setting it aside as being fraudulent. If the parties had misconceived the effect of
F what they were doing, it might have afforded very good ground for rectifying the deed. The act of God has made that perfectly unnecessary, and there is nothing to rectify, but there is no ground whatever for setting aside the deed upon the suggestion that there was any fraud. I come to the conclusion, therefore, that there is no evidence showing that Hunt thought that this was not what it was, or that he did not fully understand the effect of the act he was engaged in. I think it clear that
G he did distinctly know what he was doing, that he did not think it was a mortgage, but that he knew it was a conveyance, and that he meant it should be a conveyance.

Unable as I am to discover any obligation on Mr. Guest's part to say that Hunt should have more by way of consideration than he had asked for himself, and unable as I am to discover anything alluding to the notion that there was any endeavour
H to keep from him professional advice—on the contrary, being satisfied that there was, as far as there could be, a desire that he should have professional advice, having come to the conclusion that there was no imposition practised upon him, but that he was left to form his own judgment, that no haste whatever was exhibited, but that he was left to take his own time, and that he, nevertheless, persevered in his inclination, and perfectly well understood what he was doing, I
I confess I am unable to arrive at the conclusion at which the vice-chancellor has come. Therefore, I think that this bill ought to have been dismissed; but not with costs.

The bill was, therefore, dismissed and the appellants appealed to the House of Lords.

Shapter and Hindmarch (Swanston with them) for the appellants.

Bailey and Glasse (Edlerpon with him) for the respondent.

LORD CAMPBELL, L.C.—This case has been argued very zealously and very

ably, but, having listened to that argument, I am clearly of opinion that your Lordships ought to affirm the judgment of the court below. The bill is filed for the purpose of setting aside a conveyance on the ground of fraud on the part of Mr. Guest. It is alleged that he induced Mr. Hunt, the owner of the property to which the conveyance relates, to believe that the property was merely to be mortgaged as a security for money that was to be laid out by Mr. Guest in repayment of a mortgage then existing upon the property, and in providing for Hunt for the rest of his life, so that Hunt was cheated out of his estate by being induced to sign an absolute conveyance of it. That is not in the slightest degree proved, nor do I find any ground for imputing any fraud of any sort to Mr. Guest. I think that the conveyance was improperly framed, and I censure that. Mr. Guest is punished by this suit for having resorted to that artifice, because it is quite clear that he wished that the conveyance should not disclose the real transaction. He thought that it would have a better appearance when the title came afterwards to be examined if this pecuniary consideration appeared. But, setting that aside, which I must condemn, I see nothing in his conduct in the slightest degree to be blamed.

The offer came in the first instance from Hunt to him. Instead of its being snapped at by Mr. Guest, he goes to Scarborough, and tells Hunt that he had better take time to consider it. What was finally agreed between them, and I think quite deliberately, was what Hunt was determined upon—he would not sell this property, but he wished to enter into an engagement whereby, during his life, he should be sure of a comfortable maintenance. He first of all enters into negotiation with Evans for that purpose; that goes off, and then he comes and asks Mr. Guest, who seven years before had expressed a wish to get possession of this property, and this bargain was entered into, Hunt being at the time, according to the evidence, perfectly unimpaired in his faculties. It is quite clear that there was a bargain. Hunt over and over again stated to various people what the bargain was—that in consideration of the conveyance of this copyhold land to Mr. Guest he was to have a parlour in the Yew Tree Farm, and to be fed from the table of Mr. Guest. That bargain being so entered into, it was carried into effect; he was transferred to Yew Tree Farm, and he was fed in a manner entirely to his satisfaction.

That being so, if the conveyance had truly stated what had taken place, there would not have been the smallest colour for setting it aside, but, as it stands, it represents the transaction in a manner very much to be lamented, and to those who did not know what the real transaction was it was an excuse for an attempt to set aside the conveyance, although I cannot help wondering that this specific charge of fraud should have been made, of which there is not the slightest evidence, and that, after the answer had been given, it should still have been persevered in. If this was the genuine bona fide bargain entered into between Hunt and Guest, any difference in the statement of the transaction as to the nature of the agreement would not be a ground for setting aside the conveyance, though it would be a ground for a bill to reform it. But this is not a bill to reform it; this is a bill to set it aside, and it seems to me that there is no sufficient ground for setting it aside. I must, therefore, advise your Lordships to dismiss this appeal, and affirm the decree.

LORD BROUGHAM.—I entirely agree with my noble and learned friend in his view of the case in all its parts, and I should not say one word, except to express my very great approbation of the zeal with which this poor man's cause has been supported at your Lordships' Bar, and I state this only to express my opinion, from long experience, unvarying in that respect, that this is not an exception that Mr. Shapter has made to the ordinary course of our profession, but that he has followed the constant course of the profession in dealing with all such pauper cases.

LORD WENSLEYDALE.—I entirely agree with the opinion of my noble and learned friend on the Woolsack, and concur entirely in all the observations that he has made upon this case. There is no case of fraud made out, nor is there any

A fiduciary relation established between Mr. Guest and Hunt, so as to entitle Hunt to particular care and attention. He was a man perfectly free to enter into the contract, perfectly in possession of his faculties, according to the weight of evidence, and he was dealt with perfectly fairly upon the occasion. The error which has been alluded to in the mode of framing the conveyance, I think, is not to be attributed to fraud, though it would have been a good ground for reforming the deed if that had been sought by the bill.

LORD CRANWORTH.—I will only say that I see no reason whatever to depart from the observations that I made when the case was before me in the Court of Chancery. The only observation I would now add is that I think this case may afford a useful warning to persons in framing deeds, because it strikes me, as it did when the case first came before me, that, if the exact truth had been told, nobody would have dreamed of there being fraud in the case. It is only because the parties between them thought to make the matter clear, or to clench it by stating something that was untrue, that all this unfortunate litigation has arisen.

Appeal dismissed.

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DE MATTOS v. GIBSON

[COURT OF APPEAL IN CHANCERY (Knight-Bruce and Turner, L.JJ.), December 9, 10, 17, 1858]

[Reported 4 De G. & J. 276; 28 L.J.Ch. 165; 32 L.T.O.S. 268;
5 Jur.N.S. 347; 7 W.R. 152; 45 E.R. 108]

Contract—Implied term—Use of subject-matter agreed in previous contract—Knowledge by person acquiring subject-matter of contract—Subject-matter not to be used in breach of earlier contract.

Shipping—Charterparty—Mortgage of ship with notice of charterparty—Mortgagee restrained from exercising power of sale during charterparty.

Where a man has acquired property with a full knowledge of a previous existing contract legally entered into providing that the property should be used in a particular manner he should not be allowed to apply or use the property otherwise than in accordance with the previous contract or to the damage of the person with whom that contract was made.

The defendant became a mortgagee of a ship of which the plaintiff was the charterer, and he took the mortgage with express notice of the charterparty. On an application by the plaintiff for an injunction to restrain the defendant from exercising his power of sale under the mortgage or interfering with the ship until after the voyage for which she had been chartered,

Held: as the defendant took with notice of the charterparty the plaintiff was entitled to an interim injunction on the terms sought.

Notes. Followed: *Sevin v. Deslandes* (1860), 30 L.J.Ch. 457; *Messageries Impariales Co. v. Baines* (1863), 7 L.T. 763; *Adamson v. Gill* (1868), 17 L.T. 464. Considered: *The Celtic King*, [1894] P. 175. Distinguished: *Bucknall v. Tatem* (1900), 83 L.T. 121. Applied: *Lord Strathcona Steamship Co., Ltd. v. Dominion Coal Co.*, [1925] All E.R.Rep. 87. Considered: *Port Line, Ltd. v. Ben Line Steamers, Ltd.*, [1958] 1 All E.R. 787. Referred to: *Peto v. Brighton, Uckfield and Tunbridge Wells Rail. Co.* (1863), 1 Hem. & M. 468; *Catt v. Tourle* (1869), 4 Ch. App. 654; *Montague v. Flockton* (1873), L.R. 16 Eq. 189; *Luker v. Dennis*

(1877), 7 Ch.D. 227; *Piperno v. Harmston* (1886), 3 T.L.R. 219; *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416; *Davis v. Foreman*, [1894] 3 Ch. 654; *L.C.C. v. Allen* (1894), 78 J.P. 449; *Formby v. Barker*, [1900-3] All E.R.Rep. 445; *Herne Bay Steam Boat Co. v. Hutton*, [1900-3] All E.R.Rep. 627; *Brigg v. Thornton*, [1904] 1 Ch. 386; *L.C.C. v. Allen*, [1914-15] All E.R.Rep. 1008; *Barker v. Stickney*, [1919] 1 K.B. 121; *Macdonald v. Eyles*, [1921] 1 Ch. 631; *Greenhalgh v. Mallard*, [1943] 2 All E.R. 234. A

As to implied negative covenants and injunctions in general, see 21 HALSBURY'S LAWS (3rd Edn.) 387 et seq.; and for cases see 28 DIGEST (Repl.) 831 et seq. B

Cases referred to in argument :

Heathcote v. North Staffordshire Rail. Co. (1850), 2 Mac. & G. 100; 6 Ry. & Can. Cas. 358; 2 H. & Tw. 332; 20 L.J.Ch. 82; 14 Jur. 859; 47 E.R. 1710, L.C.; 28 Digest (Repl.) 866, 954. C

Lumley v. Wagner (1852), ante p. 368; 1 De G.M. & G. 604; 21 L.J.Ch. 898; 19 L.T.O.S. 264; 16 Jur. 871; 42 E.R. 687, L.C.; 28 Digest (Repl.) 829, 726.

Tulk v. Moxhay (1848), ante p. 9; 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, 2774.

Storer v. Great Western Rail. Co. (1842), 2 Y. & C.Ch. Cas. 48; 3 Ry. & Can. Cas. 106; 12 L.J.Ch. 65; 6 Jur. 1009, 1051; 63 E.R. 21; 42 Digest 432, 50. D

Clarke v. Price (1819), 2 Wils. Ch. 157; 37 E.R. 270, L.C.; 28 Digest (Repl.) 822, 671.

Webster v. Dillon (1857), 30 L.T.O.S. 71; 3 Jur.N.S. 432; 5 W.R. 867; 42 Digest 913, 84.

Appeal by the plaintiff from an order of PAGE-WOOD, V.-C., dated Nov. 25, 1858, refusing to grant an interim injunction to restrain the defendant George Tallentire Gibson, and all persons claiming through or under him, from removing a vessel called the *Allerton* to Newcastle, or otherwise interfering to interrupt a voyage mentioned in the bill, or from selling, transferring or disposing of the vessel otherwise than subject to the burden of a charterparty of Oct. 23, 1857. E

The bill and the affidavits in support of the motion stated, that by a charterparty dated Oct. 23, 1857, and made between Henry Trewitt Curry, one of the defendants, described as the owner of the *Allerton*, then in the port of Shields, of the one part, and the plaintiff of the other part, it was agreed that the *Allerton* should load a cargo of coal at one of the collieries in the river Tyne, and being so loaded should proceed to Suez and deliver the same. The freight to be paid at the rate of £60 per keel of 21 tons 4 cwt.; one-third by charterer's acceptance at three months, and one-third by like acceptance at six months from the sailing of the vessel from her loading port, and the remainder on the right delivery of the cargo. When the charterparty was entered into the defendant Curry was acting as owner, and was in possession of the vessel under a contract for the purchase of her. A considerable delay took place in the completion of the purchase, and that in consequence thereof a corresponding delay was occasioned in the dispatch of the vessel from her port of lading. On Jan. 6, 1858, the defendant Curry became the registered owner of the vessel, and on Jan. 12, 1858, he mortgaged her to the defendant Gibson to secure a sum of £1,500 and interest, and the mortgage was registered on the 20th of the same month. Previously to and at the date of the mortgage the defendant Gibson had full notice of the charterparty, and, in fact, advanced the sum intended to be secured by the mortgage in order to enable the defendant Curry to perform the charterparty and earn the freight made payable thereby. F

Shortly afterwards the vessel was dispatched with a cargo of coal on her voyage to Suez, and thereupon the plaintiff accepted bills drawn by Curry for £980 8s., being the amount payable under the charterparty, which bills were discounted, and the amount of them was paid over to Gibson, or was under some arrangement with him, and by his direction applied to the discharge of part of the purchase-money of the vessel. The vessel met with bad weather in the Channel, and being much damaged was obliged to put into Penzance for repairs, at which port she was when G

A the bill was filed, in the hands of Mr. W. D. Mathews, a shipwright, who claimed a lien upon her for the value of the repairs. Gibson threatened and intended to sell the vessel under his power of sale without reference to her engagement under the charterparty, and with that view he sent instructions to Matthews to allow her to be removed out of dock and sent back to Newcastle-upon-Tyne as soon as the repairs were completed, which would be in a few days.

B The prayer of the bill was, that it might be declared that the charterparty of Oct. 23, 1857, ought to be specifically performed, and that the defendant Curry might be decreed to perform it accordingly, the plaintiff submitting to perform the same on his part, and that an injunction might be granted to restrain Curry from permitting the vessel and cargo to remain at Penzance or any place other than Suez, and also for an injunction against the defendant Gibson in the terms stated
C at the beginning of the case.

Amphlett, Q.C., and *E. Macnaghten* for the plaintiff.

Rolt, Q.C., and *Bedwell* for the defendant Gibson.

KNIGHT-BRUCE, L.J.—If the acts of the defendant Gibson of which the plaintiff complained had been done by the other defendant, and if the plaintiff had
D continued quiescent, it would have been the duty of this court not to have granted the injunction. Of this both principle and precedent I have no doubt. The question then is, is there under the present circumstances any title to an injunction against Mr. Gibson in the plaintiff? I am of the opinion that this question must be answered in the plaintiff's favour; and this is so whether there is or is not a right of action at law—upon which I do not desire to express, nor do I express, any
E opinion.

Where a man has acquired property, with a full knowledge of a previous existing contract, legally entered into, that that property should be used in a particular manner, the acquirer should not be allowed to apply or use the property otherwise than under the contract, or to the damage of the person with whom that earlier contract had been made. This rule, recognised and adopted as it is by the English
F law, is possibly liable to exceptions, but none of them appear to apply to the present case. Mr. Gibson could have no better title than any other person now becoming interested in the ship, for the mortgage had been taken by him with express notice of the charterparty to the plaintiff; and by that charterparty he is, as to all liabilities, though I do not say as to all damage, effectually bound.

It has been contended that the charterparty did not alter the property in the vessel, but altered the manner in which the vessel was to be used; but if so, why
G should not a court of equity interfere to prevent a positive breach of contract? This court possesses such a power, and any system of laws in which no similar power existed must be indeed very defective. There must, therefore, in my opinion, be granted an injunction to prevent the defendant Mr. Gibson from removing the vessel to Newcastle, or from impeding in any manner her voyage to Suez.

H **TURNER, L.J.**—I agree with the opinion that the injunction now asked for ought to be granted. There are difficult and important questions to be decided at the hearing, which cannot be properly gone into upon an interlocutory application like that before the court. They appear to me to be three in number: (i) whether the plaintiff is entitled to the specific performance of the contract contained in the
I charterparty; (ii) whether, if not entitled to that specific performance, the defendant ought not to be restrained from interfering with the vessel until the voyage for which she was chartered at the time of his mortgage should have been performed; and (iii), whether Curry had or had not a right of recovering damages against the defendant Gibson, and whether that right would or would not accrue to the plaintiff through Curry. It is impossible that any of these questions can be decided except at the hearing of the cause. For these reasons I am of the opinion that there must be an injunction to restrain the defendant Gibson and his agents from removing the vessel to Newcastle, or interfering to interrupt or prevent her voyage

to Suez, the plaintiff at the same time undertaking to abide by any order the court might think proper to make as to damages; the injunction and the undertaking to be continued until the hearing of the cause. A

Order accordingly.

MORGAN v. PIKE

[COURT OF COMMON PLEAS (Jervis, C.J., Cresswell and Williams, JJ.), January 30, 1854]

[Reported 14 C.B. 473; 23 L.J.C.P. 64; 22 L.T.O.S. 242;
2 W.R. 193; 2 C.L.R. 696; 139 E.R. 195]

Deed—Execution—Non-execution by covenantee—Right of covenantee to sue.

In an action of covenant on a mortgage deed it was objected that, as the deed contained cross-covenants by the mortgagee and the mortgagor, but was executed by the mortgagee alone, the mortgagor was not liable. D

Held: this was different from the case of a lease, and was governed by the general rule of law that where a party had a covenant made to him and he covenanted in his turn he might sue on the covenant made to him though he himself had not executed the instrument containing it, and, therefore, the mortgagor was liable. E

Swatman v. Ambler (1) (1852), 8 Exch. 72, distinguished.

Notes. Referred to: *Northampton Gas-Light Co. v. Parnell* (1855), 15 C.B. 630; *Naas v. Westminster Bank, Ltd.*, [1940] 1 All E.R. 485.

As to adjudications, etc., see 33 HALSBURY'S LAWS (3rd Edn.) 281-283; and for cases see 39 DIGEST (Repl.) 306 et seq. As to the rights of non-executing parties to a deed, see 11 HALSBURY'S LAWS (3rd Edn.) 356-358; and for cases see 17 DIGEST (Repl.) 232 et seq. F

Cases referred to:

(1) *Swatman v. Ambler* (1852), 8 Exch. 72; 22 L.J.Ex. 81; 19 L.T.O.S. 312; 155 E.R. 1264; 17 Digest (Repl.) 236, 393. G

(2) *Pitman v. Woodbury* (1848), 3 Exch. 4; 154 E.R. 732; 17 Digest (Repl.) 236, 392.

Application by the defendant for a rule nisi for a new trial on the ground of misdirection, the improper admission of evidence and also why the record should not be altered back to the state in which it was after a first amendment at the trial, in an action of covenant. H

The action was tried before TALFOURD, J., at Westminster, where a verdict was found for the plaintiff for £1,800 and odd. The declaration was in covenant on a mortgage-deed by which the covenantor undertook to re-invest £1,800 stock in consols. It contained no claim of interest. The only plea on the record was non est factum.

It appearing at the trial that there was no demand of interest in the declaration, the judge, on request, amended the record, by inserting a count for interest. On objection raised by defendant to the stamp, the plaintiff abandoned his claim for interest, on which the judge again altered the record, by restoring it to the state in which it was before the amendment. The deed was dated June 15, 1852, and it was proved that there was but one copy of it; the only party who executed it was the mortgagor. The deed was stamped with a £2 5s. stamp; and, on observing this, it was objected for the defendant that the stamp was not sufficient, for two I

A reasons: First, because the sum was of indefinite amount, the contract being to re-invest £1,800 consols, at whatever price they might be when the time for re-investment should expire; secondly, the stamp was insufficient under the Statute 13 & 14 Vict., c. 97, even though it should prove that the amount to be secured was no more than £1,800. The trial was on Saturday, and the learned judge adjourned the cause to twelve o'clock on Monday. In the meantime, the plaintiff took the deed to the commissioners at Somerset House, who affixed the proper stamp; and, when the trial was resumed on Monday, the deed was put in duly stamped. It was thereupon objected for the defendant that the deed was for an indefinite amount; and, therefore, as now produced, the stamp was insufficient. The learned judge ruled that, the commissioners having had the whole document before them, and affixed their stamp, the objection was not good, and defendant estopped from making it. The defendant also objected that the mortgagees, not having executed the deed, could not recover on it. This objection was likewise overruled, and a verdict was entered for the plaintiff for £1,800.

Ogle for the defendant moved for a rule nisi.

JERVIS, C.J.—It has been contended that, as the deed contains cross-covenants by the mortgagor and mortgagees, the mortgagor is not liable, because the mortgagees did not execute the deed; and *Swatman v. Ambler* (1) has been relied upon as supporting that view, and a statement of it and its effect given by counsel, which can hardly weigh much with the court. In that case there was a plea denying the lessor's execution of the lease (for it was the case of a lease), and, therefore, it does not interfere with this case, which must be left to the general rule of law; and that rule is this—that where a party has a covenant made to him, and he in turn is to make covenant, he may sue on the covenant made to him, even though he himself has not executed it. But that is not so with a lease, as is well pointed out by **PARKE, B.**, in *Pitman v. Woodbury* (2), referred to in *Swatman v. Ambler* (1). I cannot, however, do better than to read his own words (3 Exch. at pp. 11, 12):

F “But with respect to leases by indenture, the older authorities show that the covenants which depend upon the interest of the lease, and are made because the covenantor has that interest, such as those to repair and pay rent during the terms, are not obligatory if the lessor does not execute—not because the lessor is not a party, but because that interest has not been created to which such covenants are annexed, and during which only they operate: as such covenants undoubtedly do not, if the term ends by surrender, and are suspended by G eviction by the lessor, so they do not begin to operate unless the term commences; the foundation of the covenant failing, the covenant fails also.”

This extract well points out the distinction between that and the present case, and the covenantee may here sue, though the covenantor has not executed the deed. There are, therefore, no grounds for the rule.

H CRESSWELL, J.—I am of the same opinion. This case is clearly distinguishable from *Swatman v. Ambler* (1). It is somewhat remarkable, with respect to the statement of counsel for the defendant of what fell from the judges in that case, that the judgment is a written one, so that if those dicta did fall from the learned judges, they did not think fit to repeat them.

I WILLIAMS, J.—I am of the same opinion. The main point to be decided in this case is settled and the rule laid down in **COMYNS' DIGEST**, tit. “Fait,” (C.2), where it is said:

“If one party executes his part of an indenture, it shall be his deed, though the other does not execute his part;”

and this case is governed by it.

Rule refused

DOWNMAN *v.* WILLIAMS

[COURT OF EXCHEQUER CHAMBER (Tindal, C.J., Coltman, Maule and Cresswell, JJ., Parke, Alderson Rolfe and Platt, BB.), November 27, 1844, February 3, April 22, 1845]

[Reported 7 Q.B. 103; 14 L.J.Q.B. 226; 5 L.T.O.S. 77;
9 Jur. 454; 115 E.R. 427]

Agent—Contract—Contract made on behalf of named principal—Authority—Liability of agent.

Where a person enters into a contract in writing purporting to be made on behalf of a named principal he is not personally liable on the contract unless he had no authority to make it or he exceeded his authority.

Appleton v. Binks (1) (1804), 5 East, 148, distinguished.

Notes. Applied: *Carr v. Jackson* (1852), 7 Exch. 382; *Lewis v. Nicholson* (1852), 18 Q.B. 503. Distinguished: *Cooke v. Wilson* (1856), 26 L.J.C.P. 15. Considered: *Collen v. Wright* (1857), 8 E. & B. 647. Followed: *Allaway v. Duncan* (1867), 16 L.T. 264. Considered: *Cherry and McDougall v. Colonial Bank of Australasia* (1869), L.R. 3 P.C. 24. Distinguished: *Herald v. Connah* (1876), 40 J.P. 567. Referred to: *Jenkins v. Hutchinson* (1849), 13 Q.B. 744; *Bull v. Chapman* (1853), 8 Exch. 444; *Thöl v. Leask* (1855), 1 Jur.N.S. 117; *Paice v. Walker* (1870), 22 L.T. 547.

As to relation between an agent and third parties, see 1 HALSBURY'S LAWS (3rd Edn.) 228 et seq.; and for cases see 1 DIGEST (Repl.) 717 et seq.

Case referred to:

(1) *Appleton v. Binks* (1804), 5 East, 148; 1 Smith, K.B. 361; 102 E.R. 1025; 1 Digest (Repl.) 742, 2835.

Also referred to in argument:

Ex parte Hartop (1806), 12 Ves. 349; 33 E.R. 132; 1 Digest (Repl.) 720, 2663. *Macbeath v. Haldimand* (1786), 1 Term Rep. 172; 99 E.R. 1036; 1 Digest (Repl.) 754, 2923.

Meriel v. Wymondsold (1661), Hard. 205; 145 E.R. 454; 44 Digest 1294, 10.

Horsley v. Bell (1778), Amb. 770; 1 Bro.C.C. 101, n.; 27 E.R. 494, L.C.; 12 Digest (Repl.) 42, 201.

Eaton v. Bell (1821), 5 B. & Ald. 34; 106 E.R. 1106; 1 Digest (Repl.) 743, 2841.

Burrell v. Jones (1819), 3 B. & Ald. 47; 106 E.R. 580; 1 Digest (Repl.) 731, 2753.

Hall v. Ashurst (1833), 1 Cr. & M. 714; 3 Tyr. 420; 2 L.J.Ex. 295; 149 E.R. 586; 1 Digest (Repl.) 728, 2735.

Johnson v. Ogilby (1734), 3 P.Wms. 277; 24 E.R. 1064, L.C.; 12 Digest (Repl.) 288, 2211.

Spittle v. Lavender (1821), 2 Brod. & Bing. 452; 5 Moore, C.P. 270; 129 E.R. 1041; 1 Digest (Repl.) 477, 1210.

Wilson v. Barthrope (1837), 2 M. & W. 863; Murp. & H. 81; 6 L.J.Ex. 251; 1 Jur. 949; 150 E.R. 1008; 1 Digest (Repl.) 744, 2855.

Jones v. Littledale (1837), 6 Ad. & El. 486; 1 Nev. & P.K.B. 677; Will. Woll. & Dav. 240; 6 L.J.K.B. 169; 112 E.R. 186; 1 Digest (Repl.) 727, 2727.

Higgins v. Senior (1841), 8 M. & W. 834; 11 L.J.Ex. 199; 151 E.R. 1278; 1 Digest (Repl.) 737, 2793.

Norton v. Herron (1825), 1 C. & P. 648; Ry. & M. 229; 1 Digest (Repl.) 728, 2733.

Leadbitter v. Farrow (1816), 5 M. & S. 345; 105 E.R. 1077; 1 Digest (Repl.) 743, 2838.

Appeal by the defendant from a decision of the Court of Queen's Bench (LORD DENMAN, C.J., PATTESON, COLERIDGE and WIGHTMAN, JJ.), reported 4 Q.B. 235, n., on a special verdict, in an action of assumpsit founded on a special agreement.

A The declaration stated that a commission of bankruptcy had issued against John Waters, Arthur Jones and David Jones; that before and at the time of issuing the fiat, Waters was indebted to the plaintiff in £53 7s. 2d.; that £40 6s. 6d. was due to the plaintiff for work, etc., in preparing a marriage settlement, and that Waters and D. Jones were indebted to the plaintiff in £527 5s. for work, etc., by the plaintiff as their solicitor in respect of the Pembrey works; that the plaintiff had proved the first debt against Waters's estate, the second against D. Jones's, and the third against the separate estate of Waters and D. Jones, but had received no dividend, of which the defendant had notice; that in consideration of the premises, and that plaintiff, at defendant's request, would expunge the three proofs, and would agree to look to the trustees of the marriage settlement for payment of the second debt, the defendant promised to pay him the first and third debts. The declaration then averred that the plaintiff authorized such proofs to be expunged, and agreed to look to the trustees, and that the proofs were accordingly expunged; and that, although the two first-mentioned debts had been duly paid according to the agreement above-mentioned, yet the defendant had not paid, or arranged any mode of paying, the third debt. There was a second count on an account stated. The defendant pleaded

D (i) Non assumpsit; (ii) As to the first count, that the contract was duly rescinded; (iii) Also as to the first count, that the promise was special to answer for the debts of other persons, and that no agreement or memorandum was made in writing, or signed by the defendant or his agent, according to the Statute of Frauds, s. 4. On these pleas issues were taken.

E At the trial before COLERIDGE, J., the plaintiff was nonsuited, but on motion for a new trial a special verdict was found, with leave of the court, and the verdict was to be entered for the plaintiff for £527 5s. and interest as the court might direct. The Court of Queen's Bench founded their view of the facts of the case on the ground that it was impossible to ascertain with certainty whether the letter set forth in the verdict, and which was alleged to constitute the undertaking of the defendant, did create a personal liability in him or not, and that the special verdict disclosed

F evidence from which inferences might fairly be drawn in favour of either conclusion. The inference which the court actually drew from the facts was that the defendant had only a special authority, clearly limited in extent by the principals, and falling short of sanctioning the particular undertaking; that no action would, therefore, lie on the undertaking against the principal, and, consequently, that the defendant must be held to have made himself personally liable.

G The letter from the defendant to the plaintiff on which the action was grounded was as follows :

"Church Street, Nov. 26, 1844.

H "My dear Sir, Your bill of costs against Mr. John Waters for business connected with the marriage settlement, amounting to £53 7s. 2d. I undertake to have paid to you. Perhaps I may be enabled to hand you the money tomorrow. The lease or leases of Treventy, etc., you will have the goodness to hold for Messrs. Sir James Esdaile & Co. who claim to be entitled to the benefit resulting therefrom.

"Pembrey Works.

I "Your bill of charges in this matter, amounting to £527 5s. I also undertake (on behalf of Messrs. Esdaile & Co.) to pay, and will arrange with you the time and mode immediately after the dividend meetings; in the meantime, and until this be completed, the documents you hold will be sufficient security. For the amounts thus secured (including Mr. D. Jones's, which you have agreed to look to the trustees under the marriage settlement for), I beg to inclose an authority to the commissioners under the bankruptcy of Waters, Jones & Co. to expunge from your proofs. I forwarded the draft agreement with Messrs. Esdaile & Co. on Thursday, the 13th instant, and have not yet received it back. I, however, consider the principle as agreed on, and will lose no time in having it forwarded

so as to act on it with respect to the appropriation of the dividends. With
respect, I remain, etc.

"H. R. DOWNMAN."

Chilton, Q.C. (E. V. Williams with him), for the defendant.

J. Evans, Q.C. (Henderson with him), for the plaintiff.

Cur. adv. vult.

April 22, 1845. **TINDAL, C.J.**, delivered the following judgment of the court.—
The only question for the determination of this court arises on the first issue joined
between the parties, namely, whether, on the facts found by the jury in their special
verdict as to the issue on the plea of non assumpsit, the jury ought to find that the
defendant did promise in the manner and form the plaintiff has alleged. For, as to
the second and last issues, in which the Court of Queen's Bench have directed the
verdict to be entered for the plaintiff, and have given judgment accordingly, there
was no real question made in the course of the argument before us that the verdict
as to those pleas or the judgment thereon ought to be disturbed; nor, indeed, is
there any valid ground of objection against either.

As to the first issue, the Court of Queen's Bench, when the matter was argued
before them in the form of a Special Case, came to the conclusion that the letter
written by the defendant on Nov. 26, 1834, on which the action is grounded, was
framed in such terms as to make it impossible to ascertain with certainty, merely
from the language in the letter, whether it created a personal liability by the defend-
ant or not, and that the Special Case disclosed evidence from which the inferences
might fairly be drawn in favour of either conclusion. But that court at the same
time, reasoning on the facts which were placed before them in the Special Case, and
availing themselves of the power of drawing inferences from the facts stated, arrived
at the conclusion that the defendant had only a special authority, clearly limited in
extent by the principals and falling short of sanctioning the particular undertaking;
that no action would, therefore, lie on the undertaking against the principals; and,
consequently, that the defendant must be held to have made himself personally
liable. We, sitting as a court of error, are, on well-recognised principles of law,
strictly restrained to the facts found by the jury and stated in the special verdict;
and looking at the terms of the letter itself, and, still more, calling in aid of its con-
struction the correspondence in the special verdict which preceded and gave rise to
that letter and which may be considered as part of the same transaction, we think
that it imports on the face of it an undertaking made by the defendant as agent for
the Esdailes; and that the special verdict does not state, either directly or by
necessary implication from the facts found, the want of authority on his part to
make such undertaking, or any excess of his authority in making it.

As to the first point, the very terms of the letter itself, "I . . . undertake (on
behalf of Messrs. Esdaile & Co.) to pay," would seem to us, in their natural mean-
ing, to point rather to a promise made by one person as agent for another than as
intended to bind the parties speaking in the character of principals; for, on the
latter supposition, there would appear to be no reason whatever for mentioning the
names of the principals. To say the least, however, the expression is capable of
bearing misconstruction; and, when contrasted with the expression used by the
defendant in the part of the same letter immediately preceding, namely, "Your bill
of costs . . . amounting to £53 7s. 2d. I undertake to have paid to you," the dis-
tinction taken between the two modes of expression strongly confirms the interpreta-
tion which we think it demanded for itself. But the letter written by the defendant
to the plaintiff, and dated Nov. 11, 1834, informs him that Messrs. Esdaile cannot
have the deeds of the Pembrey estates without the payment of the plaintiff's bill,
i.e., the £527 5s. mentioned in the declaration, which the defendant states he has
already told the plaintiff Messrs. Esdaile would do; and he then continues: "I am
now ready to enter into any agreement to that effect." The plaintiff, by his answer
to that letter, written on Nov. 17, with respect to the above-mentioned debt of
£527 5s. states himself ready to enter into such agreement as the defendant had

A proposed, and to sign a written authority to enable him to expunge the proof of the debt; leaving it to be settled and paid by Messrs. Esdaile & Co., according to such agreement, and that letter then further states that, as to the bills amounting to £53 7s. 2d., he will deliver up some leases, on which he claims a lien, "with many thanks for the promise to have the amount paid to me." On comparing together the language of the letter of Nov. 26 with the language of that to which we have
B just adverted, we think that the necessary result is that the undertaking on which the action was brought was, as we have before stated, an undertaking given by the defendant, as agent of Messrs. Esdaile, and not given in his own individual capacity, and that it was so understood to be given by the parties themselves.

On the part of the plaintiff, however, it was contended by counsel that, in point of law, the letter of Nov. 26 must necessarily import an undertaking by the defendant, in his own individual capacity, and that it could not be construed as an undertaking which should bind the principal. If such should be the necessary construction in point of law, there would be an end of all further doubt; but we think none of the cases referred to establish that position. In *Appleton v. Binks* (1), on which the most reliance was placed, the only point decided was that a man who covenanted for himself and his heirs under his own hand and seal for the act of another, should be personally liable, though he described himself as agent in the deed; a very different proposition from that now before us, for the question before us is that, if a person enter into a contract in writing, and describes himself as agent, and naming his principal, whether the principal shall be bound, provided the agent had authority to enter into the contract on his behalf; a point which we consider too clear to admit of doubt or argument. If, then, this contract, on its legal construction, be
E as it appears to us it is, a contract entered into by the agent on behalf of his principal, the only ground on which the agent could become personally liable on his contract is that laid down by STORY, J., in his COMMENTARIES ON THE LAW OF AGENCY, so often referred to in the course of the argument. But even if the law be as is there laid down, in order to create or let in such personal liability, the want of authority on the part of the agent must be found by the jury; and, as the letter
F of Nov. 26 is the plaintiff's evidence, and the only evidence by which he affects the defendant, whether as agent or principal, and as such liability is on the face of the letter the liability of agent, we think that the burden is imposed on the plaintiff of showing by clear proof that there was no such agency or authority as is stated in such letter, or that his authority, such as it was, has been exceeded.

We all agree, however, in thinking that, on the facts stated in this special verdict, such defect of authority is neither found by the jury directly, nor is it to be inferred
G by necessary implication from the facts found. We, therefore, think that the judgment of the court below, so far as relates to the first issue, is to be reversed, and the judgment thereon entered for the defendant; and as to the residue, the judgment is to be affirmed.

Appeal partly allowed.

SHARMAN v. SANDERS AND OTHERS

[COURT OF COMMON PLEAS (Jervis, C.J., Maule, Cresswell and Williams, JJ.), January 26, 1853]

[Reported 13 C.B. 166; 22 L.J.C.P. 86; 20 L.T.O.S. 247; 17 Jur. 765; 1 W.R. 152; 138 E.R. 1161]

Master and Servant—Wages—Truck Acts—“Artificer”—Personal service—Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 3, s. 4.

An “artificer” within the Truck Act, 1831, is a person who contracts for the use of his own personal services.

The plaintiff was employed at an iron works in carting, tipping and burning ironstone at a fixed price per ton to be paid monthly. He hired men to work under him at a fixed sum per day payable weekly, and he sometimes worked with the hired men, but was not bound by his contract to give his personal services.

Held: as it was no part of his contract to give his personal services he was not an “artificer” within s. 3 of the Truck Act, 1831, although he did part of the work himself, and he was unable to recover from his employers, under s. 4 of the Act, the amount of wages which had been paid in goods either for himself or for the hired men.

Notes. The expression “artificer” in the Truck Act, 1831, has been extended by s. 2 of the Truck Amendment Act, 1887 (9 HALSBURY’S STATUTES (2nd Edn.) 40), so as to include any workman as defined by s. 10 of the Employers and Workmen Act, 1875 (9 HALSBURY’S STATUTES (2nd Edn.) 28). The Payment of Wages Act, 1960, relaxes the Truck Acts, 1831 to 1940, by enabling wages in certain cases to be paid otherwise than in cash, viz., by cheque or like method; and the Truck Act, 1831, is modified by s. 6 (1) of the Act of 1960 (40 HALSBURY’S STATUTES (2nd Edn.) 296).

Applied: *Ingram v. Barnes* (1857), 7 E. & B. 115; *Sleeman v. Barrett* (1864), 2 H. & C. 934. Referred to: *Bowers v. Lovekin* (1856), 6 E. & B. 584.

As to persons to whom the Truck Acts apply, see 17 HALSBURY’S LAWS (3rd Edn.) 138 et seq.; and for cases see 24 DIGEST (Repl.) 1096 et seq. For the Truck Acts, 1831, 1887, 1896 and 1940, see 9 HALSBURY’S STATUTES (2nd Edn.) 11 et seq., 39 et seq., 49 et seq., 103 et seq.

Case referred to:

(1) *Riley v. Warden* (1848), 2 Exch. 59; 18 L.J.Ex. 120; 10 L.T.O.S. 420; 12 J.P. 614; 154 E.R. 405; 24 Digest (Repl.) 1096, 443.

Also referred to in argument:

Weaver v. Floyd (1852), Cox, M. & H. 599; 21 L.J.Q.B. 151; sub nom. *Floyd v. Weaver*, 19 L.T.O.S. 58; 16 J.P. 278; 16 Jur. 289; 24 Digest (Repl.) 1097, 444.

Rule Nisi obtained by the plaintiff for a new trial in an action of assumpsit for work and labour done by the plaintiff as an artificer, workman and labourer, in the manufacture of iron and carting, tipping and unloading iron and ironstone; and the plaintiff claimed wages for the work done.

The defendants, the employers, pleaded that payment had been made in goods which had been delivered by the defendants to the plaintiff who had accepted them in full satisfaction and discharge. The plaintiff, in reply, stated that he was an artificer within the meaning of the Truck Act, 1831; that goods delivered by way of payment was contrary to that Act and that he was entitled to recover wages under s. 4 of that Act. The defendants, by rejoinder, denied that the plaintiff was an artificer and issue was joined on this.

At the trial before TALFOURD, J., it was proved that the defendants owned the Stanton-by-Dale Ironworks and employed the plaintiff from June, 1850, to June,

A 1851, in carting, tipping and burning ironstone. By the contract the plaintiff was to be paid a fixed price per ton and to employ men under him. The plaintiff usually hired about nine or ten men, as the work required, at a fixed daily sum to be paid weekly, but the defendants settled with the plaintiff monthly. The plaintiff stated in evidence that he was employed to work as a labourer with the other men and that he was liable to be dismissed at a month's notice, but the defendants' evidence was that the personal service of the plaintiff formed no part of the contract and that so long as the work was properly done the defendants had no right of complaint, even though the plaintiff might be continually absent. It was proved that the plaintiff did sometimes work with the other men but his attendance was irregular. The defendants had a shop adjoining the works and gave the plaintiff a book of tickets which he filled up and gave to the men he hired in lieu of wages. C These tickets were cashed by the cashier in the shop and the arrangement was that a fixed proportion of the sum cashed was to be spent in purchase of goods in the shop. Both the plaintiff and the other men had received goods in this way, and the plaintiff claimed that the amount received in goods should be paid in wages.

TALFOURD, J., directed the jury that the plaintiff was not an artificer within the meaning of the Truck Act, 1831, unless it was an ingredient in his contract that his personal services should be given and that if he should fulfil his contract and yet be personally absent altogether he was not entitled to the protection of that Act. The jury found that the plaintiff was not an artificer within the Act and a verdict was given for the defendants. Subsequently the plaintiff obtained a rule nisi for a new trial on the ground of misdirection.

E *Serjeant Byles* (*Willmore* and *Willes* with him) for the defendants, showed cause against the rule.

Macaulay, Q.C., and *Bittleston* for the plaintiff, supported the rule.

JERVIS, C.J.—The difficulty which the learned counsel for the plaintiff have had to struggle with, arises from *Riley v. Warden* (1). Though there may be some distinction between that case and the present, inasmuch as there materials may have been supplied, whereas this is a pure contract for labour, and nothing else, still the principle which the Court of Exchequer there lay down must govern this case. To be an "artificer" within the meaning of the Truck Act, 1831, the party must be personally engaged in the performance of labour for which he is to receive wages, and that must have reference to the original contract. TALFOURD, J., left the case to the jury precisely as it was put by COLERIDGE, J., in *Riley v. Warden* (1). We are bound by the authority of that case, even if we were disposed to question the propriety of the decision, which I for one am not. I think this rule must be discharged.

MAULE, J.—I am of the same opinion. I am not disposed to question the decision of the Court of Exchequer in *Riley v. Warden* (1). Whether some of the expressions there used may not be open to criticism, I will not say: the substance of the decision is clearly right, viz., that the intention of the Truck Act, 1831, was to afford protection to a class of persons not very able to protect themselves. The law does not often interfere to prevent persons who have attained their majority from contracting in any way they think proper. Generally speaking, the rule is, that people may contract as they please, to be paid at once or at a future day, in cash or by goods. That is the general law of the land. But occasionally there occur in the course of experience cases in which it is found desirable to depart from that general principle—cases of particular inconvenience in particular trades or employments, and with reference to particular classes: for instance, in the case of seamen, whose contracts are the subject of special legislative provisions—the law considering that particular class of men to be in a state of perpetual pupillage. The Truck Act, 1831, does not say that the restriction it imposes shall apply to all trades or employments; but it has been found that, in respect of some trades, the leaving the parties the unfettered right to contract in respect of labour in such

way as they may choose, is replete with mischief and inconvenience. The persons the Act was meant to benefit are those who hire themselves to labour with their hands for daily or weekly wages. More people, no doubt, are comprehended within it than that; but it is that sort of people to whom the Act was intended to apply. I do not think it was at all designed for the protection of persons taking contracts for labour to be done by others—persons who speculate upon the state of the labour market. The letter of the Act, also, in my opinion falls short of comprehending persons of that description. I do not think the plaintiff falls within the definition of an artificer given by the interpretation clause; he not being a workman, labourer or other person engaged in the performance of any work, employment, or operation contemplated by the statute; for, the whole context shows it was only intended to apply to those who are actually and personally engaged or employed to do the work. When the procuring work to be done by the hands of others comprehends the whole of what a man contracts for, the circumstance of his doing some portion of the work himself, does not bring him within the statute. There must be a contract by which he binds himself to do it. I think that both the letter and the spirit of the Act of Parliament are consistent with the decision of the Court of Exchequer in *Riley v. Warden* (1), which has not been successfully distinguished from the present case. I, therefore, think that this rule should be discharged.

CRESSWELL, J.—I am entirely of the same opinion. The summing-up of TALFOURD, J., was strictly in harmony with the decision to which the Court of Exchequer very properly came in *Riley v. Warden* (1).

WILLIAMS, J., concurred.

Rule discharged.

MOORE v. DARTON

[VICE-CHANCELLOR'S COURT (Knight-Bruce, V.-C.), June 13, 1851]

[Reported 4 De G. & Sm. 517; 20 L.J.Ch. 626; 18 L.T.O.S. 24;
64 E.R. 938]

Gift—Donatio mortis causa—Delivery of receipt for money to agent of debtor by creditor expressing wish that debt be cancelled—Effect of Wills Act, 1837.

Trust—Inter vivos—Declaration—Document giving title to money handed to cestui que trust.

On a settlement of accounts between D., a creditor, and M., a debtor, M. gave D. two signed receipts, one for £500 and the other for £100, both sums to bear interest at 4 per cent. The £100 was expressed to be paid to S. on the death of D., but the interest was to be paid to D. and this receipt was also signed by D., as approving it. D. became ill, took the two receipts from a drawer, and gave them to S., directing that in case of her death the £600 was to be cancelled except as to the £100 which was to be paid to S.

Held: (i) as regards the £100 a sufficient declaration of trust *inter vivos* had been made; (ii) delivery of the receipt for £500, although made to S. and not to M., was on the evidence made to S. as agent for M., which was equivalent to delivery to M. and sufficient to make a *donatio mortis causa*; (iii) the Wills Act, 1837, had not abolished a *donatio mortis causa*.

Notes. Section 4 of the Revenue Act, 1845, by which a *donatio mortis causa* was deemed a legacy for the purpose of duty, was repealed by the Finance Act, 1949, s. 52 (10), Sched. 11 (28 HALSBURY'S STATUTES (2nd Edn.) 527, 529).

A Considered: *Paterson v. Murphy* (1853), 11 Hare, 88; *Tate v. Leithead* (1854), Kay, 658; *Re Dillon, Duffin v. Duffin*, [1886-90] All E.R.Rep. 407. Explained: *Birch v. Treasury Solicitor*, [1950] 2 All E.R. 1198. Referred to: *Re Andrews, Andrews v. Andrews*, [1902] 2 Ch. 394; *Re Weston, Bartholomew v. Menzies*, [1900-3] All E.R.Rep. 283; *Re Kirkley, Cort v. Watson* (1909), 25 T.L.R. 522; *Delgoffe v. Fader*, [1939] 3 All E.R. 682.

B As to gifts mortis causa, see 18 HALSBURY'S LAWS (3rd Edn.) 400 et seq.; and for cases see 25 DIGEST (Repl.) 595 et seq. For the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326 et seq.

Cases referred to in argument:

C *Snellgrove v. Baily* (1744), 3 Atk. 214; Ridg. temp. H. 202; 26 E.R. 924; sub nom. *Baily v. Snelgrove*, 2 Ves. Sen. at pp. 436, 411, L.C.; 25 Digest (Repl.) 597, 328.

Drury v. Smith (1717), 1 P.Wms. 404; 2 Eq. Cas. Abr. 575; 24 E.R. 446, L.C.; 25 Digest (Repl.) 610, 437.

Walter v. Hodge (1818), 1 Wils. Ch. 445; 2 Swan. 92; 37 E.R. 190; 25 Digest (Repl.) 602, 377.

D *Farquharson v. Cave* (1846), 2 Coll. 356; 15 L.J.Ch. 137; 6 L.T.O.S. 363; 10 Jur. 63; 63 E.R. 768; 25 Digest (Repl.) 605, 402.

Exceptions filed by the plaintiff to the master's report in the administration of the estate of Miss Betty Darton, the question being whether the delivery of two documents amounted to a donatio mortis causa. The master in his report held that the delivery of the documents did not constitute a donatio mortis causa.

E Between Miss Darton and Mr. Moore, a trustee for her life and also for her friend, Ann Dye, who later became Ann Shaw, there were accounts which after Mr. Moore's death were continued with William Moore, the present plaintiff. On Oct. 22, 1843, the accounts were closed and William Moore signed and handed Miss Darton the two following documents:

F "Received, Oct. 22, 1843, of Miss Darton, £500 to bear interest at four per cent. per annum, but not to be drawn at less than six months' notice.

£500 William Moore."

"Received, Oct. 22, 1843, of Miss Darton, for the use of Ann Dye, £100, to be paid to her at Miss Darton's decease, but the interest at four per cent. to be paid to Miss Darton.

£100. William Moore.

G I approve the above. Betty Darton."

On June 28, 1845, Miss Darton was confined to her bed by extreme illness, and (according to the testimony of Ann Dye, afterwards Ann Shaw, who was the only witness examined) believing that she would not live long, was assisted to her drawer containing her papers, and taking out the two receipts delivered them to Ann Shaw, saying: "Now mind and take care of them, and that they do not come into the hands of Mr. Darton" [her nephew, the defendant]. She directed that in case of her death the £600 was to be cancelled, except as to the £100 which it was intended should be paid by Mr. Moore to Ann Shaw, in consideration of her long acquaintance and friendship. The receipts remained in the custody of Ann Shaw until Miss Darton's death.

I *Swanston and Moxon* for the plaintiff, supported the exceptions.

Walker and Pryor for the defendant.

Marshall for other parties.

KNIGHT-BRUCE, V.-C.—It is not necessary to consider the question of donatio mortis causa, so far as the £100 is concerned, as, in my opinion, an effectual declaration of trust inter vivos was created. The document relating to that sum was apparently contemporaneous with the creation of the debt. Moore was a trustee for Betty Darton during her life, and for Ann Shaw afterwards. The question with

regard to the £500 is not so simple. It is by no means clear that the Wills Act, 1837, did not intend to put an end entirely to gifts mortis causa, as it has done, with the exception of soldiers and sailors in actual service, with regard to nuncupative wills. It has, however, never been so decided, nor has it even been argued in any reported case, and I shall, therefore, decide the question without reference to the Wills Act, 1837; and I shall do so the more readily as s. 4 of the Revenue Act, 1845, has, so far as a mere revenue Act could do so, put a construction on the Wills Act, 1837, by imposing a duty on every donatio mortis causa. The next question, therefore, is whether the evidence showed that, as to the £500 there was a donatio mortis causa. The document was placed in the hands of Ann Shaw, and not in those of Moore; but I think the evidence is sufficient to show that it was placed in her hands as agent for him, and that the delivery was equivalent to a delivery to him, and was sufficient to make a gift mortis causa. If, therefore, by law, an interest is capable of being created mortis causa, it is so in the present instance. I have no intention to contravene anything decided by any of the very eminent judges [LORD HARDWICKE, LORD ROSSLYN, LORD ELDON] whose names have been mentioned, and I think that in holding that there is a donatio mortis causa created, I do not decide anything contrary to the decisions of those judges, nor to the rules of the civil law, nor to the principles of the law of this country. The exceptions must be allowed.

Exceptions allowed.

R. v. REED

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Lord Campbell, C.J., Jervis, C.J., Pollock, C.B., Parke, B., Coleridge, Maule and Erle, JJ., Platt, B., Williams and Talfourd, JJ.), November 19, 1853, January 21, 1854]

[Reported Dears.C.C. 168, 257; 23 L.J.M.C. 25; 22 L.T.O.S. 263;
18 J.P. 71; 18 Jur. 66; 2 W.R. 190; 2 C.L.R. 607;
6 Cox, C.C. 284]

Criminal Law—Larceny—Larceny by servant—Constructive possession of master—Goods collected from station and carted to master's house—Part of goods disposed of during journey.

R. was sent with his master's cart and sacks to collect half a ton of coal from the station wharf and to cart it to the master's house. The coal was delivered, put into sacks, and loaded on the cart, and the bill was made out to the master. During the journey to the master's house R. disposed of some of the coal to P.

Held: the master had constructive possession of the coal when it was loaded on the cart at the station, and R. was guilty of larceny and not embezzlement.

Notes. Section 13 of the Criminal Procedure Act, 1851, has been repealed by the Criminal Statutes Repeal Act, 1861, repealed by S.L.R., 1950, s. 1, Sched. 1 (29 HALSBURY'S STATUTES (2nd Edn.) 810, 829). But s. 44 (2) of the Larceny Act, 1916 (5 HALSBURY'S STATUTES (2nd Edn.) 1039) allows alternative verdicts to be given in cases of larceny and embezzlement. Larceny is defined by s. 1 of the Larceny Act, 1916 (5 HALSBURY'S STATUTES (2nd Edn.) 1012) and larceny and embezzlement by clerks and servants is dealt with by s. 17 of the Larceny Act, 1916 (5 HALSBURY'S STATUTES (2nd Edn.) 1021).

Followed: *R. v. Mallinson* (1902), 66 J.P. 506. Considered: *Williams v. Phillips*,

A *Roberts v. Phillips* (1957), 121 J.P. 163. Referred to: *R. v. Pratt* (1854), 18 Jur. 539.

As to what constitutes embezzlement, see 10 HALSBURY'S LAWS (3rd Edn.) 787; and for cases see 15 DIGEST (Repl.) 1063 et seq.

Cases referred to:

- B** (1) *R. v. Robinson* (1755), 2 East, P.C. 565; 15 Digest (Repl.) 1063, 10,476.
 (2) *R. v. Spears* (1798), 2 Leach, 825; 15 Digest (Repl.) 1063, 10,483.
 (3) *R. v. Walsh* (1812), Russ. & Ry. 215; 4 Taunt. 258; 2 Leach, 1054; 128 E.R. 328; 15 Digest (Repl.) 1085, 10,744.
 (4) *R. v. Abraham* (1798), 2 East, P.C. 569; 2 Leach, 824; 15 Digest (Repl.) 1063, 10,482.

C Also referred to in argument:

- R. v. Waite* (1743), 1 Leach, 28; 2 East, P.C. 570; 15 Digest (Repl.) 1085, 10,741.
R. v. Bazeley (1799), 2 East, P.C. 571; 2 Leach, 835; 15 Digest (Repl.) 1085, 10,743.
R. v. Bull (1797), 2 East, P.C. 572; 2 Leach, 841; 15 Digest (Repl.) 1085, 10,742.
R. v. Meeres (1689), 1 Show. 50; 89 E.R. 441; 15 Digest (Repl.) 1073, 10,577.
D *R. v. Sullens* (1826), 1 Mood.C.C. 129, C.C.R.; 15 Digest (Repl.) 1086, 10,745.
R. v. Masters (1848), 2 Car. & Kir. 930; 1 Den. 332; T. & M. 1; 3 New. Sess. Cas. 326; 18 L.J.M.C. 2; 12 L.T.O.S. 154; 12 J.P. 758; 12 Jur. 942; 3 Cox, C.C. 178, C.C.R.; 15 Digest (Repl.) 1086, 10,747.
R. v. Hayward (1844), 1 Car. & Kir. 518; 15 Digest (Repl.) 1063, 10,485.
R. v. Paradise (1766), 2 East, P.C. 565; 15 Digest (Repl.) 1064, 10,492.
E *Higgs v. Holiday* (1600), Cro. Eliz. 746; 78 E.R. 978; 34 Digest (Repl.) 144, 991.
R. v. Harding (1807), Russ. & Ry. 125, C.C.R.; 15 Digest (Repl.) 1065, 10,505.
R. v. Watts (1850), 2 Den. 14; T. & M. 342; 4 New Sess. Cas. 381; 19 L.J.M.C. 192; 14 J.P. 399, 402; 14 Jur. 870; 4 Cox, C.C. 336, C.C.R.; 15 Digest (Repl.) 1063, 10,486.

F **Appeal** against conviction of larceny on the ground that the conviction was wrong in law, on the ground that, if any offence had been committed, it was embezzlement and not larceny as the goods had never been in the possession of the master, but had been in the exclusive possession of the appellant as servant.

The appellant, Abraham Reed, was charged at Kent Quarter Sessions, sitting on Jan. 4, 1853, with feloniously stealing two cwts. of coal, the property of William Newton, his master, on Dec. 6; and James Peerless, who was acquitted, was charged in the same indictment with receiving the coal knowing it to have been stolen. The appellant was employed by William Newton who sold coal by retail. On Dec. 6, 1852, Newton directed the appellant to go to Edenbridge station to collect half a ton of coal and to bring it back to Newton's house. Peerless lived about 500 yards off the direct route from the station to Newton's house. The appellant set out about 9 a.m. and should have returned about 4 p.m., but as he did not do so Newton went in search of him about 6.30 p.m., and found him outside Peerless's house where the appellant and Peerless were taking coal from the cart in a truck basket into Peerless's house. The appellant said that he had received an order from Peerless to deliver him half a cwt. of coal. But the appellant had never told Newton of such an order and had no authority from Newton to sell any coal.

I When Newton brought the coal home in the cart it was found to weigh two and three-quarters cwts. short of the half ton which the appellant had been ordered to collect from the station. Later that evening Newton went to Peerless and asked him what coal he had received from the cart and he said half a cwt. and that it had been carried from the cart in a sack. Next day Newton went to Peerless's house and found about half or three-quarters of a cwt. of coal. In cross-examination Newton said that he thought that Peerless had had some coal about a fortnight previously. James Holman, a wharfinger, proved that the appellant had collected half a ton of coal at the station and produced the order as entered to Newton.

At the close of the case for the prosecution, counsel for the appellant submitted that there was no case to go to the jury on the charge of larceny, inasmuch as the possession of the coal left at Peerless's had never been in the possession of Newton, the master. Counsel on the part of the prosecution contended that the coal was constructively in the possession of Newton, and that the offence was properly charged as larceny; but that, under s. 13 of the Criminal Procedure Act, 1851, it was immaterial whether the offence were larceny or embezzlement, as the jury might find a verdict either for larceny or embezzlement. Counsel for the appellant then proposed that it should be left to the jury as a charge of embezzlement; but to this counsel for the prosecution objected, on the ground that the receiver must then be acquitted. The court were of opinion that there was constructive possession in the master, and left the case to the jury as a case of larceny upon the evidence, who thereupon found the appellant Abraham Reed guilty. Counsel for the appellant then applied to the court to submit the case to the Court for the Consideration of Crown Cases Reserved, contending that the conviction was wrong in law; as, if any offence had been committed, it was embezzlement, and not larceny. The court acceded to the application.

This case was first argued on April 23, 1853, before JERVIS, C.J., PARKE and ALDERSON, BB., WIGHTMAN and CRESSWELL, JJ., when the court took time to consider their judgment. The court afterwards directed that the case should be argued before all the judges; and, in pursuance of that direction, the case was again heard on Nov. 19, 1853.

Ribton for the appellant.

Rose for the Crown.

Cur. adv. vult.

Jan. 21, 1854. **LORD CAMPBELL, C.J.**, read the following judgment.—I am of opinion that the appellant has been properly convicted of larceny. There can be no doubt that, in such a case, the goods must have been in the actual or the constructive possession of the master; and that, if the master had not otherwise the possession of them than by the bare receipt of his servant upon the delivery of another for the master's use, although as against third persons this is in law a receipt of the goods by the master, yet in respect of the servant himself this will not support a charge of larceny, because as to him there was no tortious taking in the first instance, and consequently no trespass. Therefore, if there had been a quantity of coals delivered to the servant for the master, and the servant, having remained in the personal possession of them, as by carrying them on his back in a bag, without anything having been done to determine his original exclusive possession, had converted them *animo furandi*, he would have been guilty of embezzlement, and not of larceny. But if the servant has done anything which determines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterwards converts them *animo furandi*, he is guilty of larceny, and not merely of a breach of trust at common law, or of embezzlement under the statute. On this supposition he subsequently takes the goods tortiously in converting them, and commits a trespass. We have, therefore, to consider whether the exclusive possession of the coals continued with the servant down to the time of the conversion.

I am of opinion that this exclusive possession was determined when the coals were deposited in the master's cart, in the same manner as if they had been deposited in the master's cellar, of which the servant had the charge. The master was undoubtedly in possession of the cart at the time when the coals were deposited in it; and if the servant had carried off the cart *animo furandi*, he would have been guilty of larceny. That is expressly determined in *R. v. Robinson* (1). There seems considerable difficulty in contending that, if the master was in possession of the cart, he was not in possession of the coals which it contained, the coals being his property, and deposited there by his order, for his use. Counsel for the appellant argued that the goods received by a servant for his master remain in the

A exclusive possession of the servant till they have reached their ultimate destination. But he was unable, notwithstanding his learning and ingenuity, to give any definition of "ultimate destination," when so used. He admitted that the master's constructive possession would begin before the coals were deposited in the cellar, when the cart containing the coals had stopped at his door, and even when it had entered his gate. But I consider the point of time to be regarded is that when the

B coals were deposited in the cart. Thenceforth the servant had only the custody or charge of the coals, as a butler has of his master's plate, or a groom has of his master's horse. To this conclusion, with the most sincere deference to any of my learned brothers who may at any time have taken a different view—to this conclusion I should have come on principle; and I think that *R. v. Spears* (2) is an express authority for it.

C The following is an exact copy of the statement of that case, signed by BULLER, J., in pp. 181, 182 and 183 of Vol. 2 of the Black Book, containing the decisions of the judges in Crown cases, deposited with the Chief Justice of the Queen's Bench for the time being :

"John Spears was convicted before me at Kingston, for stealing forty bushels of oats of James Broune & Co., in a barge on the Thames. Broune & Co. sent the prisoner with their barge to Wilson, a corn meter, for as much oats only as the barge would carry, and which were to be brought in loose bulk. The prisoner received from Wilson 220 quarters in loose bulk, and five quarters in sacks; the prisoner ordering that quantity to be put into sacks. The quantity in the sacks was afterwards embezzled by the prisoner; and the question reserved for the opinion of the judges is whether this was felony, the oats never having been in the possession of the prosecutor; or whether it was not like the case of a servant receiving change or buying a thing for his master, but never delivering it."

Then there is a reference made to DYER, 5, and 1 SHOW. 52; and then this is signed by BULLER, J.: and then is added, "April 25, 1798. Conviction affirmed." That is an exact copy from the Black Book. What follows of course is new. In that case the question arose, whether the corn, while in the prosecutor's barge, in which it was to be brought by the prisoner to the prosecutor's granary, was to be considered in the possession of the prosecutor; and the judges unanimously held, that from the time of its being put into the barge it was in the prosecutor's possession, although the prisoner had the custody or charge of it. That case has been met at the Bar by a suggestion that the whole cargo of corn, of which the quantity put on board this barge was a part, was or might have been purchased by the prosecutor, so that he might have had a title and constructive possession before the delivery to the prisoner. But the very statement of the case in the Black Book, and the authorities referred to, show that the judges turned their attention to the question whether the exclusive possession of the servant had not been determined before conversion; and during the argument of *R. v. Walsh* (3) we have the ratio decidendi in *R. v. Spears* (2) explicitly stated by one of the judges who concurred in the decision :

"HEATH, J.—That case went upon the ground that the corn was in the prosecutor's barge, which was the same thing as if it had been in his granary."

I Read "cart" for "barge," "coals" for "corn," and "cellar" for "granary," and the two cases are for this purpose precisely the same. There is no conflicting authority; for in all the cases relied upon by counsel for the appellant, the exclusive personal possession of the servant had continued down to the time of the wrongful conversion.

It is said there is great subtlety in giving such an effect to the deposit of the coals in the master's cart; but the objection rests on a subtlety wholly unconnected with the moral guilt of the servant, for as to that it must be quite immaterial whether the property in the coals had or had not vested in the master prior to the time when they were delivered to the servant. We are to determine whether this

would have been a case of larceny at common law before there was any statute against embezzlement; and I do not think that there would have been any reproach to the administration of justice, in holding that the subtlety arising from the prosecutor having had no property in the subject of the larceny before its delivery to the servant, who stole it, was sufficiently answered by the subtlety that when the servant had once parted with the personal possession of it, so that a constructive possession by the master began, the servant who subsequently stole it should be liable to be punished, as if there had been a prior property and possession in the master, and that the servant should be adjudged liable to be punished for a crime, instead of being allowed to say that he had only committed a breach of trust, for which he might be sued in a civil action. In approaching the confines of different offences created by common law or by statute, nice distinctions must arise, and must be dealt with. In the present case it is satisfactory to think that the ends of justice are effectually gained by affirming the conviction; for the only objection to it is founded upon an argument that the appellant ought to have been convicted of another offence of the same character, for which he would have been liable to the same punishment.

JERVIS, C.J.—I concur in the judgment of the Lord Chief Justice. It is admitted that the cart is in the possession of the servant for a special purpose; if he had taken the cart, he would have been guilty of larceny; if the cart has for this purpose continued the cart of the master, the delivery of the coals is a delivery to the master, and makes the offence a larceny.

PARKE, B.—I certainly had differed from the view of this case which has been taken by the Lord Chief Justice at a time when it was uncertain what *R. v. Spears* (2) actually was, and treating this case as *res nova*. The book in which the opinions of the judges are written, and which is always in the custody of the Lord Chief Justice, was mislaid; and *R. v. Spears* (2) was differently reported in the two editions of LEACH, and also in EAST'S CROWN LAW; and that case could not for a long time be found. However, since it has been found, I have satisfied myself; and I entertain no doubt upon it. I should have delivered my reasons at length; but it is unnecessary now to do so. *R. v. Abrahath* (4) and *R. v. Spears* (2) having been discovered, and having read that case with the explanation of HEATH, J., I find the point decided; and though, therefore, if this was *res nova*, I should have pronounced an opinion that this was not larceny, but as that case is a decided authority, by the authority of that case I am bound; and it is unnecessary for me to deliver my reasons at any greater length.

Conviction affirmed.

WRIGHT AND ANOTHER v. SCOTT

[HOUSE OF LORDS (Lord Cranworth, L.C., Lord Brougham and Lord St. Leonards), July 16, 1855]

[Reported 26 L.T.O.S. 180]

Compulsory Purchase—Exercise of powers—Right of trustees to construct any works incidental to or necessary for works which they were empowered to construct.

Public trustees were empowered by statute to acquire land compulsorily for the purpose of improving the navigation of a river and to construct "wharves, quays and other works" on land so acquired. On land of the appellants acquired under these powers it was proposed to construct a wharf after widening the river and a large shed to be used for the purpose of that wharf. The appellants objected that the construction of the shed was not within the trustees' statutory powers.

Held: in the absence of express prohibition from so doing the trustees had power to do anything incidental to or necessary for the works which they were expressly empowered by statute to construct; the legislature by "wharfs and quays" must have intended that all adjuncts necessary and convenient for that purpose should be included; and, therefore, the trustees had power to construct the proposed works.

Notes. As to the construction of statutory enabling powers, see 36 HALSBURY'S LAWS (3rd Edn.) 436; and for cases see 42 DIGEST 681, 682.

Appeal from a decision of the Court of Session holding that the respondents, trustees of the River Clyde navigation, were entitled to erect a certain shed or sheds upon the wharfs which were in course of construction under authority of various Acts of Parliament, their right to do so being resisted by the appellants, Wright and Connell.

The question arose in the following circumstances. Under various Acts of Parliament prior to the Act of 6 Geo. 4, c. cxvii, powers had been given to the trustees of the Clyde harbour from time to time to improve the navigation of that river. Much more extended powers were given by the Act of 6 Geo. 4, c. cxvii, which were still further enlarged by the Act of 3 & 4 Vict., c. cxviii, under which Act, reciting all the former Acts, certain persons, the former trustees and others, were to continue to be trustees. Directions were, in the first instance, given for meetings of the trustees and the mode in which they should conduct their business; and then by s. 11 it was enacted, that the trustees by themselves or their agents or workmen were empowered and authorised

"not only to execute and continue the several works authorised by the said recited Acts, but also, under the provisions and restrictions hereinafter enacted, to make, execute, construct, finish, maintain and keep in repair the additional works upon, in or along the river and in connection with the harbour delineated or represented on the map or plan hereinafter mentioned, and likewise the wet dock and other works and improvements hereby authorised to be made, and for those purposes to enter upon and take the lands."

The Act contained the usual powers given in the Lands Clauses Consolidation Act, enabling the trustees, when they wanted lands for the purpose of the making of the harbour, to acquire such lands compulsorily.

Under the provisions of this Act the trustees had in fact taken a certain piece of land with buildings upon it belonging to Wright and Connell, adjoining the River Clyde, and upon that land the trustees were preparing, first of all to widen the river, according to the directions of the Act, a certain width, and then to the south of the river thus extended, to form a wharf. Upon that wharf they were proposing to erect a very extensive building which they called a shed, occupying nearly the

whole of the land taken from Wright and Connell, and which would be of a permanent character, and they were also proposing to erect a wall. They asserted that they had a right to erect sheds under the authority of the Act of Parliament. In the conveyance of the land, the appellants reserved to themselves certain rights, as they retained other lands adjacent to those taken by the trustees, which were

"to obtain water from the Clyde for the use of their said remaining lands by means of pipes laid at their own expense at a proper depth beneath the surface, and also to have reasonable access for all the buildings to be erected on their said remaining ground, to and from the wharfs and quays, so soon as the same shall be formed opposite to their remaining property for the use thereof."

The Act of Parliament contained certain provisions applicable to proprietors like the appellants whose lands had been thus taken by the trustees. In s. 21 there was a proviso :

"that as soon as the trustees shall, from time to time, carry into effect the proper improvements, the right of the landowners severally to use and occupy the ground or soil within the improved lines shall respectively cease and determine as regards the ground or soil occupied by such improvements; and it shall not at any time be lawful to the said trustees to interpose any grounds, works or other erections between the properties respectively of the said landowners, and the waterway or channel of the river, excepting parallel dykes or water-walls for confining or regulating the channel of the said river, and such beacons, perches or other such works upon the said dykes as may be necessary for the guidance or information of parties navigating the said river."

Section 23 enacted that

"nothing herein contained shall hinder or prevent the trustees, under the authority hereby granted, from, inter alia, acquiring the grounds and other heritages belonging to any of the landowners before named, for the construction of the wharves, quays and other works for the enlargement of the said harbour, delineated on the said map or plan; and that after the acquisition of such ground, the boundary line between the said harbour, wharves, quays and other works, and the properties of the adjacent landowners shall (excepting when any public or private road or passage may exist) . . ."

be as marked by certain dotted lines.

The Court of Session held that the Clyde trustees were entitled to build the proposed shed; and Wright and Connell appealed from that decision.

Rolt, Q.C., Palmer, Q.C., and Stuart for the appellant.

The Lord Advocate (Moncrieff) and the *Solicitor-General (Bethell)* for the respondent.

LORD CRANWORTH, L.C., stated the facts, and continued: In this case the main reliance of the appellants is on s. 21 of the Act of 3 & 4 Vict., c. cxviii, under which the trustees are authorised to improve the navigation of the River Clyde. But what follows in s. 23 seems to me to show conclusively that that does not at all impede or prevent the trustees from using any portion of the land which they were authorised by the Act to take for the purpose of adding to the quays or wharfs of the harbour. It does not prevent them from interposing any works or erections between the river and the lands of those who shall remain proprietors below the land that they are taking, or from making works or doing what may be necessary for the harbour, they being authorised to make the harbour with the quays and wharfs along it. It appears to me that s. 23 is clear upon the point—nothing is to prevent the trustees from doing whatever they are authorised to do for the purpose of erecting and making the wharfs. That being so, let us see whether there is any inconsistency between the two clauses. There is none whatever.

The Act says, for the purpose of improving the navigation, you may widen the river up to a given line. You may take any land up to that line for the purpose of

A widening the navigation. There is no restriction. You may do that in the city of Glasgow as well as anywhere else. You may do that all along, deepening the river to any depth exceeding seventeen feet; but in doing that you shall not interfere with the free access of the riparian proprietors, as they are called, but you shall give to them all reasonable access, such as they had before. But nothing in that proviso, which compels you to give them reasonable access, shall prevent you from

B doing that which, by s. 23 of the Act, you are authorised to do: namely, to make wharfs and quays for the convenience of that portion of the harbour included within the dotted lines, in the town or city of Glasgow. That makes the whole thing intelligible. You are, if you are merely widening the river, to widen it; but, in widening it, you will be likely to impede the access that persons previously had. You shall not do that; you shall give them reasonable access; but though you shall

C give reasonable access to all persons which you will be taking away in widening the river, that shall not prevent you, within the limits of the city of Glasgow, taking any land that you please for the purpose of making wharfs and quays, and so on.

The force of that was so strongly felt, that it was necessary for the appellants to argue that the power to make wharfs, quays and other works for the enlargement of the harbour, did not authorise the erection of buildings upon the quays. I think

D that that would be a very forced construction. I do not care what definition you find in JOHNSON'S DICTIONARY of a wharf or quay. You must see what the legislature must have meant, when they authorised the making at Glasgow of wharfs and quays, for the more convenient use, by merchants, sending their ships and loading and unloading goods there. Of course the legislature, by "wharfs and quays," must have meant wharfs and quays, with all the adjuncts that were convenient for the

E purpose; and I confess that even if we could not have spelled out from any other part of the Act that it was the intention of the legislature to authorise such erections, I should have been very apt to hold that, upon the mere authority "to erect wharfs and quays for the convenience of Her Majesty's subjects," we must understand wharfs and quays now made according to the most approved scientific principles. Observe to what an absurd extent any other limited construction than that

F would lead. In one of the clauses, which seems to have been framed with mere tautological repetition, lamp-posts are ordered. Is it to be said that in making a wharf and quay you are not to erect a lamp-post upon it? Yet the construction contended for must go that length. I do not know that the iron rings which you see upon a wharf are, strictly speaking, part of a wharf. I dare say, if you look at the definition of the word "wharf," you would not find iron rings included. But it

G is absurd to suppose that the trustees are to fence off and build up against the river, and that they could not put that which was necessary for a ship or boat to fasten itself with. I do not know that there is any authority to make steps down to the river. I think that these considerations would have led me to the conclusion that it must have been intended by the legislature to make wharfs and quays in the mode which the trustees should deem most convenient for Her Majesty's subjects.

H I think that we may, if it be necessary, looking at this case in the sort of spirit in which it has been looked at, find that there is an express intention on the part of the legislature that the trustees should be enabled to erect, what is called in the different Acts, sheds for the convenient use of persons loading and unloading their goods. Reference was particularly made to s. 27, which authorises not merely the erection of wharfs and quays, but the making of a large wet dock, called Windmill-croft. There, it is said, the words "sheds" does occur, because the trustees are to

I make, complete, repair, and maintain the wet dock, delineated on the said map or plan, as intended to be constructed on the said lands, "together with all and every quay and quays, wharf or wharfs, locks, cuts, entrances, cranes, sheds, engines, bridges, lamp-posts, works and other matters and things necessary to, or connected with, such dock." The argument was this—sheds being enumerated there, you cannot understand that the legislature would suppose that the making of a shed was included in a mere authority to make a dock, or to make a dock with works connected therewith. But very little weight can be attributed to the use of

unnecessary or tautological expressions of this sort. For observe, that among the other things which the trustees are authorised to make for a wet dock, are "entrances." Could it be possibly imagined that the legislature meant to authorise the making of a wet dock without an entrance? And yet the word "entrance" is expressly stated. An entrance to the dock is there given as a word in addition to the dock, just as the word "shed" and the word "cranes" and other words are given; from which I only infer that you cannot adduce anything from the occasional use here and there of those words in the Act which would be implied in the more general words, and from their omission in the other part of the Act. It is only another instance among many of the loose way in which these Acts of Parliament are framed.

It was observed by the counsel for the respondent, that s. 59 expressly states this :

"that the powers and authorities granted by the said recited Acts to the trustees to exact and levy, among other things, shed duties, that is, duties for the use of sheds, or with the clauses and provisions contained in the said Acts in relation thereto, shall be, and the same are hereby repealed, and the trustees under the present Act shall be, and they are hereby authorised and empowered to demand, exact and recover from all and every person or persons importing or exporting goods at the said quays or wet docks, for the sheds, cranes and weighing machines, constructed or to be constructed at the said harbour or dock, the rates and duties specified in schedules A, B and C, hereto annexed."

The only way in which that can be possibly met is this, by saying that there was an authority to construct sheds at the wet dock, and that those words, "sheds to be constructed" must refer to sheds to be constructed at the wet dock, or to sheds hereafter to be constructed, but not yet constructed, upon lands which were included in the former Act. I think that that is an extremely narrow construction of an Act of this sort.

I can only read the Act as showing that the legislature clearly contemplated that sheds had been constructed, not merely at the wet docks, but in the harbour or dock, the harbour there excluding the wet dock; and that they might hereafter be constructed and duties levied upon them. I do not rely upon the subsequent language of the Act 9 & 10 Viet., c. cxliii. There may be weight in that, but it does not strike my mind as throwing any very great light upon the subject. It is said that there is an interpretation clause there, which makes the words "other works" include sheds, and that the two Acts of Parliament are united together, so that the words "other works" in the former Act may be read retrospectively to include sheds. I should feel very great difficulty in coming to that conclusion if it rested upon that. It is merely a further illustration of the point, that the legislature considered the general word "works" to include everything. But I do not specifically rely upon that as deciding the case at all one way or the other.

LORD BROUGHAM concurred.

LORD ST. LEONARDS, after stating various clauses of the Act, said : It is now contended that you are to spell through a number of Acts of Parliament in order to show what is the particular use to which a company acquiring land under an Act of Parliament is to apply that land. I entirely agree that land acquired under an Act of Parliament could not be applied to the purpose directly opposed to that Act of Parliament. Companies are not to abuse their powers; and, under pretence of buying land for a harbour, they are not to construct a railway, for example, or to use it for any other totally different purpose. But within their Act of Parliament, and to the extent of their powers and to the extent to which they choose to exercise those powers within the Act of Parliament, I should be clearly of opinion, unless there is some express prohibition, that acquiring the land under the Act of Parliament for the purposes of the Act, they may do with that land just as any other proprietor would do, always admitting that it is not to be applied to any works foreign to the Act itself.

A Supposing, for instance, that a company thought it necessary to build a station, and that they had got the land, is it necessary that they should have power to build a particular station? It is constantly the habit of railway companies to build a station. Supposing that these trustees thought it necessary to erect a shed anywhere for the purposes of the trade, I should be of opinion that, unless they were expressly prohibited, they would have a perfect right to do so; to erect a shed, or

B do anything of that sort which is incidental to the execution of their works, or which they deem necessary in the execution of their works, and which they erect bona fide in the exercise of their powers. The limit of that power would be a matter with which any man who sells land to them has no more right to interfere, than any stranger going along the street; and it will not do to come into a court of justice and endeavour not to look at the contract—not to look at the general scope

C of the Acts, but to pick out and dwell upon some particular provisions, in order to show that the particular dedication of a particular piece of ground has not been exactly pointed out and defined by the Act of Parliament. [His LORDSHIP then stated other grounds for his decision.]

Appeal dismissed.

D

E

ROBBINS v. HEATH AND OTHERS

[COURT OF QUEEN'S BENCH (Lord Denman, C.J., Patteson, Coleridge and Wightman, JJ.), January 31, 1848]

[Reported 11 Q.B. 257; 2 New Pract. Cas. 433; 10 L.T.O.S. 371;
12 Jur. 158; 116 E.R. 472]

F

Solicitor—London agent—Relations with country solicitor's client—Client's money held by London agent—Liability to repay to client.

Although in ordinary circumstances there is no privity of contract between a client and his country solicitor's London agent, yet in a case where the London agent holds money to which the client is entitled the court may, in the exercise

G of its jurisdiction over its officers, order such money to be paid to the client.

G

A country solicitor was employed to obtain judgment and execution on a warrant of attorney. His London agents issued writs of execution and sent them to the undersheriff in the country, with a direction to call on the country solicitor for instructions. The levy was made and the proceeds were paid by the undersheriff to the bankers of the London agents, he having first sent to the country solicitor and not found him at home. The London agents then wrote to the country solicitor informing him that the money had been remitted to them, and inquiring what they should do with it. The answer to that letter was not produced, but a second letter from the London agents to the country solicitor was produced in which they expressed their surprise at being required to refund that money and their intention of retaining it to satisfy a general balance due from the country solicitor to them. The country solicitor expressly stated that the London agents held the money without his authority and against his consent. On a summary application to compel the London agents to repay the money to the plaintiff,

H

I

Held: although in ordinary circumstances there was no privity between the London agent and the client in the country so as to make the former responsible to the latter for the client's money received by him in his character as London agent and in the ordinary course of his business as such, in the circumstances of this case he was bound to refund the money which he had

received, because it came into his hands accidentally and not merely in his character of London agent.

Notes. Followed: *Ex parte Edwards* (1881), 45 L.T. 578.

As to the relations between a London agent and a country solicitor's client, see 1 HALSBURY'S LAWS (3rd Edn.) 172-3; and *ibid.*, vol. 36, pp. 214-215; and for cases see 43 DIGEST (Repl.) 422 et seq.

Case referred to:

- (1) *Robbins v. Fennell* (1847), 11 Q.B. 248; 2 New Pract. Cas. 426; 17 L.J.Q.B. 77; 12 Jur. 157; 116 E.R. 468; sub nom. *Robins v. Fennell*, 10 L.T.O.S. 246; 43 Digest (Repl.) 423, 4465.

Also referred to in argument:

Ex parte Jones (1833), 2 Dowl. 161; 43 Digest (Repl.) 423, 4463.

Gray v. Kirby (1834), 2 Dowl. 601; 43 Digest (Repl.) 426, 4503.

Hanley v. Cassam (1847), 2 New Pract. Cas. 431; 10 L.T.O.S. 189; 11 Jur. 1088; 43 Digest (Repl.) 422, 4457.

Re Oliver (1835), 2 Ad. & El. 620.

Application by the defendants, to set aside a rule obtained on motion by the plaintiff calling on Fennell, Child & Kelly, a firm of London solicitors, to show cause why they should not pay over to the plaintiff in this action the sum of £166 3s.

The affidavits on which the rule was obtained stated that the plaintiff had signed judgment on a warrant of attorney in Wiltshire, and that the defendants, being the London agents of one Slade, the plaintiff's solicitor at Devizes, had been instructed by him to issue writs of execution; that they had done so accordingly, and had sent the writs to the undersheriff with a direction to call on Slade for instructions; that the levy was made and £166 3s. realised; that the undersheriff called on Slade, but not finding him at home, remitted the proceeds to the bankers of Fennells' in London; that Fennells' thereupon wrote to Slade, informing him that the money had been remitted, and asking what they should do with it. Subsequently they sent another letter expressing their surprise at being required to refund it, and their intention to apply it to the payment of the general balance due from Slade to them. These letters, and some others, were set out in the affidavits, but the letter written by Slade in answer to the first of the two was not produced or set out in the affidavits on either side. There was a distinct affidavit that Fennells' held the money without the authority and against the will of Slade.

Crowder, Q.C., and *Butt, Q.C.*, for the defendants.

Montague Smith and Taprell for the plaintiff.

LORD DENMAN, C.J.—This is one of the cases contemplated in our judgment in *Robbins v. Fennell* (1), where the London agent might make himself liable to the client for sums received by him.

This money did not come into the hands of the London agents merely as such London agents. It came directly from the undersheriff to them, and out of the ordinary course; indeed so much out of the ordinary course that they immediately wrote to the country solicitor to know what they are to do with it. The answer to that letter is of course in their hands but they do not produce it. Then comes another letter from them, in which they say, "We are surprised at your requiring us to refund it." That is the short state of facts. The money was not received by Fennells' at all in the course of their engagement and connection with the country solicitor but by some accident it got into their hands, as it might into the hands of a stranger.

My only doubt has been whether, as there has been a trial and the matter has been in some degree discussed and submitted to a jury, there ought not to be a new action brought; but that would be imposing great expense on the parties and I think that the case is now made out and that we ought to say that these defendants, having by an improper use of the money deprived the plaintiff of it, are bound to

A refund it. I agree with counsel for the plaintiff, that where money is improperly received, the privity is out of the question.

B **PATTESON, J.**—If this had been a case of money received by the defendants as London agents in the ordinary course of their business as such, the application must have been refused on the ground that there is no privity between the London agent and the client in the country, because I agree with LORD DENMAN that no distinction can be drawn between an action and a summary application in this respect. It is clear, however, that this money was not received by them in the ordinary course of their business as London agents.

C [HIS LORDSHIP stated the facts and referred to the second letter from the defendants to the country solicitor, Slade]. Now that distinguishes this from *Robbins v. Fennell* (1), in which I do not mean to say that the nonsuit was wrong. That action was founded entirely on the privity supposed to exist between the client in the country and the London agent, as such; and there being no such privity, the nonsuit was right. But there are special circumstances which prevent this application from resting entirely on that supposed privity and it, therefore, is not governed by that decision.

D **COLERIDGE** and **WIGHTMAN, JJ.**, concurred.

Rule absolute.

E

RICHARDS v. ROSE

F [COURT OF EXCHEQUER (Pollock, C.B., Parke, Alderson and Martin, BB.), November 8, 12, 1853]

[Reported 9 Exch. 218; 2 C.L.R. 311; 23 L.J.Ex. 3;
22 L.T.O.S. 104; 18 J.P. 56; 17 Jur. 1036; 156 E.R. 93]

Land—Right to support—Adjoining houses—Interference with party wall—Subsidence of one house.

G The defendant, the lessee of a house, dug a drain under it so near to the party-wall that the adjoining house of the plaintiff was damaged.

Held: the plaintiff was entitled to the support of the soil on the further side of the party-wall, either by implied grant or by implied reservation, and an action for the damage would lie.

H **Notes.** Considered: *Wheeldon v. Burrows*, [1874-80] All E.R.Rep. 669. Distinguished: *Howarth v. Armstrong* (1897), 77 L.T. 62. Applied: *Jones v. Pritchard*, [1908-10] All E.R.Rep. 80. Referred to: *Solomon v. Vintners' Co.* (1859), 4 H. & N. 585; *Suffield v. Brown* (1864), 4 De G.J. & Sm. 185; *Angus v. Dalton* (1878), 4 Q.B.D. 162; *Union Lighterage Co. v. London Graving Dock Co.*, [1900-3] All E.R.Rep. 234; *Puillback Colliery Co. v. Woodman*, [1914-15] All E.R.Rep. 124; *Sack v. Jones*, [1925] All E.R.Rep. 514; *Aldridge v. Wright*, [1929] 2 K.B. 117; *Vanderpant v. Mayfair Hotel Co.*, [1930] 1 Ch. 138; *Liddiard v. Waldron*, [1933] 2 K.B. 319; *Birch v. Wigan Corpn.*, [1952] 2 All E.R. 893.

I As to creation of easements by implication of law, see 12 HALSBURY'S LAWS (3rd Edn.) 538-543; as to easement of support, see *ibid.* 606-609; and for cases see 19 DIGEST (Repl.) 42 et seq.

Case referred to:

(1) *Pinnington v. Galland* (1853), 9 Exch. 1; 1 C.L.R. 819; 22 L.J.Ex. 348;
22 L.T.O.S. 41; 156 E.R. 1; 19 Digest (Repl.) 33, 166.

Application by the defendant for a rule nisi to set aside the verdict for the plaintiff and enter it for him, or for a new trial in an action brought by the plaintiff for damages for injury caused to her house as a result of excavation by the defendant under his adjoining house thereby depriving the plaintiff's house of support.

The first count of the declaration stated that the plaintiff was entitled to a messuage or dwelling-house, and was entitled to have the same supported by certain land and premises of the defendant adjoining thereto, yet the defendant wrongfully and unlawfully dug, excavated, and made a drain, hole, and tunnel, and removed and took away part of the said land of the defendant, and thereby deprived the said messuage of the plaintiff of the support which she was entitled to have, whereby the walls and parts of the dwelling-house cracked, gave way, and subsided. The second count charged the defendant with having negligently, carelessly, and improperly dug, excavated, and tunnelled a certain drain, whereby the walls of the plaintiff became undermined, weakened, and dilapidated, and cracked and subsided. The defendant pleaded that the plaintiff was not entitled to have her dwelling-house supported by the land and premises of the defendant adjoining thereto.

At the trial before **POLLOCK, C.B.**, it appeared that the plaintiff was the owner of the lease of the house, 6, Alfred Place, Camden Town, and the defendant was the leaseholder of the adjoining house, 5. The plaintiff derived her title as follows, as proved at the trial. Alfred Batson was the freeholder of the ground, and S. O. Pierce the original lessee. Pierce subleased to E. Watmough for ninety-nine years, from December, 1846; on Aug. 28, 1847, Watmough mortgaged the two houses (5 and 6) to J. B. Brown, and on Oct. 20, 1847, this mortgage was assigned to H. Halliday; and on Sept. 20, 1848, Watmough attorned to and became the tenant of Halliday, the mortgagee. Watmough having made default in payment of the mortgage debt, Halliday, on June 15, 1849, put the premises (No. 6) up to auction, and the plaintiff purchased them, and they were assigned to her by Halliday, under a power of sale contained in the mortgage deed, by deed dated July 11, 1849. The defendant derived his title in the same way, and the assignment to him bore date Sept. 3, 1849.

The defendant, being desirous to make a communication between his premises and the common sewer in front of the houses, dug a drain through his house, and so near to the party wall, that the adjoining house subsided and received considerable damage, for which injury this action was brought. The jury found a verdict for the plaintiff, damages £25, leave being reserved to the defendant to move to enter a verdict for him, if the court should be of opinion that there was no such right to the support of the adjoining soil as alleged in the declaration.

Lush moved for a rule to set aside the plaintiff's verdict or for a new trial on the ground that the verdict was against the evidence.

Cur. adv. vult.

Nov. 12, 1853. **POLLOCK, C.B.**, delivered the following judgment of the court.—In this case the rule will not be granted on the point reserved, because it seems very clear that where a number of houses are built on a spot of ground, all belonging to the same person, being all built together, and obviously requiring the mutual support of each of the others for the purpose of their common protection and security, whether the owner first parts with one and then another, or parts with two together, which he afterwards subdivides either by mortgage, or sale, or devise, or any other way, still the mutual support should seem necessary—it is a matter of common sense; and the circumstance whether the houses were separated by one act at one time, or at different times, never could make any difference as to what ought to be the result, inasmuch as the houses were originally built depending on each other, and each required the assistance of the others. As I said before, it seems a matter of plain common sense that that support must continue, and that no man who should become possessed of any one of the houses should be in a situation to say, "You are not entitled to the protection of my house, and I will pull the house down and let the houses on each side collapse and fall into ruin." It seems impos-

A sible not to come to the conclusion that the law must be, in strictness, in accordance with what is so plain and sensible.

There is a case, *Pinnington v. Galland* (1), decided in this court, which came to much the same result. However, that was in respect to a right of way, and not to a right of support. We are all of opinion that where houses have thus been erected in common by the same owner on a spot of ground, necessarily requiring mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support, so that the person who sells one reserves to himself that right, either in one way or the other—the same mutual dependence of each house on the rest remains. Therefore, there is no foundation for the point reserved—that the house had not a right to the support of the neighbour house, and on this ground the rule will be refused.

C Upon the point reserved, if the court had been of opinion that under such circumstances there was no evidence that one house was entitled to the support of the other, a rule would have been granted to enter a verdict for the defendant.

There was another point that was raised—namely, the damages being £25, and the injury probably as much as between £100 and £200. Counsel seems to object that the verdict of the jury must have been some compromise or other, which required revision. It appears to us, however, that although there are cases where the principle would prevail, as, for instance, if there were an action on a bill of exchange, and there were only one plea, that the bill was forged, and the jury found the verdict for the plaintiff, damages one farthing, compromising the matter by finding that the bill was not forged, and yet giving the plaintiff only one farthing—the court, I think, would there see that there had been a total refusal on the part of the jury fairly to discharge their duty, and the verdict would be necessarily and wholly inconsistent. That, however, is not the case where the damages are large. I remember pressing on the jury that they were by no means to consider all the damage that was found as the result of this injury, because it seems to have arisen from the houses being built on a foundation which gave way—there was some colour to that view of the subject.

F The court, therefore, are of opinion that, even if they were to grant a rule, it could not be except on payment of costs; and with that condition, and with those terms, counsel said expressly that he did not desire to have the rule. Therefore, there will be no rule on that ground; and the rule will be refused on the other, inasmuch as the court think that the point reserved ought to be decided in favour of the plaintiff.

G

Rule refused.

VALPY AND OTHERS, ASSIGNEES OF BATE AND OTHERS v. MANLEY

[COURT OF COMMON PLEAS (Tindal, C.J., Coltman, Cresswell and Erle, JJ.), May 6, 1845]

[Reported 1 C.B. 594; 14 L.J.C.P. 204; 5 L.T.O.S. 94;
9 Jur. 452; 135 E.R. 673]

Money Had and Received—Payment under duress—Threat of seizure of goods—Payment to avert sale under fi. fa.—Recovery of money paid.

Where a person has just and reasonable ground for apprehending that his goods may be seized in execution under a writ of fi. fa. and pays a sum of money to a person in possession, not, to the knowledge of the sheriff, in satisfaction of the writ, but to avert the sale of the goods and his consequent loss of them, the payment is not a voluntary payment, but is made under duress, and an action for money had and received will lie at the suit of the payor to recover the money paid.

Per CRESSWELL, J. [on the question of duress]: A threat to seize and sell would have the same effect as an actual seizure.

Notes. Referred to: *Maskell v. Horner*, [1914-15] All E.R.Rep. 595; *Eaton v. Donegal Tweed Co.* (1935), 79 Sol. Jo. 342.

As to recovery of money paid under compulsion, see 8 HALSBURY'S LAWS (3rd Edn.) 240, 241; and for cases see 12 DIGEST (Repl.) 624 et seq.

Cases referred to:

- (1) *Fulham v. Down* (1798), 6 Esp. 26, n., N.P.; 12 Digest (Repl.) 623, 4815.
- (2) *Snowdon v. Davis* (1808), 1 Taunt. 359; 127 E.R. 872; 18 Digest (Repl.) 417, 1641.
- (3) *Marriot v. Hampton* (1797), 7 Term Rep. 269; 2 Esp. 546; 101 E.R. 969; 12 Digest (Repl.) 630, 4858.
- (4) *Hamlet v. Richardson* (1833), 9 Bing. 644; 2 Moo. & S. 811; 131 E.R. 756; 12 Digest (Repl.) 630, 4862.
- (5) *Longridge v. Dorville* (1821), 5 B. & Ald. 117; 106 E.R. 1136; 12 Digest (Repl.) 225, 1672.
- (6) *Atlee v. Backhouse* (1838), 3 M. & W. 633; 1 Horn & H. 135; 7 L.J.Ex. 234; 150 E.R. 1298.
- (7) *Carter v. Carter* (1829), 5 Bing. 406; 2 Moo. & P. 732; 7 L.J.O.S.C.P. 141; 130 E.R. 1118; 12 Digest (Repl.) 594, 4600.
- (8) *Lindon v. Hooper* (1776), 1 Cowp. 414; 98 E.R. 1160; 18 Digest (Repl.) 445, 1886.
- (9) *Parker v. Great Western Rail. Co.* (1844), 7 Man. & G. 253; 3 Ry. & Can. Cas. 563; 7 Scott, N.R. 835; 13 L.J.C.P. 105; 2 L.T.O.S. 420; 8 Jur. 194; 135 E.R. 107; 8 Digest (Repl.) 196, 1255.
- (10) *Lackington v. Elliott* (1844), 7 Man. & G. 538; 8 Scott, N.R. 275; 13 L.J.C.P. 153; 3 L.T.O.S. 180; 8 Jur. 695; 135 E.R. 216; 5 Digest (Repl.) 1034, 8357.

Also referred to in argument:

- Barrett v. Stockton and Darlington Rail. Co.* (1840), 2 Man. & G. 134; 2 Scott, N.R. 337; affirmed sub nom. *Stockton and Darlington Rail. Co. v. Barrett* (1844), 11 Cl. & Fin. 590; 7 Man. & G. 870; 8 Scott, N.R. 641; 8 E.R. 1225, H.L.; 41 Digest 965, 8582.
- Hills v. Street* (1828), 5 Bing. 37; 2 Moo. & P. 96; 6 L.J.O.S.C.P. 215; 130 E.R. 973; 12 Digest (Repl.) 628, 4849.
- McCombie v. Davies* (1805), 6 East, 538; 2 Smith, K.B. 557; 102 E.R. 1393; 1 Digest (Repl.) 396, 570.

- A** *Baldwin v. Cole* (1704), 6 Mod. Rep. 212; Holt, K.B. 707; 87 E.R. 964, N.P.; 43 Digest 494, 331.
Close v. Phipps (1844), 7 Man. & G. 586; 8 Scott, N.R. 381; 135 E.R. 236; 35 Digest (Repl.) 561, 2360.
Knibbs v. Hall (1794), 1 Esp. 84; Peake, 276, N.P.; 31 Digest (Repl.) 266, 3997.
- B** *Brown v. M'Kinally* (1795), 1 Esp. 279, N.P.; 12 Digest (Repl.) 623, 4814.
Cartwright v. Rowley (1799), 2 Esp. 722, N.P.; 12 Digest (Repl.) 623, 4816.
Dew v. Parsons (1819), 2 B. & Ald. 562; 1 Chit. 295; 106 E.R. 471; 12 Digest (Repl.) 627, 4846.
Shaw v. Woodcock (1827), 7 B. & C. 73; 9 Dow. & Ry. K.B. 889; 5 L.J.O.S.K.B. 294; 108 E.R. 652; 12 Digest (Repl.) 626, 4834.

C **Rule Nisi** obtained by the defendant to enter a nonsuit in an action of assumpsit for money had and received by the defendant to the use of the plaintiffs, as assignees of Bate & Co., bankrupts.

Until their bankruptcy, Bate & Co. carried on the business of brewers at Rudgeley, in Staffordshire. On July 10, 1844, a writ of fi. fa. issued upon a judgment obtained against Bate & Co. at the suit of one Garnston. This writ was sent to the office of the defendant, the sheriff of Staffordshire, at Stafford, where it was received on the 11th. A warrant was immediately granted and put into the hands of an officer, who went with an assistant to the premises of Bate & Co. for the purpose of levying under it. On arriving there, the officer was informed that Bate & Co. had that day (July 11) executed a deed conveying all their property and effects to trustees, in trust for the benefit of their creditors. The officer thereupon forebore to make any actual seizure, but said that he considered himself in possession and would come every day to make claim until he knew whether or not the sheriff would interplead, and he left his assistant with the warrant at Rudgeley. On July 14, a fiat in bankruptcy issued against Bate & Co., and a messenger entered and remained in possession. On Aug. 15 the officer went in under the sheriff's warrant, and made an inventory of the property, breaking open a cartshed and taking out a wagon. On Sept. 2, the messenger under the fiat being still in possession, the assignees sent a clerk to the under-sheriff's office at Stafford, to inquire whether or not the sheriff intended to sell, and, upon the under-sheriff saying that he did, the clerk paid the amount claimed on the writ under protest.

In an action by the assignees to recover the money as money had and received by the defendant to their use, on the part of the defendant it was insisted that that which was done on July 11 amounted to a seizure, but the learned judge expressed a strong opinion to the contrary, and it was then contended that the payment was voluntarily made by the assignees, with full knowledge of all the facts, and, therefore, that they were not entitled to recover back the money. For the assignees it was submitted that the payment was not voluntary, but was made for the purpose of releasing the property from a sort of duress. The action came for trial before ERLE, J., who was of opinion that the wrongful seizure of the goods of another did not render a payment to obtain their release a payment made under duress. His Lordship took the view that the owner of the goods must be taken to know his legal rights, and that, if they are invaded he had his remedy by action. A verdict was taken for the plaintiffs, damages £373 6s. 9d., with liberty to the defendant to move to enter a nonsuit, if the court should be of opinion that the action was not maintainable.

Serjt. Talfourd obtained a rule nisi accordingly, referring to *Lindon v. Hooper* (8), *Atlee v. Backhouse* (6), *Parker v. Great Western Rail. Co.* (9), and *Lackington v. Elliott* (10).

Sir T. Wilde, Serjt. (with him *J. P. Wilde*), for the plaintiffs, showed cause against the rule.

Serjt. Talfourd (with him *F. V. Lee*), for the defendant, supported the rule.

TINDAL, C.J.—I am of opinion that the verdict in this case was right, and ought not to be disturbed. The question is, whether the payment made by the plaintiffs on Sept. 2, was a voluntary payment or a payment under a species of duress. It seems to me that all the circumstances show that, when the assignees made the payment, they had just and reasonable ground for apprehending that the sheriff would proceed to a sale that might have operated injuriously to their interests, unless the money were paid. The payment, therefore, was not voluntary, but was made for the purpose of averting a threatened evil. A

The whole facts that were in evidence point that way. In the first place, the officer was armed with a writ under which he had power to seize the property. In the next place, though the officer had not actually made a levy before the date of the fiat, he had been upon the premises and had said that he considered himself in possession and would come every day to make claim, until he knew whether or not the sheriff would interplead; and on Aug. 15 he broke open the door of a cartshed, took a wagon, and made an inventory of all the property on the premises. The officer making this sort of continual claim, and insisting that he has made an actual seizure—though it turns out that he has not—I think, that, as against the sheriff, we may assume that he was in possession. All the cases show that, where a party is in, claiming under legal process, the owner of the goods, contending that the possession is illegal, and paying money to avert the evil and inconvenience of a sale, may recover it back in an action for money had and received if the claim turns out to have been unfounded. Without going through the authorities, it is enough to say that this case falls within the exception in the dictum of Lord KENYON, in *Fulham v. Down* (1) (6 Esp. at p. 26, n.) that: B

“where a voluntary payment is made of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity (or, unless to redeem or preserve your person or goods), it is not the subject of an action for money had and received” C

—a form of expression which clearly assumes, that, if there be an immediate and urgent necessity, or the payment is made for the purpose of redeeming or preserving one's person or goods, the right to bring this sort of action exists. Nor am I able to distinguish this case from *Snowdon v. Davis* (2). D

I am not aware that there is any difficulty or impropriety in laying it down, that, where money is voluntarily paid with full knowledge of all the circumstances, the party intending to give up his right, he cannot afterwards bring an action for money had and received, but that it is otherwise where, at the time of paying the money, the party gives notice that he intends to resist the claim, and that he yields to it merely for the purpose of relieving himself from the inconvenience of having his goods sold. E

COLTMAN, J.—I am of the same opinion. *Snowdon v. Davis* (2) is a full authority for our present decision. It was a very remarkable case. A writ of distringas had issued out of the Exchequer, directed to the sheriff of Berkshire, requiring him to distrain the inhabitants of the borough of New Windsor by their lands and chattels, and to answer the issues of such lands, so that they should appear to render an account as in an annexed schedule. The schedule referred to was, in substance: F

“Upon the inhabitants of the borough of New Windsor, for the deficiency of G. Dixon and J. Snow, collectors in the said borough, the several sums of £7 8s. 2d., and £74 2s.” G

Upon this writ the sheriff issued a warrant to his bailiff, the defendant, commanding him to distrain the inhabitants of New Windsor for the insufficiency of Dixon and Snow, for the sums of £7 8s. 2d., and £74 2s. The defendant seems to have misunderstood the effect of the warrant. It authorised him to levy issues of one shilling in the pound, whereas he thought it authorised the levy of the full amount of the sums therein mentioned, and he, accordingly, demanded those sums of the H

A plaintiff, an inhabitant of the borough, who paid them, obtaining from the defendant a receipt for so much money by him distrained under the writ. A second distringas issued under which the sheriff issued his warrant to the defendant to distrain upon Dixon and Snow £132 14s. 7d. Upon this latter warrant the defendant demanded of the plaintiff the £132 14s. 7d., and also £6 12s. 5d. for issues. The plaintiff refusing to pay, the defendant seized his goods; whereupon B the plaintiff paid both sums, the defendant giving him a receipt for the money as received under the writ, viz. "distringas, £132 14s. 7d., issues £6 12s. 5d." The first payment there was made under circumstances similar to those of the present case, and the court held, that, inasmuch as the money was paid under the terror of a distress to an officer apparently clothed with some sort of legal authority to receive it, the plaintiff was entitled to recover it back in an action for money had and received, notwithstanding it had been paid over by the officer to the sheriff, and by the sheriff to the Exchequer. C

If that case had stood upon the second warrant alone, I think it would have supported our judgment, for, I cannot see much difference between an actual seizure and a threat to seize. The case altogether is a distinct authority to show that the payment in the present case was not a voluntary payment.

D **CRESSWELL, J.**—I also am of opinion that this verdict ought to stand, and that the payment in question was not a voluntary payment, but a payment made under that sort of duress which entitles the party making it to bring an action to recover it back.

Two or three classes of cases have been adverted to in the course of the argument. E In *Marriot v. Hampton* (8), where money had been paid by the plaintiff to the defendants under the compulsion of legal process, and it was afterwards discovered not to have been due, it was held, that the plaintiff could not recover it back in an action for money had and received. LORD KENYON observed (7 Term Rep. at p. 269):

F "If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person."

Hamlet v. Richardson (4) is to the same effect. Another class of cases tending to the same result is that to which *Longridge v. Dorville* (5) and *Atlee v. Backhouse* (6) belong, where money paid for the settlement of a doubtful claim was held G not to be recoverable back.

The present case, however, does not range itself within either of those classes. Here the plaintiffs did not submit to the demand in the sense that would make the payment voluntary. The money was paid, not in satisfaction of the writ, but to induce the sheriff to refrain from putting into execution his threat to sell the property. It has been contended that there was no duress, but I think that what H the sheriff did clearly amounted to duress. He claimed to have seized the goods in time. The assignees asserted that there had been no seizure before the issuing of the fiat. The sheriff proceeded to make an inventory, insisted on his possession, and threatened to follow that up by a sale. If he had actually seized the goods at the time the payment was made, the payment would clearly have been a payment I on compulsion, and that which he did was quite sufficient to prevent its being considered a voluntary payment. I entirely agree with COLTMAN, J., in the application of the decision in *Snowdon v. Davis* (2) to the present case, and that a threat to seize and sell would have the same effect as an actual seizure. *Carter v. Carter* (7) is also an authority to show that this was not a voluntary payment. It was there held that a payment of a ground rent by the occupier in default of the mesne tenant is not the less a compulsory payment because the occupier makes it without waiting to be distrained upon. The only distinction between that case and the present is that there the taking by the superior landlord would have been lawful,

whereas here a seizure and sale by the sheriff would have been wrongful, because there had been no levy before the issuing of the fiat. It would be an odd thing to hold that money paid under a threat to do something that might rightfully be done may be recovered back, but that, where the threat is to do something that would be wrongful, the same result is not to follow. Moreover, I think the sheriff can hardly be allowed to say that he had not seized the goods, seeing that the officer throughout insisted that he was in possession.

The payment having been made, not in satisfaction of the writ, but to avert a sale, and with notice to the sheriff that his right to receive the money would be disputed, I think the plaintiffs are not precluded from maintaining this action.

ERLE, J.—I also think that this rule should be discharged, on the ground that the conduct of the sheriff's officer precludes the sheriff from contending that the payment was voluntary.

Rule discharged.

DE BEAUVOIR v. OWEN

[COURT OF EXCHEQUER CHAMBER (Patteson, Coleridge, Coltman, Maule, Cresswell, Erle, Wightman and Williams, JJ.), February 5, 1849, February 7, 1850]

[Reported 5 Exch. 166; 19 L.J.Ex. 177; 14 L.T.O.S. 490;
14 J.P. 174; 155 E.R. 72]

Limitation of Action—Landlord and tenant—Rent—Extinguishment of claim from effluxion of time—Recovery of arrears.

In any case where a claim to rent is extinguished by operation of a statute of limitations no arrears accruing due before the day on which the extinguishment takes effect can be recovered after that day.

Notes. The Real Property Limitation Act, 1939, was repealed by the Limitation Act, 1939, s. 31 (6) of which replaces the relevant provisions of s. 34 of the 1833 Act. The relevant period of limitation is now to be found in s. 4 of the 1939 Act.

Considered: *Zouche v. Dalbiac* (1875), L.R. 10 Exch. 172. Approved: *Irish Land Commission v. Grant* (1884), 10 App. Cas. 14. Applied: *Howitt v. Harrington*, [1893] 2 Ch. 497; *Jones v. Withers* (1896), 74 L.T. 572. Referred to: *Chichester v. Hall* (1851), 17 L.T.O.S. 121; *Purnell v. Roche*, [1927] All E.R.Rep. 560; *Bar-ratt v. Richardson*, [1930] All E.R.Rep. 748.

As to the application of the Limitation Act to land, advowsons and rent, see 24 HALSBURY'S LAWS (3rd Edn.) 228 et seq.; and for cases see 32 DIGEST (Repl.) 496 et seq. For the Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to:

- (1) *Gale v. Capern* (1834), 1 Ad. & El. 102; 3 Nev. & M.K.B. 863; 3 L.J.K.B. 140; 110 E.R. 1146; 32 Digest (Repl.) 457, 768.
- (2) *Margetts v. Bays* (1836), 4 Ad. & El. 489.
- (3) *Grant v. Ellis* (1841), 9 M. & W. 113; 11 L.J.Ex. 228; 152 E.R. 49; 32 Digest (Repl.) 500, 1087.
- (4) *Sir William Foster's Case* (1603), 8 Co. Rep. 64 b.
- (5) *Bevil's Case* (1583), 4 Co. Rep. 6a; 76 E.R. 860; 32 Digest (Repl.) 499, 1086.

- A (6) *James v. Salter* (1837), 3 Bing.N.C. 544; 5 Dowl. 4096; 3 Hodg. 70; 4 Scott, 168; 6 L.J.C.P. 171; 1 Jur. 185; 132 E.R. 520; 32 Digest (Repl.) 517, 1188.

Action of Replevin for a cart distrained in a barn in the parish of West Isley, Berkshire.

- B The defendant avowed the taking of the cart, goods, and chattels in the barn, and justly, because at the material time, the barn was parcel of a certain tenement called Hodcott Farm, and holden of the manor of Stratfield Mortimer, within the county of Berkshire by fealty, and the rent of 9s. yearly, to be paid at the feast day of St. Michael in every year, according to the old style and computation of time formerly used in this kingdom, of which manor the defendant before and at the material time was the owner, and thereof lawfully possessed; and because the plaintiff held and occupied the barn, with the appurtenances, at the material time and because the sum of £2 14s. of the rent aforesaid, for six years next before and ending at the feast day of St. Michael, which was in the year of Our Lord, 1844, according to the old style, was then due, in arrear, and unpaid, to the defendant; he, the defendant, well avowed the taking of the cart, goods, and chattels in the barn, so being parcel of the aforesaid tenement called Hodcott Farm, and holden of the manor of Stratfield Mortimer as aforesaid, and justly, as a distress for the aforesaid rent so then being due, in arrear, and unpaid to the defendant, according to the form of the statute in such case made and provided. Verification and prayer of judgment, and a return of the said cart, goods, and chattels, together with defendant's damages, costs, and charges in this behalf, according to the form of the statute in such case made and provided, to be adjudged to him.
- E Pleas in bar: first, that by reason of anything in the said avowry alleged, the defendant ought not to avow the taking of the said cart, goods, and chattels in the said declaration mentioned, because the plaintiff said that the barn was not parcel of the tenement called Hodcott Farm, as in the avowry alleged, concluding to the contrary. Second, the barn was not holden of the said manor, as in the avowry alleged. Third, that the defendant was not the owner and possessed of the manor, as in the avowry alleged. Fourth, that no part of the rent was due or in arrear, as in the avowry alleged. Issues thereon.
- F

- At the trial, at the Berkshire Assizes, 1846, before MAULE, J., it was proved for the defendant, that for the period between Michaelmas, 1784, and Michaelmas, 1824, the yearly rent in question had been paid for Hodcott Farm by its owners, or their tenants in possession, to the defendant and his ancestors, lords of the manor of Stratfield Mortimer, as held in free tenure of that manor. On Jan. 15, 1825, eight years' arrears, due at Michaelmas, 1824, were paid by the then occupier, by the direction of his landlord, to the defendant's agent. Repeated applications on behalf of the defendant were afterwards made for payment of subsequent arrears, but without success; and on May 15, 1845, the defendant distrained on the plaintiff's cart, while standing in a barn, shown to be parcel of Hodcott Farm, for six years' arrears, due at Michaelmas, 1844. The defendant tendered evidence to prove the existence of the manor, and its having been in his possession and that of his ancestors, for more than sixty years, when the plaintiff's counsel interposed, contending that "the right and title" of the defendant to the rent was extinguished by lapse of time, under the operation of ss. 2, 3 & 34 of the Real Property Limitation Act, 1833, which transferred the estate in the rent to the plaintiff.
- G
- H

- I For the defendant it was answered, first, that the twenty years mentioned in ss. 2 and 3 began to run, not from the time when the last payment of rent was made, but from Michaelmas, 1825, till which time no rent was due, so that the right to distrain or sue for any arrear of the rent "first" accrued to the defendant then, viz., within twenty years before the distress was taken; and, secondly, that if it did not, the plaintiff should have pleaded specially in bar, that the right to make the distress did not first accrue to the defendant within twenty years next before the distress was in fact made, or in the terms used in *James v. Salter* (6). MAULE, J., expressed his opinion in favour of the defendant on the first point, and was inclined to think

that, if the statute did in fact operate as a bar, it should have been pleaded. He also noticed that s. 34 did not provide anything as to arrears of the rent extinguished by it. He directed a verdict for the defendant, with leave to move to enter a verdict for the plaintiff for £4 4s. (the costs of the replevin bond). Verdict for the defendant for £2 14s. the amount of six years' arrears, the cart being found to be of the same value. A

The plaintiff subsequently moved, pursuant to leave reserved, to enter a verdict. The court entered a verdict accordingly, but recommended a special verdict in order that the opinion of a court of error might be taken. The case was afterwards argued in this court. B

Cur. adv. vult.

Feb. 7, 1850. **PATTESON, J.**, delivered the following judgment of the court.—This was the case of a distress made by the defendant for the arrears of an ancient quit-rent issuing out of a tenement held of the defendant as lord of the manor of Isley, Stratfield Mortimer, by a fealty and 9s. rent. Such a rent is clearly within ss. 2, 3 and 34 of the Real Property Limitation Act, 1833, and the question turns entirely on the construction to be put on those sections. C

The last payment was made on Jan. 25, 1825, for rent due on Oct. 11, 1824. The distress in respect of which this action is brought, was made on May 13, 1845. If the twenty years mentioned in ss. 2 and 3 had then expired, the right and title of the defendant to the rent had become extinguished by s. 34, and the tenement was no longer held of the manor at a rent of 9s. per annum. The question, therefore, was properly raised on the issue of non tenuit, without pleading the lapse of twenty years specially. Notwithstanding the saving for disabilities in s. 16, the necessity to plead the Statute of Limitations applies to cases where the remedy only is taken away, and in which the defence is by way of confession and avoidance—not where the right and title to the thing is extinguished and gone, and the defence is by denial of the right. D

With respect to the argument that the case falls within the reason which has been sometimes given for requiring the Statute of Limitations to be pleaded—namely, that the exception in favour of persons under disability might not be rendered useless, and they taken by surprise at the trial by finding the Statute of Limitations then first relied on—it is to be observed that the true reason for requiring the statute to be pleaded is that it confesses and avoids the declaration, and, therefore, is not comprehended within any plea which merely denies the whole or any part of the declaration: see *Gale v. Capern* (1), and *Margetts v. Bays* (2). The general rule that matter in confession and avoidance could not be given in evidence under a plea merely negative was subject to an exception, real or apparent, in actions of assumpsit, in which many matters which might have been pleaded in confession and avoidance were, before the new rules, allowed to be shown under the general issue; and probably the reason for requiring the Statute of Limitations to be pleaded in assumpsits, and not allowing it to be comprehended among those matters in confession and avoidance which might be shown under the general issue, may have been the inconvenience suggested in this argument. E

However, in the present case the defence is, not that the cause of action did indeed accrue, but not within the time of limitation, but that the tenure alleged in the avowry was extinguished and put an end to before the time of the distress. Great difficulties undoubtedly present themselves to our minds in endeavouring to ascertain the meaning of the legislature in ss. 2 and 3 of the Real Property Limitation Act, 1833, and those difficulties have been pressed on us by counsel with great force and ability; and we feel that it is impossible by any construction to avoid some apparent incongruity; but, on the best consideration which we can give to the case, we are compelled, by the express words of s. 3, to hold that the construction put on them by the court below is the correct one. F

The defendant was himself the person who received the last rent, and who remained entitled thereto. Taking such of the words of ss. 2 and 3 as are applicable to this case, we find it enacted that no person shall make a distress to recover G

A any rent but within twenty years next after the time at which the right to make such distress shall have first accrued to the person making the same. The right to make such distress shall be deemed to have accrued at such time as is thereafter mentioned, that is to say, when the person claiming such rent shall have been in receipt of such rent, and shall while entitled thereto have discontinued such receipt, then such rent shall be deemed to have first accrued at the last time at which the rent was so received. In this case the "last time" was on Jan. 25, 1825, more than twenty years before the distress in question was made. It is obvious, that as the rent due on Oct. 11, 1824, had been paid, and that no further rent was due until Oct. 11, 1825, the right to make a distress by the express words of the statute must be deemed to have first accrued, and the twenty years, therefore, to have commenced many months before any rent which could be distrained for was due; and we are asked to put some construction on the words which shall avoid this apparent absurdity. We cannot derive any assistance from the other words of s. 3, namely, "at the time of such dispossession or discontinuance of possession," for they are not applicable to the rent, but to land only; and, therefore, unless we give to the words "at the last time at which such rent was so received," their plain and direct meaning, we must read them as if they were "at the first time at which such rent being due has not been received," a meaning of which the words as they stand in the statute are not capable.

One of the arguments adduced to guide us to some such construction was that by adhering to the literal meaning of the words of the statute we should be obliged to hold that, if a lease for fifty years, rendering rent, was made, and no rent received for twenty years, all right to the rent for the remaining thirty years would be extinguished, and yet the right to have the land at the end of the fifty years would remain. But that is not so, for these sections do not apply to leases on which a conventional rent was reserved, as was held by the Court of Exchequer in *Grant v. Ellis* (3). The two main objections to the construction adopted by the court below are, first, that it requires the limitation of twenty years against a right of action or distress to begin, in the case of rent, from a time before the right to bring the action or distrain has accrued, which, it was argued, was something so anomalous and unreasonable that it raised a presumption against such being the real intention of the Act; and, secondly, that a person coming under disability between the time when the right of action is deemed to have first accrued, and the time when it actually did first accrue, would not be protected by the saving in s. 16.

G It may be convenient, with a view to these objections, to consider what was the law respecting limitations of claims to real property, particularly of rent, before the passing of the Act in question. Those limitations depended on the Limitation Act, 1540, and the Limitation Act, 1623. The latter statute limited the entry, and consequently ejectment, to twenty years after the right and title of entry accrued and limited formedons in descender, or remainder, or reversion, to twenty years after the title and cause of action first descended or fell. This statute had no application to distress, or to any action of rent, except the action of formedon. Real actions in general, and distress for rent, were limited at the time of the passing of the Real Property Limitation Act, 1833, as far as they were subject to limitation by the Limitation Act, 1540. Sections 1, 2 and 3 of this Act limited the time for bringing writs of right on the seisin of an ancestor to sixty years, possessory actions on the seisin of the ancestors to fifty years, and all actions on the seisin of the demandant to thirty years, respectively; each of these terms began from the time of the seisin of the ancestors or the demandant, and not from the time of the first accruing of the action; and in case of rent, the seisin to maintain such an action must be actual seisin by receipt of rent: *LITTLETON*, ss. 235 and 465. So that under this statute the limitations for real actions for recovering any rent ran from the last receipt, and not from the accruing of the cause of action. By s. 4 of the Limitation Act, 1540, it is provided:

"that no person shall hereafter make any avowry or cognisance for any rent, suit, or service, and allege any seisin of any rent, suit, or service, in the same avowry or cognisance, in the possession of his or their ancestors, or predecessor, or predecessors, or in his own possession, or in the possession of any other, whose estate he shall pretend or claim to have above fifty years next before the making of the said avowry or cognisances."

By s. 6, if the avowant could not prove "the seisin within the time appointed, if the same seisin was traversed, he was barred; and it was by these sections only that the time for making the distress for rent, was limited down to the time of the Real Property Limitation Act, 1833.

On these sections it was held, that they did not extend to a rent created by deed, or reserved on a gift in tail, as to which there was no term of limitation: *Sir William Foster's case* (4). It was also determined that these sections did not require seisin in fact, but would be satisfied by seisin in law which, before the statute, was sufficient to enable the person so seised to distrain, although not to maintain an assize; for which seisin, in fact, by payment, was necessary. But whether the seisin was one, in fact, as by payment of rent, or in law, as by attornment, or by actual seisin of some other service than the rent, as fealty, or by the acquisition of an estate which authorised a distress without attornment, as by devise, the time of limitation ran not from the accruing of the right to distrain, but from the time of the seisin in fact or in law, which time might be before the right to distrain accrued: *Bevil's Case* (5); LITTLETON, ss. 565 and 585; and see the Administration of Justice Act, 1705, ss. 9 and 10 [repealed by Law of Property Act, 1925].

It may also be remarked, that in appointing the seisin as the point at which the limitation should begin, the Limitation Act, 1540, follows the still older Statute of Limitations, the Statute of Merton, 1235 (20 Hen. 3, c. 8), and the Statute of Westminster, 1275 (3 Edw. 1, c. 29), fixing the limitation from the time of seisin in real actions, and that of the second Statute of Westminster, 1285 (13 Edw. 1, c. 2), limiting the time for the distress for service in like manner. The present Act, therefore, in directing the limitation to run from the time before the right accrued, would not be adopting any new principle, but would be conformable to the law which prevailed from the time of Henry 3, until the present. The form, indeed, in which this intention is expressed, is somewhat strange and paradoxical, in directing a right of action to be deemed to have first accrued, when none has accrued at all. But the words of the Act are certainly capable of this sense, which is, indeed, the most obvious one; and a similar arbitrary use of language is not without example in recent legislation; and the substance and effect of the provision in pointing out the time from which the limitation is to run, is nothing more than might be expected, by looking to the law as it had long existed, and precedents of legislation on the subject.

There does not, therefore, seem to be in this respect such a contradiction between the probable intent of the legislature and the construction of the words of the Act adopted by the Court of Exchequer as makes it necessary to have recourse to a forced construction to reconcile the words and the intent. The inconvenience of a person coming under disability after the receipt of rent and before the right of action accrued was strongly pressed, and is indeed more substantial. However, it is to be observed that the legislature, in passing this Act, has, in much more important instances, left the right of persons under disability unprotected, inasmuch as s. 42, which bars the recovery of arrears after six years, has no proviso, in favour of such persons. The circumstance, therefore, of their not being perfectly protected by s. 16 does not afford a ground for presuming against a construction which involves that consequence.

We do not think it necessary to review some other arguments and possible cases which were put at the Bar, nor to pursue the reasoning on them which will be found in the report of this case in 16 M. & W. 547. We proceed on the words of ss. 2 and

A 3 of the statute which are plain, and to which we do not feel ourselves justified in giving any other meaning than that which was given to them by the court below. The judgment, therefore, must be affirmed.

Appeal dismissed.

B

C

R. *v.* LONDON AND NORTH WESTERN RAIL. CO.

[COURT OF QUEEN'S BENCH (Lord Campbell, C.J., Patteson, Wightman and Erle, JJ.), April 30, May 7, 1851]

[Reported 16 Q.B. 864; 1 E. & B. 199, n.; 6 Ry. & Can. Cas. 634; 20 L.J.Q.B. 399; 17 L.T.O.S. 92; 15 J.P. 642; 15 Jur. 873; 117 E.R. 1113]

D

Mandamus—Statutory right—Enforcement—Right to acquire land compulsorily—Expiration of right before issue of mandamus.

Mandamus will not lie to command an impossible thing, even though the impossibility may have arisen from the laches of the respondents to the application for the writ. Accordingly, the fact that compulsory powers, vested in a railway company, to acquire land had expired was an answer to a mandamus to command the purchase of land necessary for constructing a branch line.

E

Notes. Followed: *R. v. South Devon Rail. Co.* (1851), 17 L.T.O.S. 142. Considered: *R. v. York, Newcastle and Berwick Rail. Co.* (1851), 16 Q.B. 886; *R. v. Dundalk and Enniskillen Rail. Co.* (1861), 5 L.T. 25. Referred to: *R. v. Amergate Rail. Co.* (1853), 1 E. & B. 372; *Shackell v. West* (1859), 8 W.R. 22.

F

As to conditions precedent to the issue of mandamus, see 11 HALSBURY'S LAWS (3rd Edn.) 104–109; and for cases see 16 DIGEST (Repl.) 318 et seq.

Cases referred to:

G

(1) *R. v. Tendring Lexden and Winstree Sewers Comrs.* (1727), 2 Ld. Raym. 1470; 92 E.R. 461; sub nom. *R. v. Essex Sewers Comrs.*, 2 Stra. 763; 41 Digest 57, 419.

(2) *R. v. Round* (1835), 4 Ad. & El. 139; 1 Har. & W. 546; 5 Nev. & M.K.B. 427; 3 Nev. & M.M.C. 307; 111 E.R. 740; 16 Digest (Repl.) 384, 1708.

(3) *R. v. Williams* (1828), 8 B. & C. 681; 3 Man. & Ry.K.B. 402; 2 Man. & Ry.M.C. 32; 7 L.J.O.S.M.C. 46; 108 E.R. 1196; 16 Digest (Repl.) 382, 1672.

H

(4) *R. v. Penrice* (1745), 2 Stra. 1235; 93 E.R. 1153; 16 Digest (Repl.) 380, 1653.

(5) *R. v. Birmingham and Gloucester Rail. Co.* (1841) 2 Q.B. 47; 2 Ry & Can. Cas. 694; 1 Gal. & Dav. 324; 10 L.J.Q.B. 322; 6 Jur. 146; 114 E.R. 21; 36 Digest (Repl.) 321, 204.

Also referred to in argument:

Blakemore v. Glamorganshire Canal Co. (1832), 1 My. & K. 154, L.C.; 38 Digest (Repl.) 439, 930.

I

R. v. Cumberworth (Inhabitants) (1832), 3 B. & Ad. 108; 1 L.J.M.C. 86; 110 E.R. 40; 26 Digest (Repl.) 325, 431.

R. v. Edge Lane (Inhabitants) (1836), 4 Ad. & El. 723; 1 Har. & W. 737; 6 Nev. & M.K.B. 81; 3 Nev. & M.M.C. 527; 5 L.J.M.C. 91; 111 E.R. 959; 26 Digest (Repl.) 395, 1021.

R. v. Eastern Counties Rail. Co. (1840), 10 Ad. & El. 531; 1 Ry. & Can. Cas. 509; 2 Per. & Dav. 648; 8 L.J.Q.B. 340; 113 E.R. 201; 16 Digest (Repl.) 373, 1524.

- Cohen v. Wilkinson* (1849), 12 Beav. 125; 5 Ry. & Can. Cas. 741; 18 L.J.Ch. 378; 13 L.T.O.S. 377; 13 Jur. 641; 50 E.R. 1008; 38 Digest (Repl.) 282, 2. A
- R. v. Severn and Wye Rail. Co.* (1819), 2 B. & Ald. 646; 106 E.R. 501; 16 Digest (Repl.) 339, 1172.
- Carlisle v. South Eastern Rail. Co.* (1850), 13 Beav. 295; 6 Ry. & Can. Cas. 670; 19 L.J.Ch. 477; 16 L.T.O.S. 357; 14 Jur. 515; 51 E.R. 114; on appeal, 1 Mac. & G. 689, L.C.; 36 Digest (Repl.) 282, 3. B
- R. v. Luton Roads Trustees* (1841), 1 Q.B. 860; 1 Gal. & Dav. 248; 10 L.J.Q.B. 263; 113 E.R. 1361; 16 Digest (Repl.) 330, 1083.
- R. v. Woods and Forests Comrs., Ex parte Budge* (1850), 15 Q.B. 761; 19 L.J.Q.B. 497; 15 L.T.O.S. 561; 15 Jur. 35; 117 E.R. 646; 16 Digest (Repl.) 345, 1231.
- R. v. Clerkenwell Improvement Comrs.* (1848), 12 L.T.O.S. 241; 11 Digest (Repl.) 221, 869. C
- R. v. Birmingham and Oxford Junction Rail. Co.* (1851), 15 Q.B. 634; 6 Ry. & Can. Cas. 628; 117 E.R. 599; sub nom. *Birmingham and Oxford Junction Rail. Co. v. R.*, 20 L.J.Q.B. 304, Ex. Ch.; 11 Digest (Repl.) 184, 513.

Demurrer to the return to a writ of mandamus commanding the defendants, the London and North Western Rail. Co., to purchase the lands necessary for making one of their branch railways, and to make and complete the same, alleging a demand on June 18, 1849. The return thereto set forth (among other things) that by the special Act of Parliament authorising the construction of the line in question, the defendants' compulsory powers for taking land, had expired before the day on which the writ was tested, namely on July 27, 1849. The Crown demurred to the return. D E

Knowles for the Crown.

Sir Fitzroy Kelly for the defendants.

Cur. adv. vult.

May 7, 1851. **LORD CAMPBELL, C.J.**, delivered the following judgment of the court.—We are of opinion that the defendants are entitled to our judgment. The objection that the powers of the defendant company for the compulsory purchase of land had expired before the writ of mandamus issued, or was applied for, seems to us to be clearly decisive. We are not called on, therefore, to decide the more doubtful questions whether there lay on the defendant company an obligation to make and complete the road, which might have been enforced by mandamus, or whether the return sufficiently shows a want of funds for that purpose; or how far this want of funds would be an answer. F G

This writ of mandamus, which is tested April 22, 1850, commands the company immediately to purchase the lands necessary for making, constructing, executing, and completing the Birtle Branch railway, and extension thereof, and to make, construct, and complete the same Birtle Branch railway, and extension thereof, in pursuance of the powers and authorities contained in the recited Act of Parliament. This special Act (9 & 10 Vict., c. cclxii) which received the royal assent on July 27, 1846, enacts, by s. 18, H

“that the powers of the company for the compulsory purchase of land for the purposes of this Act, shall not be exercised after the expiration of three years from the passing of this Act”;

and, by s. 20, that the I

“works hereby authorised shall be completed within five years from the passing of this Act and, on the expiration of such period.”

the powers granted to the company for executing the same shall cease to be exercised except as to so much of the same respectively as shall have been completed. The power effectually to obey the command in the writ having expired in July,

A 1849, ought we, in the Queen's name, to have given that command in April, 1850? On full consideration, we think not.

A writ of mandamus supposes the required act to be possible and to be obligatory, when the writ issues. Generally speaking, the writ suggests acts showing the obligation and the possibility of fulfilling it and a return pursuing the suggestion and traversing it is good: *R. v. Essex Sewers Comrs.* (1); *R. v. Round* (2); *R. v. Williams* (3); *R. v. Penrice* (4). The supposed obligation here is founded on public Acts of Parliament, which are cited in the return and of which we are bound to take judicial notice. If they show that the company have no longer the power to do the act commanded, the writ is bad. What power have the defendants now to purchase the lands necessary for making a line of railway of several miles in length? On the return to a peremptory mandamus going as is prayed, no excuse can afterwards be made and the defendants must implicitly and fully obey it and abide any penalty attached to it. Supposing that they were bound to pay any price which might be demanded, however exorbitant, can it be reasonable and would it be supposed that all the landowners along the line would willingly sell at any price and that none of them are under disability to sell?

Counsel for the Crown contended that the return should have shown an application to all the landowners and a refusal by them; but such a return and the issues arising from it, would be highly inconvenient; and if all had promised to sell without a binding contract having been entered into, they might afterwards have changed their minds, and the defendants might be subject to perpetual imprisonment for not doing what the law forbade them to do. It was then said that they had violated the Acts of Parliament by not duly completing the whole of the railway and that they ought not to be allowed to make objection which amounts to taking advantage of their own wrong. However, assuming that they were under the obligation contended for and that they are liable to be punished by indictment for a breach of it, how can we say that the remedy now is to command them to do what they have no longer the power to do, however obedient they may be inclined to be?

Reliance was very properly placed on *R. v. Birmingham and Gloucester Rail. Co.* (5), which, at first sight, seems an authority in favour of the mandamus; but, when properly explained, it will be found, on this point, to be entitled to little weight. The great struggle there was whether a turnpike road, when restored, must be made as wide as it formerly was. There the notice to do the act had been given as nearly as possible to the time of the act to be done, namely, to restore the turnpike road to its former width which apparently required no purchase of land either voluntary or compulsory. In the present case the prosecutors were guilty of laches by giving no notice to do the act until the power of doing it was nearly expired and not applying for a mandamus until a considerable time after the power expired. In the former case the company might reasonably have been expected to be able to do the act without powers for compulsory purchase, but in the present case this is a mere impossibility. We, therefore, think, as much on principle as authority, our judgment must be for the defendants.

Judgment for defendants.

A

WRIGHT v. MILLS

[COURT OF EXCHEQUER (Pollock, C.B., Martin, Bramwell and Watson, BB.),
May 12, 1859]

[Reported 4 H. & N. 488; 28 L.J.Ex. 223; 33 L.T.O.S. 152;
5 Jur.N.S. 771; 7 W.R. 498]

B

Time—Judicial act—Dating from earliest moment of day on which done.

The defendant died about half-past nine in the morning before the judgment office was open. As soon as the office was opened on that day the plaintiff signed judgment. On a rule obtained to rescind an order of the judge setting aside the judgment as irregular,

C

Held: the signing of the judgment was a judicial act which must be considered to have been done at the earliest period of the day accordingly the death of the defendant before the office opened did not invalidate the judgment, and the rule must be made absolute.

R. v. Edwards (1) (1853), 9 Exch. 32, 628, applied.

Notes. Considered: *Marshall v. James* (1874), L.R. 9 C.P. 702. Distinguished: *Clarke v. Bradlaugh* (1881), 7 Q.B.D. 151. Considered: *Tabernacle Permanent Building Society v. Knight*, [1892] A.C. 298; *Re Warren, Wheeler v. Mills*, [1938] 2 All E.R. 331. Referred to: *Migotti v. Colvill* (1879), 4 C.P.D. 233.

D

As to the rules applicable to fractions of a day in respect of judicial acts, see 37 HALSBURY'S LAWS (3rd Edn.) 102; and for cases see 45 DIGEST (Repl.) 271, 272.

E

Cases referred to:

- (1) *R. v. Edwards* (1853), 9 Exch. 32; 1 C.L.R. 706; 23 L.J.Ex. 42; 21 L.T.O.S. 302; 156 E.R. 14; affirmed sub nom. *Edwards v. R.* (1854), 9 Exch. 628; 2 C.L.R. 590; 23 L.J.Ex. 165; 23 L.T.O.S. 39; 18 Jur. 384; 2 W.R. 333; 156 E.R. 268, Ex. Ch.; 45 Digest (Repl.) 270, 388.
- (2) *Shelley's Case* (1581), Moore K.B. 136; 1 Co. Rep. 936; 3 Dyer, 373b; 1 And. 69; Jenk. 249; 72 E.R. 490; 45 Digest (Repl.) 269, 360.
- (3) *Chick v. Smith* (1840), 8 Dowl. 337; sub nom. *Clinch v. Smith*, 4 Jur. 86; 45 Digest (Repl.) 270, 392.

F

Also referred to in argument:

- R. v. Earl* (1718), Bunb. 33; 145 E.R. 585; 5 Digest (Repl.) 897, 7457.
R. v. Crump and Hanbury (1670), cited in Park. at p. 126; 2 Show. at p. 481; 145 E.R. 733; 45 Digest (Repl.) 271, 402.
Clayton's Case (1585), 5 Co. Rep. 1 a; 77 E.R. 48; 45 Digest (Repl.) 255, 220.
Giles v. Grover (1832), 9 Bing. 128; 6 Bli.N.S. 277; 1 Cl. & Fin. 72; 2 Moo. & S. 197; 6 E.R. 843, H.L.; 44 Digest (Repl.) 245, 681.
Thomas v. Desanges (1819), 2 B. & Ald. 586; 106 E.R. 480; 5 Digest (Repl.) 867, 7284.

H

Rule Nisi obtained by the plaintiff to rescind an order of WILLIAMS, J., made on the application of the personal representative of the defendant, setting aside a judgment signed by the plaintiff, and execution upon it.

The ground of the order was that the defendant had died about half-past nine in the morning of May 28, and the judgment had been marked the same day, immediately after the office opened, or about a quarter-past eleven.

I

Lush, Q.C., for the defendant, showed cause against the rule.

Malcolm for the plaintiff, supported the rule.

POLLOCK, C.B.—It appears that the defendant in this case died about half-past nine on the morning of May 28, before the judgment office was opened. As soon, however, as the office opened, the plaintiff signed judgment. WILLIAMS, J., made an order setting aside the judgment; and on the application of counsel for the

A plaintiff we granted a rule to show cause why that order should not be rescinded. Counsel showing cause against the rule contends that the judgment was improperly signed, the defendant being dead at the time.

All the authorities on the subject are collected in *R. v. Edwards* (1), and the decision of this court, which was afterwards confirmed in the Exchequer Chamber, lays down the rule on which this case must be decided. In that case the question B was whether a fraction of a day could be considered with reference to the time of issuing an extent and an adjudication in bankruptcy. This court held (MARTIN, B., dissenting) that the right of the Crown must prevail, and that an act of the Crown must prevail, although posterior in point of time to an act done by a subject in an earlier period of the day. That decision was confirmed by the unanimous judgment of the Court of Exchequer Chamber; but in the judgment which was delivered by C COLERIDGE, J., the maxim is not based on the ground that the right of the Crown should prevail, but on the broad principle that, whether between the Crown and the subject, or between subject and subject, judicial acts must be considered to have taken place at the earliest possible period of the day on which they are done, and take precedence of all other acts which may occur on the same day, though they may precede it in point of time marked by hours and minutes. It was admitted in D that case that the court will inquire at what time a party did a particular act, and take notice of the hour of the day; but the rule is laid down otherwise as regards judicial proceedings. *Shelley's Case* (2) is there cited, where a recovery suffered on the first day of the term was held good, although the party had died that morning before the court sat.

I consider *R. v. Edwards* (1) is a direct authority which binds us, and it decides E that when a judicial proceeding takes place it must be considered to have occurred at the earliest period of the day. As the signing the judgment in this case was a judicial act, it must be considered to have been done at the earliest period of the day; and, therefore, the death of the party before the office was opened does not invalidate the judgment. Under the old system, a judgment, if signed in term, was dated from the first day of term, and if signed out of term, from the first day of the F preceding term, and in such a case the death of the party before the judgment was actually signed would not affect it. The Statute of Frauds altered the law in this respect, to prevent lands which had been sold being retrospectively effected by a judgment which had no existence when the sale took place. The Statute of Frauds provides that a judgment shall operate only from the day on which it was signed, and provides that the day on which it is signed shall be marked; but it makes no G distinction between the hours of the same day.

In *Chick v. Smith* (3), a *fi. fa.*, issued after the death of the party, was set aside, and we are informed that it was on the authority of that case, WILLIAMS, J., made the order now in question. It is suggested such a decision is more consistent with common sense. It is, of course, desirable that the decision of the court should be as consistent as possible with plain common sense; but it is impossible for us to H overrule what is the established practice, and what must be taken to be the law of the land as affecting the right of suitors; if the plaintiff satisfies us that by the practice of the courts a judicial act is considered as being done at the earliest moment, and is not affected by anything done in the course of the same day, it is the right of the suitor that we should decide in accordance with the established practice. It may be said that our decision is founded on what is called a fiction, I but the effect of it is to prevent and render unnecessary inquiries as to the exact moment of time at which acts occurred, which would very often be extremely difficult or impossible. The rule is now clear that judicial proceeding shall take precedence, and shall not be defeated by any mere act of the party. It appears to me that this rule must be made absolute, on the ground that the judgment was well signed, the defendant having been alive on the day on which it was signed.

MARTIN, B.—I am of the same opinion. When the rule was moved for, I thought the case was clearly governed by *R. v. Edwards* (1).

BRAMWELL, B.—I am of the same opinion. That case must decide; the only principle, however, on which the rule can be supported is, that we must give judicial acts precedence. A

WATSON, B., concurred.

Rule absolute.

B

SOMES AND OTHERS v. BRITISH EMPIRE SHIPPING CO. C

[HOUSE OF LORDS (Lord Cranworth, Lord Wensleydale and Lord Chelmsford), July 7, 1860]

[Reported 8 H.L.Cas. 338; 30 L.J.Q.B. 229; 2 L.T. 547;
6 Jur.N.S. 761; 8 W.R. 707; 11 E.R. 459] D

Lien—Repairer's lien—Costs of repair unpaid—Retention of chattel repaired—Right of repairer to expenses of detention.

No person who, having a lien on a chattel, chooses to keep it for the purpose of enforcing his lien can make any claim against the proprietor of the chattel for the expenses of its detention. The respondents, who were shipowners, sent a ship to the appellants, a firm of shipwrights and dock owners, to be repaired on the terms of paying a certain rate for materials used and from 120 to 150 guineas for the cost of the graving dock for the job. When the ship was repaired the respondents delayed to pay the cost, and the appellants sent notice that they would claim £21 per day for the use of the dock until the money was paid and the ship removed. In an action by the respondents to recover the sum of £567, being the dock charges after the repairs were completed, E

Held: no person had a right to add to his lien on a chattel a charge for keeping it until the debt was paid, and, therefore, the appellants had no right at common law, nor was it a term to be implied in the contract, to be paid a sum per day while the ship was detained by them until the price of repairs was paid. F

Notes. Considered: *Miedbrodt v. Fitzimon*, *The Energie* (1875), 32 L.T. 579. Applied: *Bruce v. Everson* (1883), Cab. & El. 18. Distinguished: *Twyford v. Manchester Corpn.*, [1946] 1 All E.R. 621. Referred to: *Ivens v. Great Western Rail. Co.* (1889), 53 J.P. 148; *Booth Steamship Co., Ltd. v. Cargo Fleet Iron Co.*, [1916-17] All E.R.Rep. 938; *Sorrell v. Paget*, [1949] 2 All E.R. 609. G

As to extent of lien, see 24 HALSBURY'S LAWS (3rd Edn.) 167; and for cases see 32 DIGEST (Repl.) 295. H

Cases referred to in argument:

Judson v. Etheridge (1838), 1 Cr. & M. 743; 3 Tyr. 954; 2 L.J.Ex. 300; 149 E.R. 598; 32 Digest (Repl.) 289, 334.

Scarfe v. Morgan (1838), 4 M. & W. 270; 1 Horn & H. 292; 7 L.J.Ex. 324; 2 Jur. 569; 150 E.R. 1430; 32 Digest (Repl.) 272, 183. I

Chase v. Westmore (1816), 5 M. & S. 180; 105 E.R. 1016; 32 Digest (Repl.) 260, 65.

Appeal by the defendants, *Somes Bros.*, from a decision of the Court of Exchequer Chamber (SIR ALEXANDER COCKBURN, C.J., WILLIAMS and CROWDER, JJ., BRAMWELL, WATSON and CHANNELL, BB.), reported E.B. & E. 367, affirming a decision of the Court of Queen's Bench (LORD CAMPBELL, C.J., WIGHTMAN, ERLE and CROMPTON, JJ.), reported E.B. & E. 353, on a Special Case stated by order of

A ERLE, J., in an action for money had and received in which the plaintiffs, the British Empire Shipping Co., claimed to recover back the sum of £567 paid under protest, and which action except as to that item was referred to arbitration.

The respondents, the British Empire Shipping Co., being the owners of the ship *British Empire*, negotiated with the appellants, *Somes Bros.*, who were shipwrights, having a dock and shipyard at Blackwall, for the repair of the ship.

B In answer to the inquiries of the respondents the appellants stated the several prices that would be charged for the materials employed in the repair of the ship, and that the cost of the use of their graving dock for the job would be from 120 to 150 guineas. The respondents on Sept. 1, 1856, sent the ship to be repaired on the terms stated by the appellants, who accordingly took the ship into their dock, and by the orders of the company executed extensive repairs of the ship.

C The repairs were complete, and the ship would have been ready to go out of dock in the early part of November, 1856, but the respondents were not then ready to pay the appellants' charges for the repairs. The respondents offered to give the appellants bills of exchange for their charges for the repairs, which offer was declined, and with a view to enabling the respondents to propose some other way of payment, they requested the appellants to send them a proximate account of what would be coming due to the appellants, including a charge for the hire of the dock, which account was sent.

Some negotiation then took place with reference to the payment of the appellants' charges, in the course of which the appellants informed the respondents that they should expect the amount of their charges to be either paid in cash or secured by a mortgage of the ship before the ship left their dock. The respondents, not having

E made any arrangements for paying the appellants' charges, and not having granted the mortgage, the appellants on Nov. 25, 1856, gave notice to the respondents that they should charge them £21 a day for the hire of the dock. It was admitted that this sum was a reasonable charge, but if too much, it might be reduced by the arbitrator. The respondents then proposed to refer the amount of the charges to arbitration. Such proposal the appellants declined, and the respondents promised to grant a mortgage, but did not do so. They also promised to pay the charges of the appellants in cash, which was not done.

On Dec. 18, 1856, Cotterill & Sons, the respondents' solicitors, sent the following letter to the appellants:

G "Gentlemen,—On behalf of the British Empire Shipping Co. (Ltd.), we hereby give you notice with reference to your claim for repairs done upon and to the ship *British Empire*, and your refusal to deliver up the said ship, that we, on behalf of the said company, are prepared to pay you whatever sum you demand under protest, and for the sole purpose of obtaining delivery and possession of the said ship, and that the said company will take such steps as they may be advised to recover re-payment of such sum as may be so paid or any part thereof, as also such damages as the said company may have sustained or may hereafter sustain by reason of your retention of, and refusal to deliver up, the said ship. Awaiting to hear from you when you will be prepared to deliver up the said ship and the amount you claim. We are, etc.

COTTERILL & SONS."

The same day the following reply was sent:

I "Dear Sirs,—In reference to your note this day delivered to my clients, Messrs. *Somes*, I beg to reiterate to you that they have been always willing and ready to deliver up the vessel upon payment of their just demand, and they have afforded you every opportunity for settlement in their power. The full amount of their claim being partially dependent upon the period the ship may remain in the dock, their account requires of course to be made up accordingly. I understand that the tides will not suit for undocking this large vessel before Wednesday next, and you shall be furnished tomorrow with the total amount which will be claimed as due to that time, including the charge for undocking,

etc., and to ensure due preparations being made for that day, in case the tide will suit, it will be expedient for your clients to pay the amount not later than Monday next.—I am, etc.,

EDW. SAXTON."

On Dec. 19 a complete account of the charges was sent, amounting to £8,816 15s. 2d. In this account were contained the following charges :

"Hire of dry dock	£150	0	0
And dock dues Nov. 27 to Dec. 29, 27 days, at £21	567	0	0"

The respondents, on Dec. 22 paid the sum of £8,816 15s. 2d. comprising these items, and the ship was taken out of the appellants' dock on Dec. 24.

The present action was brought by the respondents for money had and received, to recover back so much of the sum of £8,816 15s. 2d., as was in excess of the sum for which the appellants, *Somes Bros.*, had a right to detain the ship; the respondents contending that the appellants' charge for the work was excessive, and that they had no right to detain the ship for anything but what was really due on a quantum meruit for work, labour, and materials. By order of *ERLE, J.*, a Case was stated as to the allowance or disallowance of the item of £567, claimed in the account for the occupation of the dock from Nov. 27 to Dec. 24, during which period the ship was detained under the appellants' claim of lien. The respondents contended that the appellants had no right to detain the ship for any expense incurred or inconvenience sustained by the appellants when enforcing their lien in the circumstances described, and that what was paid in respect of this item to obtain possession of the ship was money extorted from them by the appellants. They further contended that even if the appellants were entitled to detain the ship for something in respect of this item £21 a day was excessive in amount. Nevertheless, for the purpose of this Case, and for such purpose only, it was to be assumed that the sum of £21 per day was a reasonable charge. The question for the opinion of the court was whether the appellants were entitled to retain the sum paid to them in respect of this item of £567 on the above assumption.

The Court of Queen's Bench was of opinion that the appellants were not entitled to retain the sum of £524 9s. 6d. The Court of Exchequer Chamber affirmed this judgment. The appellants appealed.

M. Smith, Q.C., and *T. Jones* for the appellants.

Bovill, Q.C., and *Honyman* for the respondents.

LORD CRANWORTH, stated the facts, as set out above, and continued: The question in this case is whether, on the whole of the correspondence and that which took place before the repairs were completed as well as that which took place afterwards, it is a fair inference that there was a contract on the part of the respondents to pay a reasonable sum for the use of the dock, provided the ship was left there after the repairs were completed. It was admitted that although, where goods are delivered to have any work done on them—and of course, among other things, a ship to have great repairs done on it—the person doing those repairs has a lien on the goods for the amount of the sum charged, yet that is confined to a lien for the amount of the sum charged, and the party doing the repairs cannot say, "I will add to this lien a charge for the use of my dock while I am keeping the goods (in this case the ship) not for your benefit, but for my own." If not admitted it must be taken to be now decided that, at common law, there is no right to such a demand, and the question to be considered is this: Aye or no, do the letters which are in evidence, and which constitute part of the case, show that there was a special contract to give such a lien? That is attempted to be deduced mainly from the first letter to which I have referred, which gives a sort of rough estimate, and states that the cost of use of the graving dock for the job will be from 120 guineas to 150 guineas; and further from the letter subsequently written on Nov. 25, after the repairs had been done, in which the appellants, the persons who had done the repairs, state: "We also give you notice that we shall charge the owners of the ship £21, per diem for the hire of our dry dock from the time our account was

A delivered." However, they modify that afterwards; they do not charge it from the time the account was delivered, but charge it from the time when this notice had been given.

It is admitted this sum would not have been an unreasonable sum if it was a matter in respect of which such a lien could be claimed; but first the Court of Queen's Bench unanimously, and afterwards the Court of Exchequer Chamber **B** unanimously, held that there was no such contract to be inferred from anything that had passed between the parties. Those courts gave, however, no opinion as to what would have been the right of the appellants if they had claimed no lien, but had said to the respondents when the repairs were completed, "Your ship is fit to be taken away; it incumbers our dock and you must take it away," but had left it an unreasonable time, namely, twenty-seven days occupying the dock. Neither **C** court has expressed an opinion as to whether there might not have been, by natural inference, an obligation on the part of the owners to pay a reasonable sum for the use of the dock for the time that she was so improperly left there. However, the question is only this, whether the appellants, retaining the ship, not for the benefit of owners but for their own benefit, in order the better to enforce the payment of their demand, could then say, "We will add our demand for the use of the dock **D** during that time to our lien for the repairs." The Courts of Queen's Bench and Exchequer Chamber held, and I humbly submit to your Lordships perfectly correctly held, that they had no such right.

Then, a point has been raised here which I think was also raised in the courts below, although it does not appear in the report of the judgment, that even supposing the appellants had no right to add to their lien this extra sum of £567 **E** for the use of their dock, it is yet to be questioned whether it was correct on the part of the respondents to say: "What is the whole amount of your demand? £8,816 odd. Well, we pay it to you, but remember, whatever portion of your demand you are wrongfully taking we shall seek to recover back again;" and whether, when there was an improper claim made, they ought not themselves to have found what was the right sum, and to have tendered that in order to make the appellants (as it **F** was called in the argument) wrongdoers. In my opinion, the appellants must, for this purpose, be considered wrongdoers from the very moment when they said, "We will not give you up your ship till you pay something ultra that which you are bound to pay." It does not lie in their mouths to say that it was wrong on the part of the shipowners to pay a sum demanded by the appellants, but which they had no right to demand. It is impossible to contend that any such argument can **G** lie in their mouths. Therefore, whether this point was argued below or not is immaterial—it does not seem to me to vary the case. I shall, therefore, move that the judgment of the court below be affirmed.

LORD WENSLEYDALE.—I am entirely of the same opinion. Two principal points have been made in this case. The first is, whether, if a person who has a **H** lien on any chattel choose to keep it for the purpose of enforcing his lien, he can make any claim against the proprietor of that chattel for so keeping it. No authority can be found for such a proposition, and I am clearly of opinion that no person has by law a right to add to his lien on a chattel a charge for keeping it till the debt is paid; that is, in truth, keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession. That was the opinion of all the **I** judges of the Courts of Queen's Bench and Exchequer Chamber, and I think their opinion is perfectly right.

The second point which has been made is, that from the circumstances of this case, there is a contract to pay not merely for the completion of the ship, not merely for the repairing job, but a contract to pay for the hire of the dock for so long a time as the vessel should be there. We are at liberty to draw such inferences as we think ought to be drawn from the facts, and I am clearly of opinion that no such inference can be drawn in this case. The only foundation for it is, that after the appellants sent their estimate for the necessary repairs of the ship, the respondents

sent by their agent a request that they would give the particulars of what they would charge for each article; and they write to say : A

"Your calculations to repair the ship *British Empire* and Mr. Preston's letter dated 16th, have been duly laid before the directors, when the suggestion of Mr. Preston not to repair the ship by contract was duly considered. They now request me to ascertain at what price you would furnish the materials we should require to complete the repairs, viz., pitch, pine, yellow pine, American elm per cubic foot, oakum, pitch per cwt., iron work . . [and] graving dock charges when you can take her in depth of water next week." B

In answer to that inquiry a letter was written by the appellants, from which it is said there is to be implied a demand on their part and a consequent contract, for the hire of the dock independently of the charge for the repairing job for so long a time as the ship shall remain in the dock. I think it is perfectly clear that that letter can imply no such contract. The answer to that inquiry states in detail the price of American red elm, and so on, and then it concludes thus : "The cost of using the graving dock for the job will be from 120 to 150 guineas;" that is to say, "we cannot calculate precisely the length of time that it will require to use the dock for making the repairs, and, therefore, we make a sort of calculation, and the gross sum it will probably cost will be 120 to 150 guineas." There is no statement that the owners are to pay £21 a day for the time that the vessel should remain there; and it would be quite absurd that if a person employed another to repair a ship, he would be considered as undertaking to pay so much a day for whatever length of time may be consumed in making the repairs. There is nothing in any part of the correspondence that leads to that conclusion. I am, therefore, clearly of opinion that there is not made out here an agreement on the part of the respondents to pay the appellants the cost of the hire of the graving dock. C D E

Then it was objected that there was no particular time at which it can be said that the appellants were wrongdoers in refusing to deliver up the vessel. They send in their bill, including in their charges the sum of £567 for the time the vessel had actually been in the dock, and then objections were made to that charge. Then on behalf of the appellants a letter is written to the respondents on Dec. 13, 1856, in these terms : "The full amount of their claim" (that is, the claim for the job) being partially dependent upon the period the ship may remain in their dock (that is, without reference to the repairs), their account requires of course to be made up accordingly"; that is, the charge for whatever length of time the ship is in the dock. Then on the following day a letter is written, saying that they shall make the claim altogether of £8,816 15s. 2d.; that includes this claim of £567 for the use of the dock. Then the respondents say : F G

"We pay under protest and for the sole purpose of obtaining delivery and possession of the ship *British Empire*; and we hereby further give you notice that the company will take such steps as they may be advised to recover repayment of the said sum of £8,816 15s. 2d., or any part thereof, as also such damages as the said company may have sustained, or may hereafter sustain, by reason of your refusal to deliver up the said ship." H

That sum was paid under protest, and it includes the sum of £567, to which the appellants had no right by common law, and no right by contract. Therefore, I am clearly of opinion that in this case they have made a demand which they had no right to make, for keeping possession of the ship till their charge for dock hire was paid. They have by these means obtained money which they had no right to obtain, and consequently an action for money had and received will lie. I

LORD CHELMSFORD.—I entirely agree in the opinions expressed by my noble and learned friends, and as they have gone so fully into the case, I think it quite unnecessary for me to add anything.

Appeal dismissed.

FRANKLIN v. SOUTH EASTERN RAIL. CO.

[COURT OF EXCHEQUER (Pollock, C.B., Martin, Bramwell and Channell, BB.), April 22, May 7, 1858]

[Reported 3 H. & N. 211; 31 L.T.O.S. 154; 4 Jur.N.S. 565;
6 W.R. 573; 157 E.R. 448]

Fatal Accident—Damages—Measure—Expectation of pecuniary benefit from continuance of life.

Under the Fatal Accidents Act, 1846, damages are not to be given as a solatium or merely in respect of the loss of a legal right. They should be calculated with reference to the amount of a reasonable expectation of pecuniary benefit from the continuance of the life.

Notes. The class of persons for whose benefit or by whom an action may be brought under the Fatal Accidents Act, 1846, has been enlarged by the Fatal Accidents Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 941).

Followed: *Dalton v. South Eastern Rail. Co.* (1858), 4 C.B.N.S. 296. Considered: *Pym v. Great Northern Rail. Co.*, [1861-73] All E.R.Rep. 180; *Bradburn v. Great Western Rail. Co.* [1874-80] All E.R.Rep. 195; *Taff Vale Rail. Co. v. Jenkins*, [1911-13] All E.R.Rep. 160; *Berry v. Humm*, [1915] 1 K.B. 627. *Burgess v. Florence Nightingale Hospital for Gentlemen Management Committee*, [1955] 1 All E.R. 511; *Malyon v. Plummer*, [1963] 2 All E.R. 344. Referred to: *Sykes v. North Eastern Rail. Co.* (1875), 44 L.J.C.P. 191; *Hetherington v. North Eastern Rail. Co.* (1882), 30 W.R. 797.

As to negligence causing death, see 28 HALSBURY'S LAWS (3rd Edn.) 34-40; as to damages for negligence, see *ibid.* 96-106; and for cases see 36 DIGEST (Repl.) 213 et seq. For the Fatal Accidents Act, 1846, see 17 HALSBURY'S STATUTES (2nd Edn.) 4.

Case referred to:

(1) *Blake v. Midland Rail. Co.* (1852), 18 Q.B. 93; 21 L.J.Q.B. 233; 18 L.T.O.S. 330; 16 Jur. 562; 118 E.R. 35; 36 Digest (Repl.) 221, 1176.

Rule Nisi obtained by the defendants to enter a nonsuit or for a new trial in an action brought by the plaintiff, as administrator of his son, under the Fatal Accidents Act, 1846 (Lord Campbell's Act), to recover compensation in consequence of his son having lost his life by the negligence of the defendants.

At the trial before BRAMWELL, B., it appeared that the plaintiff was a night porter at St. Thomas's Hospital, and one of his duties was to carry up coals to the different wards, for which he received 3s. 6d. a week, but in consequence of his age and infirmities he became unable to do this himself, and for a year and a half previous to his son's death the son had been in the habit of coming from time to time to do it for him, the 3s. 6d. per week being still paid to the plaintiff; there was also some evidence of the son having occasionally assisted the father with small presents. The judge left it to the jury to say whether the plaintiff had any reasonable expectation of benefit from the continuance of his son's life, and if so, to what extent. The jury were of opinion that he had, and, accordingly, returned a verdict for the plaintiff, with damages £75, and leave was reserved to the defendants to move to enter a nonsuit if the court should be of opinion that the action was not maintainable. The defendants obtained a rule nisi accordingly on the ground that the damages were excessive.

G. Francis for the plaintiff, showed cause against the rule.

Edwin James, Q.C. (Petersdorff with him), for the defendants, supported the rule.

Cur. adv. vult.

May 7, 1858. **POLLOCK, C.B.**, delivered the following judgment of the court.—This was an application to enter a nonsuit, or for a new trial on the ground of excessive damages. The contention of the defendants was, that they were not

liable for any damage, except legal pecuniary damage; and that, if the defendants were liable, the damages were excessive. The plaintiff, as administrator of his son, sued under the Fatal Accidents Act, 1846, and he claimed that in consequence of the negligence of the defendants his son's death had been caused; and the question was whether he was entitled to maintain the action, it being contended that it was necessary that the plaintiff should show a legal damage, and that on the evidence he had not shown any.

The statute does not in terms say on what principle the action given is to be maintainable, nor on what principle the damages are to be assessed; and the only way to ascertain what the principle is to be referred to, or to which we are to give effect, is to show what it does not mean for the purpose of ascertaining what it does mean. It is clear that the damages must be shown, for the jury are to give such damages as they think proportionate to the injury. It has been held that these damages are not to be given as a solatium, but are to be given in reference to pecuniary loss: see *Blake v. Midland Rail. Co.* (1). It is also clear that the damages are not to be given merely in reference to the loss of a legal right, where they are to be distributed between relations only, and not to all individuals sustaining such a loss; and, accordingly, the practice has been, not to ascertain what benefit could have been enforced by the claimants had the deceased lived, and give damage limited thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to a reasonable expectation of pecuniary benefit, either of a right or otherwise, from the continuance of the life.

No doubt the manner in which the action has been held sustainable with reference to a wife or children, where the husband or the father might undoubtedly have exercised considerable judgment as to what he would do, and where he was under no legal obligation of doing it, for which the jury have undoubtedly, with the full sanction of all the courts, given liberal compensation. Whether the plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and, if so, to what extent, were the questions left in this case to the jury. The proper question then was left, if there was any evidence in support of the affirmative of it, and we think that there was. The plaintiff was old and infirm; the son was young, earning good wages, and apparently well disposed to assist his father, as, in fact, he had so assisted him to the extent of 3s. 6d. a week. We do not see that it is necessary that actual benefit should have been derived; reasonable expectation is enough, and such reasonable expectation might well exist, though when, the father not being actually in need, the son had never done anything for him. On the other hand, the jury ought not to make a mere guess in the matter, but ought to be reasonably satisfied that there has been a loss of a reasonable expectation of a sensible and pecuniary benefit.

We think, therefore, the action is maintainable; but it appearing to us that the damages are excessive, we think that there ought to be a new trial.

Rule absolute for new trial.

A

UPTON v. TOWNEND

[COURT OF COMMON PLEAS (Jervis, C.J., Williams, Crowder and Willes, JJ.), November 8, 9, 1855]

B

[Reported 17 C.B. 30; 25 L.J.C.P. 44; 26 L.T.O.S. 76; 19 J.P. 775; 1 Jur.N.S. 1089; 4 W.R. 56; 139 E.R. 976]

Landlord and Tenant—Eviction—Act done by landlord with intention of depriving tenant of enjoyment of demised premises—Re-building of premises—Tenant deprived of part.

C

Although the word "eviction" was at one time used to denote an expulsion from property by the assertion of a title paramount or by process of law, the term is now applied to every class of expulsion, and may be taken to mean, not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises. The question whether or not there has been an eviction, therefore, depends on the circumstances of the case and is a question of fact.

D

The tenant of premises, which he had sublet, concurred with the landlord in their being re-built after a fire in such a way that the sub-tenant was deprived of part of the land sub-demised to him.

E

Held: the tenant had done an act of a permanent character, without the assent of the sub-tenant, which showed an intention to oust him from the demised premises; accordingly, he must be taken to have evicted the sub-tenant and a claim by him for subsequent rent failed.

Notes. Applied: *Crown Lands Comrs. v. Page*, [1960] 2 All E.R. 726. Referred to: *Williams v. Hayward* (1859), 1 E. & E. 1040; *Matthey v. Curling*, [1922] All E.R.Rep. 1.

F

As to the eviction of a tenant, see 23 HALSBURY'S LAWS (3rd Edn.) 551-553 and 558; and for cases see 31 DIGEST (Repl.) 273 et seq.

Cases referred to:

G

- (1) *Smith v. Raleigh* (1814), 3 Camp. 513, N.P.; 31 Digest (Repl.) 276, 4100.
- (2) *Hunt v. Cope* (1775), 1 Cowp. 242; 98 E.R. 1065; 31 Digest (Repl.) 274, 4071.
- (3) *Hall v. Burgess* (1826), 5 B. & C. 332; 8 Dow. & Ry.K.B. 67; 4 L.T.O.S.K.B. 172; 108 E.R. 124; 31 Digest (Repl.) 312, 4494.
- (4) *Burn v. Phelps* (1815), 1 Stark. 94, N.P.; 31 Digest (Repl.), 276, 4095.
- (5) *Cibel and Hills Case* (1588), 1 Leon. 110; 74 E.R. 102; 31 Digest (Repl.) 276, 4097.

Also referred to in argument:

H

Doe d. Palk v. Marghetti (1831), 1 B. & Ad. 715; 9 L.J.O.S.K.B. 126; 109 E.R. 953; 31 Digest (Repl.) 587, 7069.

Baker v. Holtzaffell (1811), 4 Taunt. 45; 128 E.R. 244; 31 Digest (Repl.) 279, 4132.

Izon v. Gorton (1839), 5 Bing.N.C. 501; 2 Arn. 39; 7 Scott, 537; 8 L.J.C.P. 272; 3 Jur. 653; 132 E.R. 1193; 31 Digest (Repl.) 279, 4135.

I

Shaw v. Kay (1847), 1 Exch. 412; 17 L.J.Ex. 17; 154 E.R. 175; 31 Digest (Repl.) 350, 4806.

Hodgkins v. Thornbury (1675), 1 Freem.K.B. 417; 3 Keb. 557; 2 Lev. 143; Poll. 141; 1 Vent. 276; 89 E.R. 310; 31 Digest (Repl.) 276, 4094.

Roper v. Lloyd (1681), T.Jo. 148; 84 E.R. 1190; 31 Digest (Repl.) 274, 4070.

Cherbourn v. Rye (1594), Cro. Eliz. 341; 78 E.R. 590; 31 Digest (Repl.) 281; 4159.

Tomlinson v. Day (1821), 2 Brod. & Bing. 680; 5 Moore, C.P. 558; 129 E.R. 1128; 31 Digest (Repl.) 310, 4476.

Bushell v. Lechmore (1698), 1 Ld. Raym. 369; 91 E.R. 1144; 31 Digest (Repl.) 273, 4061. A

Reynolds v. Buckle (1620), Hob. 326; 80 E.R. 468; 31 Digest (Repl.) 274, 4073.

Hart v. Windsor (1844), 12 M. & W. 68; 13 L.J.Ex. 129; 8 Jur. 150; 152 E.R. 1114; 31 Digest (Repl.) 280, 4151.

Action in which the plaintiff, as landlord, claimed rent from the defendant, the tenant, under agreements of May 30, 1846, and April 18, 1849. B

By the particulars endorsed on the writ, the plaintiff claimed:

1854. June 24. Half-year's rent to this day, of warehouse on the	} £ s. d.	115 0 0	C
ground-floor and basement of house, No. 5, Bread			
Street, Cheapside, in the city of London.			

1854. June 24. Half-year's rent to this day, of warehouse on the	} 30 0 0	C
first-floor of the same house.		

145 0 0

Declaration for money payable for use and occupation of premises and on accounts stated. The defendant pleaded as to £72 10s., payment into court, and, as to the residue, a denial of the debt. The plaintiff accepted payment in satisfaction pro tanto, and joined issue as to the residue. D

The action was tried on Dec. 13, 1854, at Guildhall, before JERVIS, C.J., when a verdict was found for plaintiff for damages, £72 10s., subject to a Case stated for the opinion of the court whether the plaintiff was entitled to recover the further sum of £72 10s. or any part of it.

On Dec. 1, 1836, the Goldsmiths' Company being seised in fee of the tenements hereinafter mentioned, by indenture demised to the plaintiff for twenty-one years from Mar. 25, 1836, the house and premises No. 5, Bread Street, London, subject to the annual rent of £270 12s. 6d., payable quarterly on the usual days, and to payments to the company on Mar. 25 each year of certain money for fire insurance. The company covenanted to keep in force insurance to the amount of £2,500 against loss or damage by fire, and that, in the event of such loss or damage, the sums payable in respect thereof under the insurance, were to be applied towards rebuilding and repairing. On May 30, 1846, the plaintiff demised to the defendant for seven years from Mar. 25, 1846, all those warehouses, etc., on the ground-floor and basement of No. 5, Bread Street, at a rent of £230, payable quarterly. On April 18, 1849, by a memorandum in writing subscribed by the plaintiff and the defendant, the plaintiff agreed to let to the defendant the first-floor front warehouse or room of No. 5 for three years from Lady Day, 1849, and so on for so long as both parties should agree, at a rent of £60 payable quarterly, and at the expiration of the lease already granted to the defendant of the ground-floor and basement warehouses, to grant a lease of the first-floor front room for such term as plaintiff had agreed to do by the lease dated May 30, 1846, at the rent of £60 per annum. On Sept. 25, 1852, the defendant, by notice in writing, required the plaintiff to execute to the defendant, on or before Mar. 25 then next, a new lease of the premises demised by indenture of May 30, 1846. After the expiration of the term granted by the lease of May 30, 1846, the defendant continued in possession of the premises thereby demised, and of the premises agreed to be let by the memorandum of April 18, 1849, and the defendant continued to pay and the plaintiff to accept rent for the two sets of premises. At the time of the fire hereinafter mentioned, the plaintiff was the tenant from the Goldsmiths' Company, of the house No. 4½, Bread Street, adjoining No. 5, under a demise made to one Francis Nalder, of date June 14, 1849, for a term unexpired at the time of the fire. E F G H I

On Dec. 31, 1853, No. 5 and the adjoining building No. 4½ were wholly consumed by fire with the exception of the larger portion of the party-wall separating No. 4½ and the premises occupied by the defendant. The Goldsmiths' Company signified their intention to rebuild, the rebuilding was proceeded with, and it was completed in December, 1854. On May 4, 1854, by an agreement made between Philip Hardwick, the architect for the company, and the plaintiff, Hardwick agreed that

as soon as the building should be completed, the company would demise to the plaintiff all that plot of ground situate on the western side of Bread Street, as described in the plan attached to the agreement, together with the messuage and premises intended to be built thereon as thereafter mentioned for 24 years from Lady Day, 1854, at the yearly rent of £270 12s. 6d. for the first three years, and the yearly rent of £500 for the residue of the term. Hardwick further agreed within the first year of the term to erect two warehouses according to the plans and specifications signed by him and the plaintiff. The plot of ground mentioned in the agreement comprised the ground formerly covered by Nos. 4½ and 5 Bread Street. After that agreement, and before June 24, 1854, Hardwick pulled down what remained of the party-wall which divided No. 4½ from the premises occupied by the defendant, and built on the sites formerly occupied by Nos. 4½ and 5, the two new warehouses. On May 4, 1854, the plaintiff surrendered to the company all the premises described by the indenture of Dec. 1, 1836, and on Oct. 19, 1854, the company demised to the plaintiff for twenty-four years from Mar. 25, 1854, at a rent of £270 12s. 6d., for the first three years of the term, and £500 for the remaining twenty-one years, the two new warehouses. The defendant never authorised or consented to the plan signed by the plaintiff and Hardwick, which in fact resulted in his being deprived of part of the premises demised to him, or the agreement of May 4, 1854, or the lease of Oct. 19, 1854, and had not since the fire occupied any part of the premises held by him under the lease of May 30, 1846 and agreement of April 18, 1849. On June 7, 1854, his attorney wrote to the plaintiff protesting that the new premises would be altogether different from those leased by him to the defendant, and threatening legal proceedings. The defendant had not paid any rent except the sum of £72 10s. paid into court and considered as satisfying the quarterly payments due on Mar. 25, 1854.

On May 23, 1854, the plaintiff entered into an agreement by which he agreed to let the two new warehouses—the new No. 5 Bread Street—to T. and M. Hutchinson & Spiller for three years from Sept. 29, 1854, at a rent of £530.

Henderson for the plaintiff.

Serjt. Byles and *Honeyman* for the defendant.

Cur. adv. vult.

Nov. 9, 1855. **JERVIS, C.J.**—I am of opinion that there must be judgment for the defendant. The view the court takes of the question of eviction renders it unnecessary to express any opinion as to the effect of the surrender, or upon the other matters which have been suggested in the course of the arguments. The simple question, then, is whether there was an eviction by Upton of Townend, the tenant, from a part of the premises demised, before June 24, 1854, so as to operate a suspension of the rent. It is not denied that an eviction of the tenant from a part of the demised premises is for the present purpose the same as an eviction from the whole. In dealing with the question whether there has in this case been an eviction in fact, and whether the plaintiff was a party to it, we are by the concession of the parties put in the position of a jury, and are at liberty to draw such inferences of fact from the circumstances stated as a jury would be warranted in drawing.

It is extremely difficult at the present day to define with technical accuracy what is an eviction. Latterly, the word has been used to denote that which formerly it was not intended to express. In the language of pleading the party evicted was said to be expelled, amoved, and put out. The word eviction—from evincere, to evict, to dispossess by a judicial course—was formerly used to denote an expulsion by the assertion of a title paramount and by process of law. But that sort of eviction is not necessary to constitute a suspension of the rent, because it is now well settled, that, if the tenant loses the benefit of the enjoyment of any portion of the demised premises, by the act of the landlord, the rent is thereby suspended. The term

"eviction" is now popularly applied to every class of expulsion or amotion. Getting rid thus of the old notion of eviction, I think it may now be taken to mean this—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises. If that may in law amount to an eviction, the jury would very naturally cut the knot by finding whether or not the act done by the landlord is of that character and done with that intention.

Smith v. Raleigh (1), in its circumstances, approaches very nearly to the present case. There the tenant railed off a portion of the garden which had been demised with the house at one entire rent for the purpose of erecting a building for the accommodation of his other tenants, and it was held to amount to an eviction. There, as here it has been suggested, the tenant might have taken down the railing, and rased the building—treating the landlord's act as a mere trespass. But, inasmuch as it was done with the intention of permanently depriving the tenant of the enjoyment of a portion of the subject-matter of the demise, and the rent issuing out of the whole, the entire rent was suspended by the landlord's act of withdrawing a portion from the tenant's occupation. So, *Hunt v. Cope* (2), where the question arose upon the form of pleading, shows to a certain extent that, if the facts there relied on had been pleaded in a technical form as an eviction, it would have gone to the jury, and they would have said whether or not the circumstances did amount to an eviction. The question, therefore, of eviction or no eviction depends upon the circumstances, and is in all cases to be decided by the jury.

Sitting here with the power to draw inferences as a jury would, I can entertain no doubt in the present case. The defendant has, it is suggested, less commodious premises than he had before. Be it so: the landlord had no right to give him a less space than he had before. The tenant might very well say: "I am entitled to have the thing which was originally demised to me, neither more nor less; and, as you have deprived me of that, I am exonerated from my tenancy." In his case, therefore, there can be no question that there has been an ouster in fact from a portion of the thing demised.

The only remaining question is whether the plaintiff has by his conduct made himself a party to that which in point of fact amounts to an eviction and that, I think, admits of no doubt. It appears from the Case that the Goldsmiths' Company had entered into a covenant with the plaintiff to let to him certain premises which comprised those which were subsequently underlet to the defendant, and also covenanted to insure the premises in a certain sum, and to re-build them in the event of their destruction by fire. As between the plaintiff and the Goldsmiths' Company, therefore, the effect of the covenant was, to enable the plaintiff to compel the company to restore the buildings exactly as they stood before. We may assume that the parties—that is, the plaintiff and the company's representative—met for the purpose of ascertaining in what manner that should be done; that the matter was discussed between them; and that the plaintiff, the only person who could compel the company to restore the premises as they were, authorised them to deviate from the original plan. He must, therefore, be taken to have constituted the company his agents for the purpose of re-building in the form so agreed upon.

On May 23, 1854, the plaintiff entered into an agreement to let the new premises to Hutchinsons & Spiller. This clearly was an act of a permanent character done by the landlord without the assent of the tenant, showing an intention to oust him from the possession of the premises. As matter of fact, therefore, it seems to me that there is enough to satisfy us that there has been an eviction of the tenants, with the consent and procurement of the landlord so as to disentitle the latter to maintain this action, and, consequently, I am of opinion that our judgment must be for the defendant.

WILLIAMS, J.—I am entirely of the same opinion. As to the last point, I agree with the observations of my Lord, and do not think it necessary to add anything. Assuming that the acts done by Mr. Hardwick, the architect of the Gold-

A smiths' Company are identical with the acts of the plaintiff, the question is narrowed to the inquiry whether those acts amount to an eviction of part of the demised premises, so as to operate a suspension of the rent. It appears to me that they do.

B Considering how frequently transactions of this sort are taking place, it is somewhat remarkable that so little is to be found in the books upon the subject of eviction. There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either mere acts of trespass or eviction according to the intention with which they are done. If those acts amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises, they would constitute an eviction.

C We have been much pressed by counsel for the plaintiff, in the course of the argument, with a reference to the state of things at the time the acts here complained of were done, viz., that the premises had been burnt down, and were incapable of any beneficial occupation. But it must be borne in mind that it is the plaintiff who has to make out that he is entitled to maintain an action for use and occupation. There has been no actual occupation, and the question is whether D there has been an eviction with respect to the tenant's constructive occupation. In *Hall v. Burgess* (3), a tenant from year to year, at a rent payable half-yearly, without giving any notice to the landlord, quitted the premises at the expiration of the current year. Before the next half year expired the landlord let the premises to another tenant, who occupied the same. It was held, that the landlord was not entitled to recover rent from the first tenant from the expiration of the current E year, when he quitted the premises, to the time when the landlord re-let the same to the second tenant. HOLROYD, J., there says :

F "Before the [Distress for Rent Act, 1737], the landlord's remedy by action for his rent must have been upon the demise, and he could only recover according to it. The tenant's endeavour to give up the premises in this case was unavailing, and the possession was not altered until the subsequent letting by the landlord. That letting, therefore, was an eviction of the tenant, and, had this action for rent been brought upon the demise, the defendant might have pleaded the eviction as a bar."

G The same principle appears to have been decided by LORD ELLENBOROUGH in *Burn v. Phelps* (4). There the defendant, being tenant to the plaintiff of premises in Worcestershire, at £130 per annum, underlet the premises to Badger and several other under-tenants. During this tenancy and the under-tenancies the plaintiff gave notice to Badger and the other under-tenants to quit, and Badger in fact quitted. The premises occupied by him, worth £60 per annum, remained un-occupied for one year at the expiration of which the defendant again under-let them to another tenant and continued in possession of the whole by his under-tenants. H The defendant paid into court a sum which covered all the rent claimed except the £60, which he insisted was not due to the plaintiff. LORD ELLENBOROUGH expressed an opinion, that, under the circumstances the plaintiff was guilty of an eviction as to the premises occupied by Badger, at the least, and suggested that an eviction might have been pleaded to the whole demand.

I How can it be doubted that the acts done by the agent of the Goldsmiths' Company were acts of interference with the defendant's rights as a tenant, rendering it incompatible for him to hold according to the terms of his demise, and that those acts were done with the intention of no longer permitting the tenant to enjoy the premises as he was entitled to enjoy them? I feel no doubt whatever that the facts disclosed in this case do amount to what the law calls an eviction, and, consequently, that the plaintiff's right to sue for the rent is gone.

CROWDER, J.—I am of the same opinion. The question is whether the defendant has been evicted from part of the demised premises so as to disentitle the plaintiff to sue for the rent accruing between Mar. 25 and June 24. It seems that

there is no very distinct definition of eviction in any of the books as employed with reference to acts done by a landlord towards his tenant. As to the acts of a stranger, it is very well defined. Eviction, properly so called, is a wrongful act by the landlord, which operates the expulsion or amotion of the tenant from the land. The question here is whether there has been an eviction as it is popularly called, a putting out or depriving the tenant of the subject-matter of the demise.

The nearest case which I have heard cited is *Smith v. Raleigh* (1). The act there complained of doubtless was an act of trespass—and indeed every entry by a landlord upon the possession of his tenant must include a trespass—but LORD ELLENBOROUGH considered it to amount to an eviction. It seems to me that there is in the present case strong evidence of that species of eviction. The fallacy of the argument of counsel for the plaintiff was that he rested the conduct of the landlord entirely upon the assent given by him to the plan for re-building proposed to him by the architect of the Goldsmiths' Company. It is necessary, however, to look at all the circumstances. The Goldsmiths' Company were bound to re-build. The plaintiff had a right to have the premises restored in the same position in which they were before the fire. Having himself proposed a plan differing from the original structure, he afterwards assents to Mr. Hardwick's plan, and accepts a lease of the premises erected pursuant to it.

By the agreement of May 23, 1854, he actually let a portion of the premises to other persons, including a part of what had formerly composed the defendant's demise. That clearly was an act done by the landlord amounting to an expulsion or amotion of the tenant, and a preventing him from occupying the premises according to the demise. Although, therefore, I agree that it is not every act of trespass by a landlord that will amount to an eviction, I think that the defendant has been substantially and permanently deprived of the subject-matter of the demise so as to entitle him to say that he has not had the occupation of that to which he was entitled.

WILLES, J.—I am of the same opinion. There is nothing in the argument that the Goldsmiths' Company ought not to be considered as the agents of the plaintiff in doing the acts complained of. It is not necessary that the relation of principal and agent, in the sense of one commanding and the other obeying, should subsist in order to make one responsible for the tortious act of another; it is enough if it be shown to have been by his procurement and with his assent. The cases where the liability of one for the wrongful act of another has turned upon the relation of principal and agent are quite consistent with the party's liability irrespective of any such relation. If I agree with a builder to build me a house according to a certain plan, he would be an independent contractor and I should not be liable to strangers for any wrongful act unnecessarily done by him in the performance of his work, but clearly I would be jointly liable with him for a trespass on the land if it turned out that I had no right to build upon it.

Counsel for the plaintiff has likened eviction to a disseisin. Assuming that to be correct, I find it laid down in *Co. Litt.* 180, b, that,

"if A. disseise one to the use of B., who knoweth not of it, and B. assent to it, in this case till the agreement A. was tenant of the land, and after agreement B. is tenant of the land, but both of them be disseisors; for, *omnis rati habitio retrotrahitur et mandato equiparatur*. And it is worthy of the observation, and implied also in the latter 'etc.,' that, seeing coadjutors, counsellors, commanders, etc., are all disseisors, that, albeit the disseisor which is tenant dieth, yet the assise lieth against the coadjutor, counsellor, commander, etc., and the tenant of the land, though he be no disseisor."

Several cases are referred to in the note to *Co. Litt.* 181, a, as to trespassers by procurement.

Here, the circumstances, as to this point, are these. The Goldsmiths' Company were bound by covenant with the plaintiff to expend £2,500 in building up the premises as they were before the fire. Having that right, he proposed a plan—a

A totally different one. The architect of the company proposed another, departing still further from the original plan of the building. To that the plaintiff assented, signed the plan, and agreed to take a new lease of the premises when re-built according to that plan. It is clear, therefore, that the plaintiff counselled and procured the re-building according to that plan and is answerable for it.

If the plaintiff is liable for what has been done, does it amount to an eviction?

B I am of opinion that it does, as being an act of a permanent character done by the landlord in order to deprive, and which had the effect of depriving, the tenant of the use of the thing demised or of a part of it. I cannot agree with counsel for the plaintiff, that there must necessarily be a going upon the land, and an actual expulsion of the tenant from the possession. That part of his argument is not supported either by principle or by authority.

C Many cases are collected in VINER'S ABRIDGEMENT, Rent (I, a), which show that it is not necessary that there should be an actual bodily expulsion of the tenant from the land. Thus, in *Cibel and Hills Case* (5) (1 Leon. at p. 110):

"It was given in evidence [of an entry, etc., for the suspension of rent], that on the land demised was a brick-kiln and a small cottage, and that the lessor entered and went to the cottage and took some of the bricks, and untiled the cottage. But it was proved that the lessor had reserved the bricks and tiles, which in truth were there ready made at the time of the lease granted, and that he did not untile the brick-kiln house, but that it fell by tempest; and so the plaintiff did nothing, but came upon the land to carry away his own goods; and also he used the bricks and tiles on the reparation of the house. And, as to the extra tenet, which was parcel of the issue, the lessor did not continue upon the land, but went off from it, and relinquished the possession. But the court held, the continuing the possession or not was not material; for, if he once does anything amounting to an entry, though he departs presently, yet the possession is in him sufficient to suspend the rent, and he shall be said extra tenere the defendant, the lessee, till he has done an act amounting to a re-entry."

F In Co. LITT. 331, b., I find this incidentally laid down as to disseisins, in a passage cited from BRACON (lib. 4, fo. 238):

"Per hoc autem quod dicitur in brevi ultimæ præsentationis deforceant, videtur quibusdam quod querens innuat per hoc quod deforceans sit in seisinâ, sicut in brevi de recto, sed reverâ non est ita, sed satis deforceat qui possessorem uti seisina non permiserit omnino vel minus commode impediât præsentando, appellando, impertrando, secundum quod dicitur de disseisitore, satisfacit disseisina, qui uti non permisit possessorem vel minus commode licet omnino non expellat."

H It is not true, therefore, as suggested, that the older authorities required an actual expulsion to constitute disseisin. In the same book, 153, b., the distinction between a mere act of wrong and a dispossession is pointed out in the following terms:

"Omnis disseisina est transgressio, sed non omnis transgressio est disseisina. Si eo animo forte ingrediatur fundum alienum, non quod sibi usurpet teneamentum vel jura, non facit disseisinam, sed transgressionem, etc. Quærendum est à judice quo animo hoc fecerit, etc."

I An entry upon the land of another, and an expulsion of or a substantial interference with the enjoyment of the land by the tenant—as in the case of a diversion of the entire stream from a mill, or preventing a man from having access to his land, or entering his orchard and cutting down all the fruit trees—though the wrongdoer do not remain upon the land, appear to me to be equally cases of eviction, if the tenant in consequence ceases to occupy. This also appears to have constituted a disseisin, from Co. LITT. 161, a., where it is said:

"He that disturbs a man of the meane disseiseth him of the thing itself; as, the turning of the whole stream that runs to a mill, is a disseisin of the mill itself.

So it is if a man be disturbed to enter and manure his land, this is a disseisin of the land itself; for, qui adimit medium dirimit finem, and qui obstruit aditum destruit commodum."

Supposing that, as counsel for the plaintiff contends, the law of disseisin is analogous to that of eviction, the argument from analogy appears to be in favour of the defendants. What are the facts? Instead of the thing demised to the defendant, a wall was built upon part of the land; that wall is a permanent structure and excludes him from the occupation of the portion of the land upon which it stands, and he has not occupied the rest. All the conditions of eviction are, therefore, in his case fulfilled. It seems to me, therefore, that the defendant was, by an act of the landlord, which was intended to be and was of a permanent character, deprived of the perfect and convenient use of the thing demised. He was virtually expelled and amoved from the subject-matter of the demise, and that expulsion and amotion occurred before and continued until the rent now sought to be recovered would have become due. No rent, therefore, became payable. For these reasons, I agree with the rest of the court in thinking that the defendant is entitled to judgment.

Judgment for defendant.

UPTON v. GREENLEES

Landlord and Tenant—Eviction—Act done by landlord with intention of depriving tenant of enjoyment of demised premises—Land added to property let to tenant.

In this case, which was argued at the same time as *Upton v. Townend*, the plaintiff had let to Greenlees premises adjacent to those he had demised to Townend, and the removal of the wall had resulted in a piece of land being added to that let to Greenlees.

JERVIS, C.J.—In re-building the messuages, a portion has been added to what the tenant had before. But still the question arises: Is it the thing demised? The landlord has no right to impose upon his tenant a thing different from that which he undertook to let to him. It seems to me, therefore, that, though there is that distinction between the cases of *Townend* and *Greenlees*, the one is as much a deprivation of the enjoyment of the thing demised as the other. There clearly is evidence whence the court must infer that, by the act of somebody, the tenants have been deprived of the enjoyment of the premises demised to them respectively.

WILLIAMS, J., agreed.

CROWDER, J.—In the case of *Greenlees* the new building allots him a somewhat larger space than he had before, but still it is depriving him of the occupation of the thing demised.

WILLES, J.—In the case of *Greenlees* the same space that he had before was left open, but the wall has been removed four or five feet from the old boundary. He, therefore, could not use his premises without incurring the constant danger of committing a trespass on the land of another, and he was deprived of the protection and support of the boundary wall and hindered from restoring the place to the state in which he was entitled to enjoy it. And he has not in fact occupied any part of the land.

Re DEWELL. EDGAR v. REYNOLDS

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), March 22, 1858]

[Reported 4 Drew. 269; 27 L.J.Ch. 562; 31 L.T.O.S. 50;
4 Jur.N.S. 399; 6 W.R. 404; 62 E.R. 104]

Intestacy—Administration—Administration by Crown—Delay in appearance of next-of-kin—Liability of Crown to pay interest on net estate.

Where the Crown takes out letters of administration to the estate of an intestate, it is bound by the ordinary rules applicable to all administrations, and is, therefore, liable, upon the successful claim of a next-of-kin of the intestate, to refund the intestate's property of which it may have possessed itself, with interest.

Notes. Considered: *Lawrence v. Maule* (1859), 4 Drew. 472. Followed: *A.-G. v. Köhler* (1861), 9 H.L.Cas. 655. Considered: *Re Gosman* (1880), 15 Ch.D. 67; *Re Rendell, Wood v. Rendell*, [1901] 1 Ch. 230. Referred to: *Partington v. Reynolds* (1858), 6 W.R. 615; *Bauer v. Mitford* (1860), 3 L.T. 575.

As to administration by the Crown, see 16 HALSBURY'S LAWS (3rd Edn.) 219-221; and for cases see 23 DIGEST (Repl.) 158-160.

Cases referred to:

- (1) *Turner v. Maule* (1849), 3 De G. & Sm. 497; 18 L.J.Ch. 454; 14 L.T.O.S. 62; 14 Jur. 165; 64 E.R. 578; 24 Digest (Repl.) 745, 7312.
- (2) *Chambers v. Bicknell* (1843), 2 Hare, 536; 7 Jur. 167; 67 E.R. 222; 23 Digest (Repl.) 205, 2417.
- (3) *De La Viesca v. Lubbock* (1840), 10 Sim. 629.
- (4) *Anstruther v. Chalmer* (1826), 2 Sim. 1; 4 L.J.O.S.Ch. 123; 57 E.R. 691; 44 Digest 499, 3196.

Also referred to in argument:

- Gallivan v. Evans* (1809), 1 Ball & B. 191.
Phillipo v. Munnings (1837), 2 My. & Cr. 309; 40 E.R. 658, L.C.; 32 Digest (Repl.) 473, 879.
Kane v. Reynolds (1854), 2 Sm. & G. 331; 23 L.J.Ch. 638; 2 Eq. Rep. 672; 2 W.R. 541; affirmed, 4 De G.M. & G. 565; 24 L.J.Ch. 321; 24 L.T.O.S. 137; 1 Jur.N.S. 148; 43 E.R. 628; sub nom. *Kane v. Maule, Kane v. Reynolds*, 3 Eq. Rep. 101; 3 W.R. 85, L.C.; 23 Digest (Repl.) 283, 3460.
Melland v. Gray (1845), 2 Coll. 295; 63 E.R. 741; 24 Digest (Repl.) 748, 7354.
Bruère v. Pemberton (1806), 12 Ves. 386; 33 E.R. 146, L.C.; 24 Digest (Repl.) 748, 7355.
Trimleston v. Hamill (1810), 1 Ball & B. 385; 43 Digest 970, 4093iii.
Raphael v. Boehm (1805), 11 Ves. 92; 32 E.R. 1023, L.C.; 24 Digest (Repl.) 749, 7366.
Playfair v. Cooper, Prince v. Cooper (1853), 17 Beav. 187; 23 L.J.Ch. 341; 21 L.T.O.S. 40; 1 W.R. 216; 51 E.R. 1004; 32 Digest (Repl.) 577, 1662.

Further Consideration of a suit instituted by persons claiming as next-of-kin it having been established that they were next-of-kin and that the sum of £2,064 17s. 1d. was in the hands of the defendant Reynolds, the Solicitor to the Treasury.

Lieutenant Dewell died at Gosport, in 1826, intestate, and, as was supposed, without leaving any next-of-kin as claimants to his estate which consisted of a sum of £1,023 9s. 4d., and some long annuities. The then Solicitor to the Treasury, Mr. Maule, on the nomination of the Crown, took out administration, received the dividends upon the annuities up to 1827, paid the costs of administering the estate amounting to £257 5s. 9d., and then sold the annuities, and handed the proceeds of the annuities and the residue of the £1,023 9s. 4d., amounting together to about £2,000, to the King's Proctor. In 1856 the plaintiff commenced proceedings by a summons in chambers, and succeeded in establishing his claim as next-of-kin to the

intestate. The defendant, Mr. Reynolds, was the present Solicitor to the Treasury, and the question now to be determined was whether the Crown was liable to refund the property of which it had taken possession, with interest on the balances in the hands of the defendant, and, if so, from what time? A

Glasse, Q.C. (Prendergast with him), for the plaintiff.

The Solicitor-General (Sir Hugh Cairns, Q.C.) and Wickens for the defendant. B

KINDERSLEY, V.C.—I cannot consider that the cases which have been cited govern the present case. They may be useful for guiding the court as to the principle to be adopted, but certainly none of them seems to decide the question raised here. *Turner v. Maule* (1) might have decided it, but it did not. In that case the question was raised on the footing of the principle of an administrator being liable for interest on balances improperly retained in his hands; but when the matter in the course of the proceedings came to be discussed, the court, upon discovering that it was a question of an actual sale of a large sum of stock—I think some £39,000 odd, and at a given period—said, that it was not a question of interest on balances, but a question whether there was not a sale of stock by an administrator, which there was no reason for and which ought not to have been made, and, therefore, the court put it to counsel whether they would be satisfied to have interest at £4 per cent. on the proceeds of that sum of stock which ought not to have been sold out, not expressing an opinion one way or the other on the question of the liability to interest on balances retained. C

It appears to me that where, as in this case, a particular individual—always the Solicitor to the Treasury—is nominated by the Crown as the person to whom the Crown desires that administration should be granted, and administration is granted under that authority, the administration expresses it to be for the use and benefit of the Crown, but the individual is to all intents and purposes the administrator. It is exactly the same thing as when a person entitled to administration is abroad and appoints an attorney or agent here authorising the grant of administration to that individual for his benefit. In *Chambers v. Bicknell* (2), the party who was entitled to the administration was abroad and the form of the letters of administration in that case—which was just the same as where administration is granted to the nominee of the Crown, after the usual words was as follows: D

“And we do by these presents, ordain, depute and constitute you administrator of all and singular the goods, chattels and credits of the said deceased with the said will annexed for the use and benefit of the said Ann Chambers, now residing at Surat, in the presidency of Bombay, in the East Indies; and until she shall duly apply for and obtain letters of administration (with the said will annexed) of the goods of the said deceased to be granted to her.” E

That is exactly the form mutatis mutandis of the grant of letters of administration to the nominee of the Crown where the Crown by reason of there being no next-of-kin of the intestate is entitled to the property of the intestate. What has been determined with regard to an administrator who is the attorney of a party abroad entitled to the administration? In *Chambers v. Bicknell* (2) it has been determined that that individual, though the nominee of the party abroad, and though his letters of administration may be determined wherever the party for whose use they were granted chooses to come in and apply for letters of administration for himself, yet so long as those letters of administration remain unrevoked, he is to all intents and purposes, as far as regards the claims and demands of any person beneficially entitled, the administrator exactly in the same manner as if he had obtained the administration in his own right. F

As I think that ruling lies at the root of the whole case, I will refer to the vice-chancellor's judgment upon it. He says (2 Hare, at pp. 538-540): G

“It appears that administration of the estate of the testator has been granted to the defendant as the attorney of the widow, and for her use and benefit; and a doubt has been suggested whether the grant in this form places Bicknell, the H

A defendant, in such a position that the court can act against him at the suit of the other parties beneficially interested in the estate, or at least can so act in the absence of the widow. It was said that he held the money as her agent, and was accountable to her and to her alone. The case of *De la Viesca v. Lubbock* (3) has been referred to, upon which case I am not called on, nor do I presume, to make any observations. The vice-chancellor seems to have held

B that where administration has been granted to the attorney of a person for the use and benefit of that person, the latter may sue the administrator in this country without making the parties beneficially interested parties to the suit, and without taking out letters of administration in this country. That case certainly affirms the proposition that Bicknell is to be considered as the agent of the widow and accountable to her. I do not think that it bears further on the

C point now before me. The question then arises whether the plaintiff is entitled to sue Bicknell or not. The case of *Anstruther v. Chalmer* (4), is a very important case on this subject. Catherine Anstruther having made her will, died, and Elizabeth Campbell, her sister and only next-of-kin, by her power of attorney authorised Chalmer and Frazer to obtain the administration of the testatrix's estate from the ecclesiastical court as her attorneys, and they accordingly obtained such administration as attorneys of Elizabeth Campbell, and, as

D in the present case, 'for the use and benefit' of that person. The question was thereupon raised, whether the letters of administration being expressed to be granted to Frazer and Chalmer for the use and benefit of Elizabeth Campbell, that circumstance did not exclude the parties beneficially interested in the estate from any claim against the attorneys, that is, whether they were not

E merely agents. Sir Anthony Hart directed the case to stand over, that it might be ascertained whether the question had not been decided by the ecclesiastical court in the form in which the letters of administration had been granted. A certificate from the deputy-registrar of the Prerogative Court was afterwards produced, which stated in substance that the words used in the grant of letters of administration were invariably used when it was made under a power of

F attorney from the parties entitled to representation, and that these words did not exclude the claim of others to share in the estate. It could not exclude those beneficially interested, and it was decided in that case that the plaintiff might sue. I am of opinion that the plaintiff may in this case also sustain a suit against the administrator notwithstanding the character in which he has taken upon him that office. The suit, however, must be properly framed."

G That decision clearly decides that when the administrator to whom the administration has been granted is merely the attorney of a third person, who is entitled to the administration, but is abroad, the person to whom the letters of administration are granted is to all intents and purposes full administrator, exactly as if he had taken out the administration in his own right, so far as relates to the liability

H of any other person who may have a claim or a beneficial interest in the estate; and unquestionably such a person would be liable to an action by creditors. And such a person would, if the administration was with the will annexed, be liable to the claim of legatees, and, of course, to the claim of residuary legatees, or to the claim of persons standing in the situation of next-of-kin.

I It appears to me that, that foundation being laid, I cannot distinguish between that case and the case where the administration is granted to Mr. Maule or Mr. Reynolds, as the nominee of the Crown. The form of administration is the same—the purposes of administration are the same. It is true that the administration is granted for the use and benefit—in the very terms of a grant—of the person in whose behalf the grant is made. But when the administrator is constituted, that administrator is liable to all the claims of persons who are entitled to claim against the estate or to claim an interest in the estate, and it cannot be questioned for a moment but that, if a creditor of this intestate had brought an action against Mr. Maule to recover a debt due from this intestate, Mr. Maule would have been liable

to that action exactly in the same manner as any other administrator would be. A
 If it were otherwise, what monstrous injustice would be done to the subject by
 reason of the grant having been made to the nominee of the Crown.

We now come to this case. At the time when administration was granted it was
 supposed that there were no next-of-kin of the intestate, and upon that assumption
 it was supposed the Crown was beneficially entitled to the whole residuary personal
 estate, and so was entitled to nominate the administrator. In the eye of the law B
 it is physically impossible for the Sovereign to take out administration in propria
 persona—it would be beneath his dignity so to do, and it is never done; but the
 Sovereign is the individual who is entitled to administration. The Crown being
 entitled, it is suggested that Mr. Reynolds is merely the agent of the Crown.
 True, in one sense, he is merely the agent of the Crown. The Crown being en-
 titled to administer and being beneficially interested in the property, nominates C
 this person, and this person is undoubtedly accountable to the Crown if it turns
 out that there is no next-of-kin. The Crown may compel an account from the
 party as agent. I will assume, independently of the character of administrator, the
 Crown might even bring an action at law against him. Still I apprehend there is
 no reason to doubt but that the Crown might, by the Attorney-General, file a bill
 against this party as administrator and compel that administrator to account. D
 It appears to me immaterial whether the Crown has the right to treat the adminis-
 trator as agent or to treat him as administrator. The third person—that is, if there
 be such next-of-kin—must have a right, and can have no other right, but to treat
 this individual as the administrator.

Then, what is the duty of the Crown? It has been suggested that there is a
 duty in the Crown to administer. If there were any Act of Parliament or some E
 provision of the common law which imposed upon the Crown, when a person died
 intestate and the next-of-kin did not within some short time turn up, the duty, not
 for its own benefit, but for the benefit of persons who might ultimately turn out
 to be entitled, to take out administration in order to preserve the effects, then
 indeed there would be a duty on the part of the Crown to take out such administra-
 tion. What is suggested as the duty of the Crown does not apply to this particular F
 case, because it was before this property under recent legislation became the
 property of the public. How can you say that the Crown has a duty to enforce
 rights which are properly personal to itself? It has no duty any more than a duty
 in an individual to enforce his own personal rights. True, there is a duty in the
 Crown to recover that which belongs to the public, but to whom is that duty G
 owing? It is owing to the public who may be the persons beneficially entitled to
 it if there are no next-of-kin, but there is no duty to protect the property for the
 next-of-kin; therefore, if the Crown thought fit not to take out administration or to
 nominate a person to whom administration should be granted and let the property
 take its own chance, the next-of-kin never could say: "The Crown has not done
 its duty to me," because there is no duty to the next-of-kin. So it does not appear
 to me it can stand at all upon the footing of any duty on the part of the Crown. H

Let me first of all regard this individual as the administrator and as if he had
 taken out administration in his own name and not as the nominee of the Crown
 or for the benefit of the Crown or for the benefit of anybody, but simply as
 administrator. What is the rule of this court with regard to such an administrator?
 I need not say where there is a will and an executor is under the direction of the
 will to invest, he must invest, but in this case there is no will, and, therefore, no I
 direction to invest. In the case of an executor where there is a will, or in the case
 of an administrator where there is no will, is there not a duty on the part of the
 executor or administrator, in the absence of any direction or a positive trust, to
 invest and not to retain the money in his hands? It appears to me clearly that
 there is. Otherwise what mischievous consequences would arise. One of the next-
 of-kin takes out administration, he receives, it may be, a very large personal
 estate, he keeps that in his own pocket, it may be, for years before it is ascertained
 who are the other next-of-kin, and then he says to the other next-of-kin: "I have had

A this in my pocket—there was no obligation in me to invest, and there is your money without interest.” He has no right, I apprehend, to keep this money wrapped up in a napkin; still less has he a right to keep it in his pocket, when you must assume he is getting the benefit of it. If the persons beneficially interested could make out that he has employed it in his trade, they would have a right to demand that he should account to them for the profits which he had made by

B using the money in his business. If you can show that he has used it in his trade, although you cannot make out what is the profit which he has derived, you have the right to charge him with 4 per cent. as a compensation for the profits he has made. No doubt there must be a benefit, because every man who has a large sum in his hands derives a benefit from it, either in the shape of investment, or getting him credit in some shape or other, and the persons beneficially entitled have a right

C to say that he shall be charged with interest upon it. If it is necessary to retain certain sums in his hands, because there are sums which are expected to have to be paid, shortly due from creditors or other persons in respect of the estate, he may be well justified in not making any investment, but whenever it comes up to the point that he has a large sum in his hands which is not required for any purpose, it appears to me that he is bound to invest in [trust investments].

D That I conceive to be the position of an ordinary administrator. I cannot distinguish this case from the case of an ordinary administrator. What has been done in the present case is this. At a certain period Mr. Reynolds handed over the £2,000—we will say the balance—to the King’s Proctor for the benefit of the Crown. Supposing now, to take an analogous case, an administrator, or an executor where there is an intestacy as to the residue, on the supposition that A. is next-of-kin

E is asked by A. to hand over the property to him. What would such an administrator or executor be entitled to do? What would be his duty? He would be entitled to say: “I cannot recognise your right—it is a doubtful one—it depends upon a pedigree, and I cannot take upon myself the risk of deciding that you are entitled to that. If I do, I make myself personally responsible. As it is impossible for me to hand over this money to you with safety to myself, institute a suit and take proceedings, and then I am perfectly willing to deal with it in any way the court thinks fit.” If the court desires it to be done, and it is done, however wrong the court may be as to that party being the next-of-kin, the administrator is perfectly safe in following the directions of the court. But if he takes on himself to hand over the property to A., the claimant, he takes on himself the risk of being personally responsible for it to the persons who may turn out to be the actual next-of-

G kin. He may take the risk. He may say: “I will hand it over to you if you will give me an indemnity.” Indemnity implies a risk, and if the party to whom he has handed over the money turns out to be the person not entitled, but somebody else turns out to be the next-of-kin, he, the administrator, remains liable, and he may have his remedy over.

H It appears to me that the position of Mr. Reynolds as the administrator in this case is precisely analogous to that of an administrator who has handed over the property to the person supposed to be entitled upon an indemnity, and, although there is not the actual form of an indemnity passing from the Crown to the Crown’s nominee, to whom administration is granted as a matter of course, the administrator is indemnified by the Crown. He is entirely under the direction of the Crown, and, therefore, indemnified by the Crown. Surely in such a case the Crown is respon-

I sible—responsible, it may be, only indirectly, through the administrator. If you once regard the administrator as being for every purpose as merely representing the Crown, then it is the Crown as administrator who has retained the balance in its own hands, and it appears to me to come within the principle to which I have alluded. It does appear to me, subject to the question as to the time and the sums in respect of which interest is to be charged, that there is a liability to interest on the balance. If it were not so, I think that injustice would be done as between the Crown and individuals. When we talk of the Crown now, which means the public, it is very hard and unreasonable that the public should have the benefit,

without paying for it, of moneys which did not belong to it but belonged to A. from the death of the intestate. It would be very unreasonable and unjust that the public should have the benefit of those moneys, which is the same thing as if the public was getting interest upon the money or employing it at interest, and then at any time afterwards saying to the party who turns out to be beneficially entitled; "True, we have had the use of these moneys, but you ought to have come sooner; and although we have had the benefit, you shall have nothing but the dry principal." I do not see the equity or legal justice of that. It appears to me to be contrary to all analogy and principle. A B

In the present case there is a double ingredient. There is a portion of the property which consists not of property invested, and another part which was property yielding an income. It is true, the part which was yielding an income was a terminable property, that is to say, long annuities. No doubt, if this had been the case of property which was the subject of a will, where there was a tenancy for life and remainder, there would be an obligation under ordinary circumstances upon the party who was the administrator or executor to convert it and invest it. But I see no such obligation in this case, where the administrator has nothing to do but to hold the property which is not unproductive and receive such profit as may arise. The sale of the stock took place about the latter end of the year 1827, and the money arising from that sale was not wanted for any purpose whatever. The total amount of debts, funeral and testamentary expenses, outgoing expenses of every kind, and administration expenses, amounted to £257 5s. 9d., and the total amount of what was actually received in money, other than what arose from the proceeds of the sale of stock down to the end of the year 1826 is £1,023 9s. 4d., leaving a balance of £766 3s. 9d. at the end of the year 1826. At that time every debt and every testamentary expense and outgoing had been satisfied, and, therefore, there was a clear balance at that time not wanted to be retained for any apparent or apprehended purpose. It appears to me, upon principle, that interest at 4 per cent. ought to be charged on that balance from that time, and on the long annuities from the sale thereof in the following year. C D E

Order accordingly. F

NELSON AND OTHERS v. STOCKER

[COURT OF APPEAL IN CHANCERY (Knight-Bruce and Turner, L.JJ.), May 31, June 1, 30, 1859]

[Reported 4 De G. & J. 458; 28 L.J.Ch. 760; 33 L.T.O.S. 277; 5 Jur.N.S. 751; 7 W.R. 603; 45 E.R. 178]

Infant—False representation—Representation false to knowledge of person to whom made—Effect on plea of infancy—Representation by infant that he is of full age—Action on settlement entered into by him.

Per TURNER, L.J.: Infants are no more entitled than adults are to gain benefits to themselves by fraud. On the question whether a false representation made by an infant, e.g., that he is of full age, to a person who knows it to be false can be said to be a fraud, and such a fraud as will take away the privilege of infancy, there can be no doubt that it is morally wrong in an infant of competent age, as it is in any other person, to make any false representation whatever, but the court cannot enforce the observance of obligations or duties which rest on moral grounds only. Some wrong or injury must be shown to the party complaining in order to call the court into action, and I do not see how any wrong or injury can be said to have been done to any person to whom a false representation is made when the person to whom it is made knows it to be false. If the representation is known to be false, the person to whom it is made cannot be deceived by it. . . . The privilege of infancy is a legal privilege. On the one hand, it cannot be used by infants for the purposes of fraud. On the other hand, it cannot be allowed to be infringed by persons who, knowing of the infancy, must be taken also to know of the legal consequences which attach to it.

Notes. Applied: *Mohori Bibee v. Dharmodas Ghose* (1903), 19 T.L.R. 295. Considered: *R. Leslie, Ltd. v. Sheill*, [1914–15] All E.R.Rep. 511. Referred to: *Wright v. Leonard* (1861), 5 L.T. 110; *Burton v. Levey* (1891), 7 T.L.R. 248.

As to misrepresentation regarding his age by an infant, see 21 HALSBURY'S LAWS (3rd Edn.) 148, 149; and for cases see 28 DIGEST (Repl.) 520–523.

Cases referred to in argument:

King v. King (1857), 1 De G. & J. 663; 27 L.J.Ch. 29; 30 L.T.O.S. 177; 4 Jur. N.S. 721; 6 W.R. 85; 44 E.R. 881, L.JJ.; 43 Digest 776, 2167.

Clarke v. Cobley (1789), 2 Cox, Eq. Cas. 173; 30 E.R. 80; 28 Digest (Repl.) 525, 413.

Stikeman v. Dawson (1847), 1 De G. & Sm. 90; 4 Ry. & Can. Cas. 585; 16 L.J.Ch. 205; 8 L.T.O.S. 551; 11 Jur. 214; 63 E.R. 984; 28 Digest (Repl.) 521, 382.

Wright v. Snowe (1848), 2 De G. & Sm. 321; 64 E.R. 144; 28 Digest (Repl.) 523, 394.

Overton v. Banister (1844), 3 Hare, 503; 8 Jur. 906; 67 E.R. 479; 28 Digest (Repl.) 494, 118.

Cory v. Gertcken (1816), 2 Madd. 40; 56 E.R. 250; 28 Digest (Repl.) 523, 392.

Esron v. Nicholas (1733), 1 De G. & Sm. 118; 63 E.R. 996; sub nom. *Evroy v. Nicholas*, 2 Eq. Cas. Abr. 488, L.C.; 28 Digest (Repl.) 548, 640.

Jorden v. Money (1854), ante p. 350; 5 H.L.Cas. 185; 23 L.J.Ch. 865; 24 L.T.O.S. 160; 10 E.R. 868, H.L.; 35 Digest (Repl.) 5, 11.

Barrow v. Barrow (1858), 4 K. & J. 409; 27 L.J.Ch. 678; 33 L.T.O.S. 42; 4 Jur.N.S. 1049; 6 W.R. 714; 70 E.R. 171; 28 Digest (Repl.) 554, 707.

Re King, Ex parte Unity Joint Stock Mutual Banking Association (1858), 3 De G. & J. 63; 27 L.J.Bey. 33; 31 L.T.O.S. 242; 4 Jur.N.S. 1257; 6 W.R. 640; 44 E.R. 1192, L.JJ.; 4 Digest (Repl.) 29, 246.

Savage v. Foster (1723), 9 Mod. Rep. 35; 88 E.R. 299; 21 Digest (Repl.) 459, 1584.

Field v. Moore, Field v. Brown (1855), 7 De G.M. & G. 691; 25 L.J.Ch. 66; 26 A
L.T.O.S. 207; 2 Jur.N.S. 145; 4 W.R. 187; 44 E.R. 269, L.J.J.; 28 Digest
(Repl.) 531, 454.

Watts v. Creswell (1714), 2 Eq. Cas. Abr. 515; 9 Vin. Abr. 415; 22 E.R. 435;
28 Digest (Repl.) 525, 4161.

Campbell v. Ingilby (1856), 21 Beav. 567; affirmed (1857), 1 De G. & J. 393;
26 L.J.Ch. 654; 29 L.T.O.S. 287; 5 W.R. 837; 44 E.R. 775, L.J.J.; 28 Digest B
(Repl.) 556, 725.

Countess of Strathmore v. Bowes (1789), 1 Ves. 22; 2 Bro.C.C. 345; 2 Cox, Eq.
Cas. 28; 7 Term Rep. 482; 30 E.R. 211, L.C.; affirmed sub nom. *Bowes v.*
Bowes (1797), 6 Bro. Parl. Cas. 427, H.L.; 40 Digest (Repl.) 591, 943.

Baylis v. Dineley (1815), 3 M. & S. 477; 105 E.R. 689; 28 Digest (Repl.) 490, 80.

Furnivall v. Coombes (1843), 5 Man. & G. 736; 6 Scott, N.R. 522; 12 L.J.C.P. C
265; 1 L.T.O.S. 80; 7 J.P. 322; 7 Jur. 399; 134 E.R. 756; 17 Digest (Repl.)
358, 1651.

Appeal from a decision of STUART, V.-C., on a bill filed on behalf of certain infants
by Mr. Henry Wise, their next friend, to enforce a covenant entered into by the
defendant, their stepfather, for their benefit.

Mrs. Anne Perkins Nelson, the mother of the infants, after the death of her first
husband, J. H. Nelson, and up to the time of her marriage with the defendant,
William Burbank Stocker, carried on the business of a pawnbroker at Newport,
Monmouthshire. Shortly before her second marriage an indenture of settlement,
dated Oct. 10, 1850, and made between the defendant, of the first part, Mrs. Nelson
of the second part, and Ebenezer Vaughan Jenkins, a trustee, of the third part, was
executed. It recited that Mrs. Nelson had four children by her first husband; that
she had carried on business at Newport as a pawnbroker and had employed in that
business a capital of upwards of £1,000; and that in view of the intended marriage
between Mrs. Nelson and Stocker it was agreed that the defendant, Stocker, should
enter into a covenant for the payment to the trustee of the sum of £1,000 and
interest, and that the trustee should stand possessed of that sum and interest upon
and for the trusts thereafter appearing. It then witnessed that, in consideration
of the intended marriage and of the agreement, the defendant would pay to the
trustee the sum of £1,000. It was provided that it should not be lawful for the
trustee during the lifetime of Mrs. Nelson to compel payment of the £1,000 unless
required so to do by her. The trusts relating to the £1,000 were then declared
during the joint lives of the defendant and Mrs. Nelson for her separate use, and
if she survived the defendant, for herself absolutely, but if she should die in the
lifetime of the defendant, then for her four children in manner therein mentioned.
The marriage was solemnised on Oct. 18, 1850, and the defendant immediately took
possession of the stock and continued the pawnbroking business.

Mrs. Stocker died on Aug. 11, 1857, leaving three children (the plaintiffs) by her
former marriage, one having died. On Aug. 17, the trustee of the settlement wrote
to the defendant requesting payment of the £1,000. To this the defendant's solicitor
replied by the following letter:

"Newport, Monday, Aug. 20, 1857.

"Sir,—Mr. Stocker has placed your letter to him in my hands, with instruc-
tions to reply that at the time the settlement in question was made he was a
minor, and, therefore, not competent to bind himself by deed, and now that he
is of full age and more competent to judge of the propriety of executing such a
settlement, he declines to be bound by the document in question. I may add
that from the time of his majority he has always expressed and acted upon that
determination."

The bill alleged that at the time of the execution of the settlement and of his
marriage the defendant represented himself to Mrs. Nelson as being of full age,
and that she executed the settlement on the faith of that representation. It prayed

A that the defendant might be decreed to pay to the trustee and next friend of the plaintiffs the sum of £1,000 and interest from Mrs. Stocker's death.

The defendant, by his answer, said that he was not of full age at the time of the execution of the settlement and that of the marriage; he was then only seventeen years of age, having been born in 1832. Previously to his signing the settlement, he thought that the solicitor asked him, in the course of conversation, whether he **B** was of age, and he replied, as was then the fact, that he thought he was, but he did not then know that the question was of any importance. In the register of his marriage the defendant was described as "of full age." The defendant's mother and aunt proved that he was born on Nov. 29, 1832. The defendant, by his affidavit, further said that he had never at any time since he had attained the age of twenty-one adopted or confirmed the settlement, but, on the contrary, he had always, since **C** he discovered what his age was at the time of the marriage—which discovery he made within a year after the date of the settlement—refused to be bound by it, and he denied that the marriage was solemnised on the faith of any representation whatever as to his age.

STUART, V.-C., held that the defendant could not be allowed to set up his infancy as a bar to the settlement, and that, both on the ground of misrepresentation and **D** also that of acquiescence subsequently to his attaining twenty-one he was bound by it. He ordered that the defendant should pay the gross sum of £1,000 within three months, with liberty to make any proposals in chambers as to the security for the same; but that, as it appeared that he had maintained the infant plaintiffs since the death of Mrs. Stocker, no interest was to be paid on the £1,000. From this decree the defendant appealed.

E *Malins, Q.C.*, and *W. Wyllys Mackeson* for the plaintiffs.
Elmsley, Q.C., J. K. Smithies and *Pemberton* for the defendant.

Cur. adv. vult.

June 30, 1859. KNIGHT-BRUCE, L.J.—It being established in the cause that the defendant did not attain his majority before the latter part of the year 1853, **F** he is prima facie not bound by the instrument of settlement signed and sealed by him in the year 1850, the year of his marriage, which it is the object of the suit to enforce against him. The plaintiffs, however, say that the defendant is bound by the instrument because, as the plaintiffs contend, he, with knowledge of his true age, misrepresented his age to his now deceased wife, and caused her, when the **G** settlement was agreed to, when it was prepared and signed, and when they married, to believe him not to be a minor. The plaintiffs say that she accepted the settlement in that faith, and married in that belief—a faith and belief induced by the defendant's fraud. The plaintiffs also say that, independently of any question of fraud before the marriage, the defendant's conduct after the marriage, and especially after his majority, amounted to a confirmation by him of the settlement, and that, **H** on both grounds or one of them, he is barred from denying his liability to make it good.

It appears to me, upon the whole of the evidence, however, that the defendant's deceased wife is not shown to have been defrauded or deceived by the defendant in any respect before their marriage. I believe that at the time of the marriage and previous to it—before the instrument of settlement was signed by either of them, and before it was prepared—she was aware of his minority, and that the case **I** stands substantially upon the same footing, so far as the parties to the present record are concerned, as if the fact of his infancy had been stated on the face of the settlement. With regard to confirmation, independently of the difficulty placed, perhaps, in the plaintiffs' way by the Prescription Act, 1832, as well as the nature of the document which they seek to enforce against the defendant, I conceive that the plaintiffs' claim in this respect, whether excluded or not excluded by the mode in which the bill is framed, fails on the evidence. I think that there is no confirmation, no agreement to confirm, nor conduct tantamount to proof. The rights

of the defendant seem to me to remain as they did on the day after his marriage. A
I am of opinion, therefore, that the bill is without foundation, but that it is not a
case for costs.

TURNER, L.J.—The evidence in the cause seems to me to establish beyond all
doubt that at the date of the settlement and that of the marriage the defendant was
only between seventeen and eighteen years of age, and Anne Stocker was a widow of
the age of thirty-two. As I read the evidence, it further establishes in favour of
the plaintiffs that the defendant, before the execution of the settlement, was asked
by the solicitor who prepared it whether he was of age, and replied that he thought
that he was; and in favour of the defendant, that Anne Stocker herself knew before
the marriage that the defendant was not of age. This, in my judgment, is the
true result of the evidence in the cause, and it is upon these facts that STUART, V.-C.,
has decreed the payment of the £1,000. The defendant has appealed from the
decree. C

If the case had depended simply upon the point of the defendant having repre-
sented himself to be of age when he was not of age, I should have felt no doubt
about it, for it would be too much to call upon the court to believe that this defend-
ant could really have thought himself to be of age at the date of the settlement
when he was under eighteen years of age, and if he did not so think, the representa-
tion he made to the solicitor was false and fraudulent. Infants are no more entitled
than adults are to gain benefits to themselves by fraud, and had the case, therefore,
depended upon this point alone, I should have agreed most fully with the decision of
STUART, V.-C. It is not, however, upon the question of false representation alone
that the decision of the case, in my judgment, depends. It is scarcely less difficult
to believe that Anne Stocker did not know that the defendant was under age at
the time of the settlement and of the marriage than that the defendant himself did
not know it. In fact, the evidence proves that she knew it. The question, there-
fore, seems to me to be, not whether the representation made by the defendant was
false, but whether a false representation made to a person who knows it to be false
can be said to be a fraud, and such a fraud as will take away the privilege of
infancy. There can be no doubt that it is morally wrong in an infant of competent
age, as it is in any other person, to make any false representation whatever, but the
court cannot enforce the observance of obligations or duties which rest upon moral
grounds only. Some wrong or injury must be shown to the party complaining in
order to call the court into action, and I do not see how any wrong or injury can
be said to have been done to any person to whom a false representation is made when
the person to whom it is made knows it to be false. If the representation is known
to be false, the person to whom it is made cannot be deceived by it. E F

Looking at the case in this point of view, it opens a question of great general
importance. The law has for the wisest reason thrown around infants a protection
against acts done by them during their infancy, and the policy of the law cannot
be maintained if this privilege of infancy be allowed to be broken in upon on slight
and insufficient grounds. If the contracts of infants with persons who know them
to be under age are held not to be binding on the ground that the infants represented
themselves to be of age, there will hardly be a case in which the plea of infancy will
be of any avail, and the door will be open to all frauds against infants which the
law was intended to protect them from. The privilege of infancy is a legal privilege.
On the one hand, it cannot be used by infants for the purposes of fraud. On the
other hand, it cannot, I think, be allowed to be infringed by persons who, knowing
of the infancy, must be taken also to know of the legal consequences which attach
to it. This decree, so far as I am aware, is in this respect of the first impression,
and I am not prepared to support a precedent which goes so far to destroy the legal
privileges of infants. STUART, V.-C., seems, as I collect from his judgment, to have
considered the knowledge imputed to Anne Stocker to have been of no importance,
because the representation was made to the solicitor, but, according to the evidence,
the solicitor was employed by her—he was her agent in the transaction. The G H I

A settlement was prepared at her instance and for her benefit, and if the representation made to Anne Stocker herself would not have rendered the covenant binding upon the defendant, I do not see how the representation made to her agent can have that effect. It may be said, indeed, that the solicitor, had he been informed of the infancy, would have advised some different settlement, but I do not see how this can improve the plaintiffs' case. If there was a false representation made in such circumstances as would render the covenant binding upon the defendant, it would equally do so whether a different settlement would have been made or not. It is, indeed, a mere speculation whether a different settlement, or even any settlement, would have been made if the infancy had been disclosed to the solicitor, and it must be remembered, with reference to this point, that, assuming, as I do, that Anne Stocker knew of the infancy, it was her duty—no less her duty than it was the duty of the defendant—to have apprised the solicitor of the fact, and that if, on the one hand, there was false representation on the part of the defendant, there was, on the other hand, suppression on the part of Anne Stocker.

It was much insisted upon, on the part of the plaintiffs, that there had been adoption and confirmation by the defendant, but this is wholly denied by the answer, and I can find no evidence of it beyond the fact that the defendant took possession of the business and stock-in-trade and has continued in possession of it. This was, however, property to which the defendant became entitled *jure mariti*, and not by virtue of the settlement [this was before the Married Women's Property Act, 1882]. Upon the whole case, much as I disapprove the conduct of this defendant, I cannot go the length of saying that he is bound by this covenant, and I am of opinion, therefore, that this bill ought to have been dismissed.

Appeal allowed.

VALPY AND OTHERS v. SANDERS AND ANOTHER

[COURT OF COMMON PLEAS (Wilde, C.J., Maule, Cresswell and Williams, JJ.), January 22, 24, May 12, 1848]

[Reported 5 C.B. 886; 17 L.J.C.P. 249; 11 L.T.O.S. 201; 12 Jur. 488; 136 E.R. 1128]

Bankruptcy—Property available for distribution—Conversion of bankrupt's goods—Recovery by trustee.

Where a person converts the goods of a bankrupt and the trustee in bankruptcy demands payment from that person as on a sale by the bankrupt, the trustee is not precluded from suing in trover when payment is refused.

The defendants bought goods at A.'s shop after notice that A. had committed an act of bankruptcy by absconding, and claimed to set off against the price a debt due to them from A. A fiat having afterwards issued against A., his assignees demanded payment for the goods bought by the defendants.

Held: the assignees did not thereby so affirm the sale as to disentitle them to maintain trover for the goods on a subsequent demand and refusal.

Notes. Referred to: *Rice v. Reed*, [1900] 1 Q.B. 54; *United Australia Co. v. Barclays Bank, Ltd.*, [1940] 4 All E.R. 20.

As to remedies for conversion, see 38 HALSBURY'S LAWS (3rd Edn.) 791–798; and for cases see 1 DIGEST (Repl.) 471 et seq.

Cases referred to:

(1) *Brewer and Gregory v. Sparrow* (1827), 7 B. & C. 310; 1 Man. & Ry.K.B. 2; 2 L.J.O.S.K.B. 1; 108 E.R. 739; 1 Digest (Repl.) 480, 1236.

- (2) *Morris v. Robinson* (1824), 3 B. & C. 196; 5 Dow. & Ry. K.B. 34; 107 E.R. 706; 1 Digest (Repl.) 294, 1886. A
- (3) *Burn v. Morris* (1834), 2 Cr. & M. 579; 4 Tyr. 485; 3 L.J.Ex. 193; 149 E.R. 891; 6 Digest (Repl.) 395, 2835.
- (4) *Hurst v. Gwennap* (1817), 2 Stark. 306, N.P.; 5 Digest (Repl.) 1053, 8509.

Also referred to in argument :

- Pickard v. Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest (Repl.) 369, 1103. B
- Colles v. Bank of England* (1839), 10 Ad. & El. 437; 2 Per. & Dav. 521; 9 L.J.Q.B. 36; 4 Jur. 266; 113 E.R. 166; 3 Digest (Repl.) 133, 30.

Rule Nisi obtained by the plaintiffs to set aside a nonsuit and enter a verdict for them in an action of trover brought by the plaintiffs, assignees of the estate and effects of Thomas Sutton, a bankrupt, for goods, alleged in the first count to have come into the defendants' possession before the bankruptcy, and in the second count, after the bankruptcy of Sutton. The defendants pleaded not guilty, and not possessed. C

At the trial before PATTESON, J., at Warwickshire Assizes, it appeared that Thomas Sutton, the bankrupt, carried on the business of a draper at Atherstone, in the county of Warwick. On Feb. 23, 1846, he committed an act of bankruptcy, by absconding to America. A fiat in bankruptcy issued against him on Mar. 3; the adjudication took place on Mar. 5; and on Mar. 24 the plaintiffs were appointed assignees. The defendants were wine-merchants carrying on business in partnership together at Atherstone. At the time of his absconding, the bankrupt was indebted to the defendants for wine. On Feb. 25 and 27—the defendants having then full knowledge that the bankrupt had absented himself—Mrs. Sanders, the second defendant, went to the shop, where the business was still going on under the direction of the plaintiffs, and looked out goods to the amount of £5 6s. 5d. on the first occasion, and £6 4s. 11d. on the second. The first parcel the second defendant took away with her; the second was sent to the defendants' house on Feb. 28. The shopman who delivered the last-mentioned goods demanded the money for them, whereupon the second defendant observed that she did not understand that she was to pay for the goods, and desired the man to call again in an hour. When he called again, she declined either to pay the money, or to restore the goods. D

On April 9, the plaintiffs' agent sent in a bill of parcels or invoice of the goods purchased, enclosed in a letter, addressed to the defendants, as follows: E

“April 9, 1846. “In re Sutton, a bankrupt. G

“Gentlemen,—I am directed to apply to you for the sum of £11 11s. 4d. for goods supplied to you on Feb. 25 and 27 last, which be pleased to remit to me without loss of time.”

On April 23, the following letter was sent to the defendants by the solicitor of the assignees: H

“Rugby, April 23, 1846.

“Gentlemen,—I am directed by Mr. Sutton's assignees to apply to you for the payment of the sum of £11 11s. 10d.: and you will be so good as to pay the same to me, with 5s. for this letter, by Thursday next, as, in case of non-payment, I have positive instructions to sue you for the same.”

To this letter the defendants' solicitors sent the following reply: I

“Atherstone, April 28, 1846.

“Dear Sir,—Messrs. Sanders & Sanford consulted us on the subject of the claim made against them by the assignees of T. Sutton, as appears in your letter to them of the 23rd instant. We carefully considered all the circumstances, and advised that they were not liable to pay that claim, but were legally entitled to set off the amount of their claim on the bankrupt's estate. Since that time, we have taken the opinion of Mr. J. B. on the matter; and he

A concurs with us: and, if it be determined to bring an action, we will accept service of the writ, and appear."

At the trial it was contended on the part of the defendants that, by the delivery of the bill of parcels on April 9, and the demand of payment as for goods sold and delivered by the bankrupt, the plaintiffs had affirmed the sale, and could not afterwards disaffirm it, and bring trover. The jury having found that the
B defendants had notice of Sutton's bankruptcy after the purchase of the first parcel of goods, and before the purchase of the last parcel, the judge directed a nonsuit. He held that the plaintiffs, having treated the transaction as a sale, it was not competent to them afterwards to turn round and treat it as a tort. He reserved leave to the plaintiffs to move to enter a verdict for £6 4s. 11d., if the court should be of opinion that the action was maintainable. The plaintiffs obtained a rule
C accordingly.

Whitehurst and *Mellor* for the defendants showed cause against the rule.

Waddington (with whom was *Humfrey*) supported the rule.

Cur. adv. vult.

May 12, 1848. **WILDE, C.J.**, delivered the following judgment of the court.—

D This was an action of trover brought by the plaintiffs, as assignees of Sutton, a bankrupt, for the purpose of recovering the value of certain goods which had belonged to the bankrupt, and which had been sold by the bankrupt's shopman after an act of bankruptcy committed by the bankrupt who had absconded, and after notice of the act of bankruptcy received by the defendants. Subsequently to the plaintiffs' appointment as assignees, their agent sent a bill of parcels to the
E defendants, as for goods sold by the bankrupt to the defendants; and the plaintiffs' solicitor demanded payment of the amount of such bill of parcels. The defendants refused to pay for the goods, whereupon the plaintiffs demanded the goods, and, on the defendants' refusal to deliver them, the present action of trover was brought.

At the trial, it was contended on the part of the defendants that, by the delivery of the bill of parcels and demand of payments as for goods sold and delivered by the
F bankrupt, the plaintiffs had affirmed the sale, and could not afterwards disaffirm it and maintain trover. On this objection the plaintiffs were nonsuited, leave being given to them to move to enter a verdict in their favour for the amount demanded if the court should be of opinion that the plaintiffs were entitled to recover. It appears by the judge's report of the evidence, that the sale was made by the bankrupt's servant after his [the bankrupt's] absconding and altogether without authority, and after notice of the act of bankruptcy. It is, therefore, clear that the defendant,
G by receiving the goods under such unauthorised sale, was guilty of a conversion as against the assignees of the bankrupt. There was no evidence to show that the plaintiffs, or their agents, had any notice that the bankrupt was indebted to the defendants at the time of the delivery of the bill of parcels, or at the time the demand was made for payment; and it was proved that, before the delivery of the
H goods, the shopman who sold them informed the defendants that the goods must be paid for to the estate of the bankrupt. In these circumstances, the plaintiffs obtained the present rule nisi to set aside the nonsuit and to enter a verdict for them. On the argument of the rule, the principal point discussed was, whether the plaintiffs had, by the acts before mentioned, affirmed the sale by the shopman as a sale by their agent and so precluded themselves from maintaining an action
I of trover.

The court is of opinion that such was not the effect of those acts and that the utmost effect to be given to them is, that they amounted only to a qualified offer to adopt such sale, that is, if the defendant would pay for the goods; and that, when the defendant refused to pay for them, it was competent to the plaintiffs to repudiate the sale altogether, and bring the present action. In *Brewer and Gregory v. Sparrow* (1), assignees were held to have adopted the dealings of the defendant with the estate of the bankrupt, which had taken place after an act of bankruptcy and with notice, by adjusting an account of receipts and payments in respect of

such dealings, and by receiving the balance due on the result of such an account —treating all the transactions as valid. But, in *Morris v. Robinson* (2), where a quantity of indigo had been shipped at Calcutta, on freight, and had been improperly sold under the order of the Vice-Admiralty Court at the Mauritius, and the proceeds paid into court, the owner of the indigo was held entitled to maintain trover against the defendants, who had purchased and received thirty-two chests of the indigo so sold, notwithstanding the plaintiff's agent, under a power of attorney executed by the plaintiff, had made an unsuccessful application to the Vice-Admiralty Court to obtain the proceeds paid into court of certain other of the chests of indigo sold under the same circumstances as those purchased by the defendants. In *Burn v. Morris* (3), where trover was brought for a £20 bank-note which the plaintiff had lost, and which the defendant had received from a woman who had found it and exchanged it at the bank, notwithstanding the plaintiff had received from the woman who so found it the sum of £7, being part of the proceeds which had been obtained by the defendant by the exchange of the note at the bank —the £7 being allowed only in reduction of damages. On *Brewer and Gregory v. Sparrow* (1) being cited, the court said that case was distinguishable by the fact that the assignees had there received a sum as the whole balance due to them upon the footing of the account. Again, in *Hurst v. Gwennap* (4), goods had been delivered by a bankrupt to the defendant, on sale or return, after an act of bankruptcy but without notice. The assignees, after their appointment, required the defendant to say whether he would keep the goods or not; the defendant elected to keep them, whereupon the assignees delivered a bill of parcels, as on a sale by the bankrupt to the defendant, and demanded payment of the amount. The defendant refused to pay, claiming a set-off, as in the present case; whereupon the assignees, without further demand, brought trover and were held entitled to recover. The court confirmed the ruling of LORD ELLENBOROUGH at nisi prius.

We are, therefore, of opinion that the plaintiffs, by demanding payment for the goods, as on a sale by the bankrupt—which demand was not acquiesced in by the defendants—did not preclude themselves from maintaining trover on the defendants' refusal to pay according to such demand. The plaintiffs are, therefore, entitled to make the rule absolute for entering the verdict for them for the value of the goods so received by the defendants under the circumstances before stated.

Rule absolute.

A

KEENE v. BEARD

[COURT OF COMMON PLEAS (Erle, C.J., Byles and Keating, JJ.), April 30, May 1, 1860]

B

[Reported 8 C.B.N.S. 372; 29 L.J.C.P. 287; 2 L.T. 240;

6 Jur.N.S. 1248; 8 W.R. 469; 141 E.R. 1210]

Bill of Exchange—Cheque—Endorsement—Payable to “A. B. or bearer”—Endorsement by A. B.—Action on cheque by holder against A. B.

A cheque on a banker drawn payable to A. B., or bearer, and endorsed by A. B., may be recovered on in an action by a holder against A. B.

C

Per BYLES, J.: A cheque is in the nature of an inland bill of exchange, and has nearly all the incidents of ordinary bills of exchange, and, therefore, may be endorsed. The writing the name on the back of the cheque must be done *animo endorsandi* in order to make it effectual to bind the endorser.

Notes. As to negotiation of bills, see now the Bills of Exchange Act, 1882, ss. 31–38; s. 73.

D

Approved: *M'Lean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95. Referred to: *Currie v. Mash* (1875), L.R. 10 Exch. 153; *Robinson v. Marsh*, [1921] 2 K.B. 640; *Gerald McDonald v. Nash & Co.*, [1924] All E.R.Rep. 601; *Bank of Baroda, Ltd. v. Punjab National Bank, Ltd.*, [1944] 2 All E.R. 83.

As to negotiability of cheques, see 3 HALSBURY'S LAWS (3rd Edn.) 142; 161–163; and for cases see 6 DIGEST (Repl.) 9–10; 26–32. For the Bills of Exchange Act,

E

1882, ss. 31–38, see 2 HALSBURY'S STATUTES (2nd Edn.) 521–525; and for s. 73 of that Act, see *ibid.* 544.

Case referred to:

(1) *Waynam v. Bend* (1808), 1 Camp. 175, N.P.; 6 Digest (Repl.) 208, 1429.

Also referred to in argument:

F

Tassell and Lee v. Lewis (1695), 1 Ld. Raym. 743; 91 E.R. 1397; 6 Digest (Repl.) 215, 1488.

Bromwich v. Lloyd (1696), 2 Lut. App. 1582; 125 E.R. 870; 6 Digest (Repl.) 146, 1049.

Buller v. Crips (1703), 6 Mod. Rep. 29; 87 E.R. 793; 6 Digest (Repl.) 44, 354.

Gibson v. Minet (1791), 2 Bro. Parl. Cas. 48; 1 Hy. Bl. 569; 1 E.R. 784, H.L.; 6 Digest (Repl.) 28, 202.

G

Welsh v. Craig (1728), 8 Mod. Rep. 373.

Hodges v. Steward (1692), 1 Salk. 125; 1 Ld. Raym. 181.

Grant v. Vaughan (1764), 3 Burr. 1516; 1 Wm. Bl. 485; 97 E.R. 957; 6 Digest (Repl.) 397, 2839.

H

Ramchurn Mullick v. Luchmeechund Radakissen (1854), 9 Moo.P.C.C. 46; 14 E.R. 215, P.C.; sub nom. *Radakissen and Doss v. Ramchurn Mullick*, 2 C.L.R. 1664; sub nom. *Mullick v. Radakissen*, 23 L.T.O.S. 25; 6 Digest (Repl.) 211, 1452.

Laus v. Rand (1857), 3 C.B.N.S. 442; 27 L.J.C.P. 76; 30 L.T.O.S. 286; 4 Jur.N.S. 74; 6 W.R. 127; 140 E.R. 812; 6 Digest (Repl.) 216, 1497.

Walmsley v. Child (1749), 1 Ves. Sen. 341; 27 E.R. 1070, L.C.; 6 Digest (Repl.) 393, 2812.

I

Peto v. Reynolds (1854), 9 Exch. 410; 23 L.J.Ex. 98; 22 L.T.O.S. 246; 18 Jur. 472; 2 W.R. 196; 2 C.L.R. 491; 156 E.R. 175; 6 Digest (Repl.) 33, 245.

R. v. Snelling (1853), Dears.C.C. 219; 23 L.J.M.C. 8; 22 L.T.O.S. 107; 17 L.J. 742; 17 Jur. 1012; 2 W.R. 54; 2 C.L.R. 114; 6 Cox, C.C. 230, C.C.R.; 6 Digest (Repl.) 35, 264.

Bishop v. Young (1800), 2 Bos. & P. 78.

Rothschild v. Corney (1829), 9 B. & C. 388; Dan. & Ll. 325; 7 L.J.O.S.K.B. 270; 109 E.R. 144; 6 Digest (Repl.) 183, 1250.

Boehm v. Sterling (1797), 7 Term Rep. 423; 2 Esp. 574; 101 E.R. 1055; 6 Digest (Repl.) 183, 1248. A

Brooks v. Mitchell (1841), 9 M. & W. 15; 11 L.J.Ex. 51; 152 E.R. 7; 6 Digest (Repl.) 181, 1238.

Diron v. Bovill (1856), 3 Macq. 1; 28 L.T.O.S. 130; 2 Jur.N.S. 933; 4 W.R. 813, H.L.; 6 Digest (Repl.) 427, 3001.

Gorgier v. Mievill (1824), 3 B. & C. 45; 4 Dow. & Ry.K.B. 641; 2 L.J.O.S.K.B. 206; 107 E.R. 651; 6 Digest (Repl.) 419, 2959. B

Lewin v. Edwards (1842), 9 M. & W. 720; 1 Dowl.N.S. 639; 11 L.J.Ex. 291; 6 Jur. 401; 152 E.R. 304; 6 Digest (Repl.) 288, 2115.

Mills v. Oddy (1835), 2 Cr.M. & R. 103; 3 Dowl. 722; 1 Gale, 92; 5 Tyr. 571; 4 L.J.Ex. 168; 6 Digest (Repl.) 115, 860.

Moore v. Burthorp (1822), 1 B. & C. 5; 2 Dow. & Ry.K.B. 25; 1 L.J.O.S.K.B. 4; 107 E.R. 2; 5 Digest (Repl.) 758, 6507. C

Demurrer to the declaration in an action by the holder of a cheque against the payee and endorser claiming £15.

The declaration stated that one T. S. Bodenham, on Mar. 10, 1859, made his draft or order in writing for the payment of money, commonly called a cheque on a banker, and directed it to certain persons trading as bankers, by the name and style of the Union Bank of London, and thereby required them to pay to the defendant or bearer the sum of £11; and then delivered the draft or order to the defendant, who then endorsed and delivered it to the plaintiff, who then became and was and still is the lawful bearer thereof. The draft or order was duly presented for payment and was dishonoured, of which the defendant had due notice, but did not pay the same. The plaintiff claimed £15. The defendant demurred to the declaration. Joinder in demurrer. D E

Grant for the defendant in support of the demurrer.

G. Denman for the plaintiff.

Cur. adv. vult.

May 1, 1860. **ERLE, C.J.**—In my opinion this is a good declaration. The action is brought by the holder of a cheque on a banker against the payee and endorser. The declaration states [HIS LORDSHIP stated the declaration as above]. To this there is a demurrer, and the principal point made by counsel for the defendant in support of the demurrer was, that a cheque was not to be called a bill of exchange so as to be capable of being sued upon and creating a liability in the endorser to the person who may be holder of the document. Certainly the analogy holds between cheques and bills of exchange in a great many respects. The banker might, for ought I know, accept the cheque. A cheque has all the incidents of a bill of exchange as regards passing by delivery, and of being as cash in the hand of a party taking it bona fide and for value. Having then several of the incidents which appertain to bills of exchange, has a cheque the incident of passing by endorsement? that is to say, when the endorsement is made, not by a mere affixing of the party's name on the back of the document, but an affixing of the name *animo endorsandi*, with the intention to pass a title to the cheque, and to incur the liabilities of an endorser of a negotiable instrument. Here it seems to me that the endorsement must have been made with that intention, and therefore our judgment in favour of the plaintiff will be at least in accordance with the intention of the parties to the cheque. But I also think that we act in accordance with the principles of law in holding that a cheque is a negotiable instrument. F G H I

BYLES, J.—I am of the same opinion. I conceive that a cheque is in the nature of an inland bill of exchange, and has nearly all the incidents of ordinary bills of exchange. In one respect a cheque differs from a bill of exchange, for it is in the nature of an appropriation of money in the banker's hands for the purpose of discharging a liability of the drawer to a third person; it is not necessary that there should be money of the drawer's in the hands of the drawee of a bill of exchange.

- A** There is another minor difference as to staleness; the drawer is not prejudiced by any delay in presenting his cheque to the banker unless in the meantime the banker has become insolvent. Counsel for the defendant was mistaken when he supposed that the negotiability of bills of exchange inland drawn depended on the statute 9 Will. 3, c. 17 [repealed by Bills of Exchange Act, 1882]; they had been so negotiated for many years previously to that date. Even the notes and bonds
- B** of foreign princes and states are all negotiable instruments in this country, and persons who take them for value are entitled to render them available. That seems to be so clear upon the decisions that I think it would be impossible to hold that cheques are not in at least an equally favourable position; and to me it is clear that a cheque is, in fact, in the class of an ordinary bill of exchange; and, if so, why cannot it be endorsed? Since the endorsement—that is an endorsement *animo*
- C** *endorsandi*—must be proved (*Wayman v. Bend* (1)), no inconvenience can ensue from our holding this. In *STORY ON PROMISSORY NOTES*, s. 132, it is laid down:

“Although a note payable to bearer is transferable by mere delivery, it may also be transferred by endorsement of the payee, or of any other subsequent holder.”

- D** It is very true that when a man's name is written on the back of an instrument without the intention to endorse, and so make himself liable upon it, he is not so liable; for though it may be said he has put his name on the back of the cheque, that is a writing on the back, but it is not an endorsement in the legal sense of the term; and so in the case of a bank-note, a party who writes his name on the back is not liable on it if he wrote without intending to endorse. The writing must
- E** always be done *animo endorsandi* in order to make it effectual to bind the endorser. I do no injustice to counsel for the defendant when I say that his argument would have been of more authority if addressed to this court a hundred years ago than it could be expected to have in these times.

KEATING, J.—I consider that this cheque is a negotiable instrument, and that the plaintiff has a right to sue upon it, and that our judgment ought to be for him.

F

Judgment for plaintiff.

FINDON v. PARKER

[COURT OF EXCHEQUER (Lord Abinger, C.B., Gurney and Rolfe, BB.), June 10, 1843]

[Reported 11 M. & W. 675; 12 L.J.Ex. 444; 1 L.T.O.S. 289;
7 J.P. 385; 7 Jur. 903; 152 E.R. 976]

Maintenance of Action—Contract by proprietors of land to fight claims made for tithes on their land and to employ attorney for this purpose—Common link of interest between proprietors—Claim by attorney for work done.

Jesus College, who were the lessees of certain tithes, gave notice to the proprietors and the tenants of the land demanding that the occupiers of the land pay their tithes in kind. The proprietors held a meeting at which it was resolved to resist the claim of the college "and support the present moduses; that the expenses incurred in such proceedings shall be borne and paid by the proprietors in proportion to the value of their estates;" and that the plaintiff who was an attorney "be requested to take such steps as may be considered necessary." This resolution was signed by the defendant and six other proprietors of the land. At the time of the agreement it was uncertain whether the college would proceed by one or several bills in equity, but subsequently nine bills were filed and seven issues were directed against the occupiers of the different farms. The plaintiff in his capacity of attorney did work defending certain of the suits and in due course presented his account. The defendant refused to pay on the grounds that the work was done in pursuance of an agreement which amounted to maintenance.

Held: the agreement was not illegal and did not amount to maintenance since there was reasonable evidence of a common link of interest uniting the proprietors of the land in question at the time they made the agreement.

Notes. Followed and Applied: *Hunter v. Daniel* (1845), 4 Hare, 420. Distinguished: *Hutley v. Hutley* (1873), L.R. 8 Q.B. 112; *Re Cambrian Mining Co.* (1882), 48 L.T. 114; *Bradlaugh v. Newdegate* (1883), 11 Q.B.D. 1; *Alabaster v. Harness*, [1891-4] All E.R.Rep. 817. Applied: *British Cash and Parcels Conveyors, Ltd. v. Lamson Store Service Co.*, [1908-10] All E.R.Rep. 146. Considered and Explained: *Neville v. London Express Newspaper, Ltd.*, [1918-19] All E.R.Rep. 61. Distinguished: *Ford v. Radford* (1920), 36 T.L.R. 658. Considered: *Martell v. Consett Iron Co.*, [1955] 1 All E.R. 481.

As to definition and scope of maintenance in general, see 1 HALSBURY'S LAWS (3rd Edn.) 39; and for cases see 1 DIGEST (Repl.) 80 et seq.

Cases referred to in argument:

Potts v. Sparrow (1835), 1 Bing.N.C. 594; 3 Dowl. 630; 1 Hodg. 135; 1 Scott, 578; 4 L.J.C.P. 201; 131 E.R. 1246; 1 Digest (Repl.) 100, 765.

Master v. Miller (1791), 4 Term Rep. 320; 100 E.R. 1042; 1 Digest (Repl.) 73, 550.

Wallis v. Duke of Portland (1797), 8 Bro. Parl. Cas. 161; 3 Ves. 494; 3 E.R. 508; 1 Digest (Repl.) 83, 629.

Flight v. Leman (1843), 4 Q.B. 883; 1 Dav. & Mer. 67; 12 L.J.Q.B. 358; 1 L.T.O.S. 287; 7 Jur. 557; 114 E.R. 1130; 1 Digest (Repl.) 81, 612.

Pechell v. Watson (1841), 8 M. & W. 691; 11 L.J.Ex. 225; 151 E.R. 1217; 1 Digest (Repl.) 84, 640.

Olivier v. Haywood (1792), 1 Anst. 82; 145 E.R. 806; sub nom. *Olivier v. Bakewell*, 4 Gwill. 1381; 18 Digest (Repl.) 135, 1199.

Rule Nisi obtained by the defendant to enter a nonsuit or a verdict for him in an action brought by the plaintiff one Findon against the defendant Sir G. Phillips for the balance due to him on his bill of costs for work done as attorney for the

A defendant, in defending certain tithe suits relating to lands in the parish of Tredington of which the defendant and others were the proprietors.

At the trial before WIGHTMAN, J., at the last Spring Assizes for the county of Worcester, it appeared that the lands in Tredington consisted of what were denominated the Old and the New inclosures, the former of which, from time of living testimony, had been exempted from the payment of tithes in kind, there being paid instead of them a certain sum varying in amount, for each of the several farms within the parish; whereas for the New inclosures tithes in kind were paid, or a composition entered into. In 1832, the principal, fellows, etc., of Jesus College, Oxford, being patrons of the living, and also lessees of the tithes, gave notice to the tenants and proprietors of the Old inclosures to set out their tithes in kind. In consequence of this notice having been given, the proprietors of land in Tredington held a meeting together upon the subject of this claim by the college, and at that meeting it was resolved

D "that the proprietors do resist the claim of the college, and support the present moduses, and that the expenses incurred in such proceedings shall be borne and paid by the proprietors, in proportion to the value of their estates, and that Messrs. Findon and Wood be requested to take such steps as may be considered necessary."

This resolution was signed by the defendant and six other landowners in the parish of Tredington. At the time of making this agreement, it was uncertain whether the college would proceed by one or several bills in equity. Nine bills, however, were subsequently filed, and seven issues were directed by the Lord Chief Baron to be tried against the occupiers of the different farms. These issues were set down for trial at Worcester Assizes, and the first of the issues was accordingly tried, but during the time that the jury were deliberating upon the first issue, and the second was in the course of trial, it was agreed by the counsel on both sides that the result of all the issues should depend upon the verdict in the first. The jury, however, being unable to agree, were discharged without returning any verdict. The plaintiff afterwards brought the present action for the balance due to him on his bill of costs.

It was objected at the trial, that the agreement was illegal, as amounting to maintenance on the part of the different parties signing it. The learned judge, however, was of opinion that it was not illegal; that the landowners had a common interest in resisting the claim to tithes, on the ground that the old inclosed lands had never paid tithes before; and he accordingly directed the jury to find for the plaintiff, reserving leave to the defendant to move to enter a nonsuit or a verdict for him. The defendant obtained a rule accordingly.

Serjeant Talfourd, Whitehurst and Butt for the plaintiff, showed cause against the rule.

H *Kelly, R. V. Richards and W. J. Alexander* for the defendant, supported the rule.

LORD ABINGER, C.B.—I am of opinion that this rule ought to be discharged. I will put the case in the most naked form, for the purpose of applying what I have always considered as a maxim of law recognised and established. Suppose a man employs an attorney to defend an action in which he has no interest, and the attorney defends the action accordingly, does it lie in the mouth of the person who employs him to say he was guilty of maintenance in employing him? Every man who has been in a court of law has heard the maxim that a man cannot take advantage of his own wrong. In this case, however, I do not resort to that maxim, except to show that the present is rather an unusual defence. This is said to be a case of maintenance at common law, where an action is brought against a man who admits himself to have been a party to the contract, but alleges that he has committed the crime of maintenance; and as that allegation is to the prejudice of another person, we ought to hold him to strict proof of the fact. The plea alleges

the agreement to be corrupt and illegal; the replication denies that it was illegal or corrupt, in the manner and form alleged by the plea. A

I do not think that, in order to determine the question, we are bound to look at the ultimate results of the particular suits, but that we ought to see whether there was any ground on which the parties making this agreement might reasonably suppose that they had a common interest in resisting the claim of the college. That claim was a general claim of tithe in kind from all the defendants; the defences to which would depend upon the answers put in. Suppose the answer in each case claimed a distinct modus for the specific land occupied by each defendant, and claimed it in the exact terms of a modus—"from time whereof the memory of man runneth not to the contrary;" and suppose that all the parishioners making this agreement were satisfied that, as far as the parol evidence was concerned, and as far as human memory could go back, and ancient receipts could show, they could prove the payment of the particular moduses on which they meant to rely, far beyond the time necessary in such cases. I put this case as being a stronger one than the present, because here the opinion really entertained by these parties was, that all the inclosures were of that antiquity as to show that the moduses had been paid for enclosed lands. If the college could show that these lands had once been common, and had been inclosed within the time of legal memory, they would give an answer to all the moduses; in that respect all the occupiers and proprietors had a common interest, to show that these lands were ancient inclosures, or it might turn out that the college was able in some instances to prove that the lands were not ancient inclosures, and in others that the defendant succeeded in proving the lands to be ancient inclosures. It is a case of the same nature as if they had all claimed certain abbey lands, because then the question would be whether each could prove that his lands were of that description. In that case the issues would be found according to the various proofs in the cases; but still there would be a reason why they had one common interest in making a common defence. B
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If any ground can be fairly suggested for making this contract legal, we ought to adopt it in favour of the party who makes the defence, in order to acquit him of the imputation that he casts upon himself. The contract does not necessarily imply any thing that the law calls maintenance. The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make. I do not like to give an opinion upon an abstract case, and, therefore, am not desirous to consider it; but if a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance: I am not prepared to say, that, in modern times, courts of justice ought to come to that conclusion. However, I give no opinion upon that point. In this case I proceed upon the ground, that there was reasonable evidence of a common link of interest uniting the proprietors of the lands in question, at the time they made the agreement. F
G
H

GURNEY, B.—When the parties entered into this agreement, they seem to have had reasonable ground of belief that they had all one common interest in proving the lands for which the moduses were claimed to be ancient inclosures; and, being of that opinion, I think it follows that there is nothing illegal in the agreement, and, therefore, that this rule must be discharged. I

ROLFE, B.—I am of the same opinion. The only hesitation I have had in the case has arisen from the fear, that the indignation one feels against so unrighteous a defence as the present might lead me into bending the law more than ought to be done. But I think the law here appears to concur with the honesty of the case.

- A** It seems that, Jesus College being the lessees of these tithes, and having set up a demand for payment of them in kind, the landowners, not having been accustomed to pay them, met to consider what was to be done. It appears it was stated at the meeting, that if one modus failed the whole must fail. That, perhaps, was wrong; but if it was the bona fide opinion of the proprietors, and they thought it was something in the nature of a farm modus, and that it was apportioned in different shares among the different landowners of the district, and that they had a common interest in it, and, having formed that opinion, they entered into this agreement, the only question on these pleadings is, was that or was it not a legal agreement? What is the agreement? It is an agreement by the proprietors of the land to resist the claim of the college to the payment of tithes in kind, and to support the present moduses. I may observe that these parties were not, in truth, the occupiers—not the parties who really were to pay the tithes, but the landlords. But whatever may be the law of maintenance in modern days, and however it is to be restricted, I do not believe that, in the most stringent times, the act of a landlord in protecting his interest in lands in the occupation of his tenants would be called maintenance, because it is, in truth, protecting his own actual reversionary interest. Any lawful construction must be placed upon this agreement, rather than one that renders it criminal; and the natural construction is, that the proprietors supposed that all the tenants would be included in the proceeding; then, so far from their conduct being illegal, it is merely an arrangement, that, as there is one proceeding against all, they will pay in proportion to their interests. That being the agreement entered into, and the traverse being whether in truth that agreement was or was not illegal, it seems to me to be clear that it was not illegal, and consequently that this rule ought to be discharged.

Rule discharged.

F

FILLITER v. PHIPPARD

G [COURT OF QUEEN'S BENCH (Lord Denman, C.J., Coleridge and Wightman, JJ.), December 9, 11, 1847]

[Reported 11 Q.B. 347; 17 L.J.Q.B. 89; 10 L.T.O.S. 225;
11 J.P. 903; 12 Jur. 202; 116 E.R. 506]

Fire—Accidental fire—Liability of owner of premises—Fire started negligently allowed to spread to adjoining owner's premises—Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), s. 86.

H

By s. 86 of the Fires Prevention (Metropolis) Act, 1774: "...no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall . . . accidentally begin. . . ."

This section provides no defence where the fire was produced negligently or where it was started deliberately.

I

The plaintiff and the defendant were the owners of adjoining land. The defendant started a fire on his land, and negligently permitted it to spread to the plaintiff's land where it caused damage and necessitated expenditure by the plaintiff to have it extinguished.

Held: the defendant was liable to the plaintiff at common law for the damage caused and money spent.

Notes. Referred to: *Re Barker, Ex parte Gorely* (1864), 4 De G.J. & Sm. 477; *Musgrove v. Pandelis*, [1918-19] All E.R.Rep. 589; *Collingwood v. Home and*

Colonial Stores, Ltd., [1936] 3 All E.R. 200; *Balfour v. Barty-King*, [1957] 1 All E.R. 156. A

As to an occupier's liability in regard to fire in general, see 28 HALSBURY'S LAWS (3rd Edn.) 52-53; and for cases see 36 DIGEST (Repl.) 76 et seq. For s. 86 of the Fires Prevention (Metropolis) Act, 1774, see 13 HALSBURY'S STATUTES (2nd Edn.) 10.

Cases referred to: B

(1) *Turberville v. Stamp* (1697), 1 Com. 32; Carth. 425; Comb. 459; Holt, K.B. 9; 1 Ld. Raym. 264; 12 Mod. Rep. 152; 1 Salk. 13; Skin. 681; 92 E.R. 944; 36 Digest (Repl.) 164, 870.

(2) *Richards v. Easto* (1846), 3 Dow. & L. 515; 15 M. & W. 244; 15 L.J.Ex. 163; 8 L.T.O.S. 253; 10 Jur. 695; 153 E.R. 840; 36 Digest (Repl.) 76, 410. C

(3) *Viscount Canterbury v. A.-G.* (1843), 1 Ph. 306; 4 State Tr.N.S. 767; 12 L.J.Ch. 281; 7 Jur. 224; 41 E.R. 648, L.C.; 36 Digest (Repl.) 76, 408.

(4) *Vaughan v. Menlove* (1837), 3 Bing.N.C. 468; 3 Hodg. 51; 4 Scott, 244; 6 L.J.C.P. 92; 1 Jur. 215; 132 E.R. 490; 36 Digest (Repl.) 29, 126.

Also referred to in argument:

Piggot v. Eastern Counties Rail. Co. (1846), 3 C.B. 229; 15 L.J.C.P. 235; 7 L.T.O.S. 209; 10 Jur. 571; 136 E.R. 92; 36 Digest (Repl.) 145, 765. D

Rule Nisi obtained by the defendant to arrest the judgment for the plaintiff in an action tried by CRESSWELL, J., brought by the plaintiff, against the defendant for damages for loss and damage arising from a fire which had spread from the defendant's land to land belonging to the plaintiff.

Barstow for the plaintiff, showed cause against the rule. E

Serjeant Kinglake and *Stock* for the defendant, supported the rule.

Cur. adv. vult.

Dec. 11, 1847. **LORD DENMAN, C.J.**, delivered the following judgment of the court.—This was a motion in arrest of judgment, on a declaration stating that the plaintiff was possessed of a close in which certain hedges and gates were standing, and several trees growing, that the defendant was possessed of an adjoining close, and that the defendant made and kept a fire in his close in such a negligent manner, and at a time when, by reason of the then state of the wind and weather, it was dangerous and improper so to do, that, through the negligence and improper conduct of himself and his servants, and for want of due care and caution, the said fire extended itself out of his close into plaintiff's, and the plaintiff's trees, hedges, fences, etc., were burnt and destroyed. F

The ancient law, or rather custom of England, appears to have been, that a person in whose house a fire originated, which afterwards spread to his neighbour's property and destroyed it, must make good the loss; and it is well established that, where the fire was occasioned by a servant's negligence, the owner, the master of the house where it began, is answerable for the consequences to the sufferer. *Turberville v. Stamp* (1), the last decided case before the statute 6 Ann. c. 58, makes this plain, and declares the same principle where the fire originates in the defendant's close. The Act contemplates the probability of fires in cities and towns arising from three causes, the want of water, the imperfection of party walls, and the negligence of servants. The Act provided some means for supplying these material defects: but the third section was directed against the moral one, the carelessness or negligence of servants, which (it observes) often causes fires: and it imposes on the servant by whose negligence the fire may have been occasioned a fine of £100, to be distributed among the sufferers at the discretion of the churchwardens, or imprisonment for eighteen months in case of non-payment. The clause, raising the same sum whatever the extent of suffering and the number of the sufferers, and inflicting the same penalty to whatever degree the negligence may have been culpable, without any power to lower the fine or shorten the imprisonment, can scarcely be supposed to have undergone much consideration on the part of the legislature. G

H

I

A The most usual cause of fires was assumed to be the negligence of servants: and the enactment might operate to induce habits of caution in that important class. The same statute, in s. 6, enacts that, after a day named, no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered or occasioned thereby.

B Both provisions seem to have found favour with the legislature; for both were re-enacted by 12 Geo. 3, c. 73, and the Fires Prevention (Metropolis) Act, 1774; the latter by s. 86 adding, to the words "house or chamber," "stable, barn, or other building;" and also the words "or on whose estate."

C No terms can be more comprehensive. We cannot doubt that PARKE, B., in *Richards v. Easto* (2), rightly viewed it as a general law. And, though the word "estate" is used in a sense very different from that which it bears in the language of the law, it clearly applies to land not built upon, and makes the owner of such land liable in the same manner as it had previously the owner of buildings.

D The question then is upon the meaning and effect of the word "accidentally," here applied to fire. And here a very singular doubt has arisen from the mode in which this enactment is discussed by SIR WILLIAM BLACKSTONE in his COMMENTARIES. The passage is introduced by that learned writer incidentally, as an illustration of the principle on which masters are held responsible for the acts of their servants (vol. 1, p. 431):

E "Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master; because this negligence happened in his service. . . . But now the common law is altered by statute 6 Ann., c. [58, ss. 3, 6] which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servant's carelessness."

F This reason, by the way, is not stated in the Act of Parliament, and must be allowed to be very far from satisfactory; because the principle on which actions are maintainable is not the punishment of guilty persons, but compensation to innocent sufferers. Besides, making servants punishable for fires resulting from their negligence is no exemption of masters from responsibility for the same fault; for fires which accidentally begin are not fires produced by negligence.

G It would, therefore, appear that BLACKSTONE had drawn a conclusion from the enactment cited, which it by no means sustains. LORD LYNTHURST, however, has in some degree sanctioned by his high authority the inference thus drawn by BLACKSTONE, in the remarks by which he prefaced his decision against Lord Canterbury's petition of right (*Viscount Canterbury v. A.-G.* (3)). We must, however, observe that those remarks are wholly unnecessary for the decision to which he came, and indeed are stated rather as arguments with which that petitioner would H have had to contend, if his cause had come to a hearing on the merits, than as expressing a deliberate opinion.

I It is true that, in strictness, the word accidental may be employed in contradistinction to wilful, and so the same fire might both begin accidentally and be the result of negligence. But it may equally mean a fire produced by mere chance, or incapable of being traced to any cause, and so would stand opposed to the negligence of either servants or masters. When we find it used in statutes which do not speak of wilful fires but make an important provision with respect to such as are accidental, and consider how great a change in the law would be effected, and how great encouragement would be given to that carelessness of which masters may be guilty as well as servants, we must say that we think the plaintiff's construction much the more reasonable of the two.

LORD LYNTHURST in *Viscount Canterbury v. A.-G.* (3) remarked on the absence of decisions on this point. Yet he mentions two cases, both surely entitled to great weight, one tried before ALDERSON, J., in Berkshire [cited in argument by SERJEANT

TALFOURD in 4 Scott, at p. 248] the other, *Vaughan v. Menlove* (4) before PATTESON, J., in Shropshire, which latter was very fully discussed on a rule to show cause, and decided by the whole Court of Common Pleas. In both these cases a plaintiff recovered damages for a fire spreading to his corn from the defendant's field through the negligence of the defendant and his servants. His Lordship says that the Fires Prevention (Metropolis) Act, 1774, escaped notice on those occasions. But, if we ask how it came to be overlooked, since it would have furnished a complete and easy defence, the only answer can be the universal impression of the eminent lawyers, both at the Bar and on the Bench, who took part in the argument and judgment, that s. 86 of that Act respecting accidental fires cannot apply to such as are produced by negligence.

It may be further observed, with reference to this doctrine, that the exemption given by this enactment cannot apply. Its words suppose the fire to begin accidentally on the estate of him from whose estate it spreads. This fire did not begin accidentally, but was knowingly lighted by the defendant himself.

Judgment for plaintiff.

BEATSON v. SKENE

[COURT OF EXCHEQUER (Pollock, C.B., Martin, Bramwell and Wilde, BB.), May 1, 3, 24, June 2, 5, 1860]

[Reported 5 H. & N. 898; 29 L.J.Ex. 430; 2 L.T. 978;
6 Jur. N.S. 780; 8 W.R. 544; 157 E.R. 1415]

Slander—Privilege—Military inquiry—Information given by defendant to officer under duty to inquire and to receive information—Question for jury whether information relevant to inquiry.

The plaintiff had been the commanding officer of an irregular corps of cavalry during the Crimean war and the defendant was the civil commissioner attending the corps. Immediately after the plaintiff had given up his command the general officer commanding directed a colonel to inquire into and report on the condition of the corps, and the colonel was referred to the defendant for information. The defendant was authorised to give the information, and he gave certain information to the colonel who passed it on in a letter to the general. The defendant admitted that the letter contained in substance the information he had given to the colonel and that the contents of the letter were defamatory of the plaintiff, but he claimed that what passed between the colonel and himself was privileged.

Held: it was a question of fact for the jury whether the communication the defendant made to the colonel was relevant to the inquiry that the colonel had to make and in which the defendant was to assist him.

Evidence—Document—Privilege—State paper—Injury to public service—Possibility of injury—Determination by head of Government Department.

If the production of a State paper would be injurious to the public service, the general public service must be considered paramount to the individual interest of a suitor in a court of justice. Whether the production of the document would be injurious to the public service must be determined, not by the judge, but by the head of the Department having the custody of the paper. If he states that in his opinion the production of the document would be injurious to the public service, the judge ought not to compel the production of it.

- A Notes.** Considered: *H.M.S. Bellerophon* (1874), 44 L.J.Adm. 5; *Hennessy v. Wright* (1888), 21 Q.B.D. 509. Followed: *Hughes v. Vargas* (1893), 9 T.L.R. 551. Considered: *Spigelman v. Hocken*, *Goldblatt v. Hocken* (1933), 150 L.T. 256; *Duncan v. Cammell Laird & Co.*, [1942] 1 All E.R. 587. Referred to: *Campbell v. Spottiswoode* (1863), 3 B. & S. 769; *Henwood v. Harrison* (1872), L.R. 7 C.P. 606; *Dickeson v. Hilliard* (1874), L.R. 9 Exch. 79; *Kain v. Fairer* (1877), 37 L.T. 469; *Marks v. Beyfus* (1890), 54 J.P. 775; *Re Hargreaves* (1899), 16 T.L.R. 93; *Asiatic Petroleum Co. v. Anglo-Persian Oil Co.*, [1916-17] All E.R.Rep. 637; *Robinson v. State of South Australia* (No. 2), [1931] All E.R.Rep. 333; *Rowell v. Pratt*, [1936] 2 All E.R. 576.
- B** As to qualified privilege in libel and slander, see 24 HALSBURY'S LAWS (3rd Edn.) 129 et seq.; and for cases see 32 DIGEST (Repl.) 129 et seq. As to grounds for resisting production of State papers, see 12 HALSBURY'S LAWS (3rd Edn.) 53 et seq.; and for cases see 22 DIGEST (Repl.) 386 et seq.
- C** Case referred to:

(1) *Dickson v. Earl of Wilton* (1859), 1 F. & F. 419, N.P.; 32 Digest (Repl.) 188, 2002.

- D** Also referred to in argument:
- Home v. Bentinck* (1820), 2 Brod. & Bing. 130; 8 Price, 225; 1 State Tr.N.S. App. A. 1348; 4 Moore, C.P. 563; 129 E.R. 907, Ex. Ch.; 32 Digest (Repl.) 128, 1500.
- Anderson v. Hamilton* (1816), 2 Brod. & Bing. 156, n.; 8 Price, 244, n.; 129 E.R. 917; 22 Digest (Repl.) 386, 4155.
- Wyatt v. Gore* (1816), Holt, N.P. 299, N.P.; 32 Digest (Repl.) 203, 2197.
- E** *Coxhead v. Richards* (1846), 2 C.B. 569; 15 L.J.C.P. 278; 10 Jur. 984; 135 E.R. 1069; 32 Digest (Repl.) 142, 1617.
- Toogood v. Spyring* (1834), 1 Cr.M. & R. 181; 4 Tyr. 582; 3 L.J.Ex. 347; 149 E.R. 1044; 32 Digest (Repl.) 136, 1565.
- Pattison v. Jones* (1828), 8 B. & C. 578; 3 C. & P. 383; 3 Man. & Ry.K.B. 101; 7 L.J.O.S.K.B. 26; 108 E.R. 1157; 32 Digest (Repl.) 138, 1533.
- F**

Rule Nisi obtained by the plaintiff to set aside the verdict for the defendant and for a new trial in an action for slander brought by the plaintiff, General Beatson against the defendant Mr. Skene. The most important part of the slander alleged was contained in the following passage:

- G** "When General Smith arrived at the Dardanelles, General Beatson assembled the commanding officers of regiments, and actually endeavoured to persuade them to make a mutiny in their regiments against General Smith, and against the authority of General Vivian."

At the trial before BRAMWELL, B., and a jury, verdict was given for the defendant with leave reserved to the plaintiff to move the full court. In pursuance of such leave a rule nisi was obtained on the following grounds: (i) that there was no evidence to prove a prima facie case of privilege and that the judge should have directed the jury accordingly; (ii) that the judge should have ordered the production by the Secretary of State for War of certain letters and notes in his possession; and (iii) that the verdict was against the weight of the evidence.

- H** *Bovill, Q.C., Lush, Q.C., and Garth* for the defendant, showed cause against the rule.

E. James, Q.C., Hawkins, Q.C., and Gray for the plaintiff, supported the rule.

Cur. adv. vult.

June 2, 1860. **POLLOCK, C.B.**, delivered the following judgment of the court.—This was an action for slander tried before BRAMWELL, B., during Hilary Term last. The alleged slander was the speaking of certain words by the defendant to Colonel (now General) Shirley, in February, 1856.

The plaintiff had been the general commanding an irregular corps of cavalry

during the war in the Crimea. He gave up his command in September, 1855. The defendant was the civil commissioner attending the corps. General Vivian, under whose general command the corps was placed prior to September, 1855, directed Colonel Shirley to inquire into and report the condition of the corps, and referred him to the defendant for information, writing also to the defendant to give it. Colonel Shirley wrote a letter to General Vivian in consequence. The defendant adopted the contents of that letter as containing the substance of his communication to Colonel Shirley, and admitted his responsibility to the contents of the letter, if any there were. That letter contained matter which, if spoken, must be deemed slanderous, unless the occasion on which it was uttered furnished a justification. The plaintiff, therefore, was entitled to a verdict, unless the defence set up could be established—viz., that what passed between the defendant and Colonel Shirley was a privileged communication. The jury found a verdict for the defendant. In the following term a motion was made for a new trial on three grounds: first, that the learned judge had declined to compel the production of certain documents; secondly, that he had misdirected the jury; thirdly, that the verdict was against the evidence.

With respect to the first point, it appeared that the Secretary of State for War, Mr. Sidney Herbert, had been subpoenaed to produce certain letters written by the plaintiff to him, and also the minutes of a court of inquiry as to Colonel Shirley's conduct in writing the letter in question to General Vivian. Mr. Sidney Herbert attended at the trial, but objected to produce the documents, on the ground that his doing so would be injurious to the public service. The learned judge refused to compel their production on Mr. Sidney Herbert making this statement, and this forms the first ground upon which the rule for a new trial was obtained. Now, it turns out, on referring to the date and nature of the documents called for, that not one of them could have been given in evidence on the trial had they been actually produced. Seven of the letters were written long before the conversation complained of took place, and the defendant was in no way a party or privy to the writing of any of them. As to the notes or minutes of what passed on the inquiry, they had been taken by a person who was not present at the trial to prove their correctness, and therefore the mere notes were certainly not admissible as evidence. It may be further remarked that no prejudice could have been sustained by the plaintiff, inasmuch as the defendant admitted on the inquiry that he had spoken the words, as was proved at the trial by a witness who took a note of what passed on that occasion. Nor was any doubt or question raised at the trial as to the fact that the conversation complained of had taken place. Under these circumstances we are all of opinion that the non-production of these documents furnished no ground for a new trial. Indeed, had the documents been produced and received in evidence, and the verdict had been for the plaintiff instead of (as it was) for the defendant, the reception of the evidence (if objected to) would have been a ground for a new trial; but inasmuch as BRAMWELL, B., did not at the trial take this view of the case, but declined to compel the production of the evidence on the ground that the Secretary for War stated that the production of the documents would be injurious to the public service, we think it due to BRAMWELL, B., and to the importance of the question to express the entire concurrence of a majority of the court in that ruling of his.

We are all of opinion that it cannot be laid down that all public documents of every sort, including treaties with foreign powers, and all the correspondence that may precede or accompany them, and all communications to the heads of departments, are to be produced and made public whenever a suitor in a court of justice thinks that his case requires such production. It is manifest, we think, that there must be a limit to the duty or the power of compelling the production of papers which are connected with acts of State. As an instance we would put the case of a British Minister at a foreign court writing in that capacity a letter to the Secretary of State for Foreign Affairs in this country containing matter injurious to the reputation of a foreigner, or possibly a British subject; can it be contended that

- A the person referred to would have a right to compel the production of the letter in order to take the opinion of a jury whether the injurious matter was written maliciously or not? We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises, How is this to be determined? It is manifest it must be
- B determined either by the presiding judge or by the responsible servant of the Crown in whose custody the paper is. The judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service—an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against.
- C It appears to us, therefore, that the question whether the production of the document would be injurious to the public service must be determined, not by the judge, but by the head of the Department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it. The administration of justice is only a part of the general conduct of
- D the affairs of any State or nation, and we think that it is (with respect to the production or nonproduction of a State paper in a court of justice) subordinate to the general welfare of the community. If the head of the Department does not attend personally to say that the production of the document will be injurious, but sends the document to be produced or not as the judge may think proper, or, as was the case in *Dickson v. Earl of Wilton* (1), before LORD CAMPBELL, when a subordinate
- E was sent with the document with instructions to object, but nothing more, then indeed the case may be different—the judge may compel the production of it.
- MARTIN, B., does not entirely agree with us as to the general view we have taken of this question. He is of opinion that whenever the judge is satisfied that the document may be made public without prejudice to the public service, the judge ought to compel its production, notwithstanding the reluctance of the head of the
- F Department to produce it; and perhaps cases might arise where the matter would be so clear that the judge might well ask for it in spite of some official scruples as to producing it; but this must be considered rather as an extreme case, and extreme cases throw very little light upon the practical rules of life.
- The second ground upon which the rule for a new trial was obtained was the misdirection of the learned judge. The misdirection complained of was, that the
- G judge left it to the jury to say whether the communication the defendant made to Colonel Shirley was relevant to the inquiry that Colonel Shirley had to make, and in which the defendant was to assist him. It was argued that the judge ought to have told the jury it was not, and that he ought to have directed them to find a verdict for the plaintiff. We are of opinion that the direction was right. Colonel Shirley
- H had been directed to inquire into the condition of the corps, and had been referred to the defendant for information, and the defendant had been directed to give him the information. It is impossible to say that the condition of the corps in February, 1855, might not be affected, which would depend in some manner upon the circumstances attending the transfer of the command in the previous autumn. The doubt, as far as there is any, is rather the other way—whether the judge ought not to have
- I told the jury as a matter of law that the communication was relevant to the inquiry Colonel Shirley had to make, which it certainly might have been. The question, however, involved matters of fact, and was, therefore, properly left to the jury, and we see no reason to be dissatisfied with their finding.

It was further contended that, assuming the question was properly left to the jury, their verdict was against the evidence in the cause, and great reliance was placed on the summing-up of the learned judge, which certainly was very much in favour of the plaintiff. The jury, however, found for the defendant, and, with the concurrence of BRAMWELL, B., we think that they were right. The plaintiff's

counsel relied on expressions used by the defendant in giving his own account of the matter on cross-examination, such as that "he volunteered the statement"; that "the communication was not official," and similar expressions. The answer to this is, that when once a confidential relation is established between two persons with regard to an inquiry of a private nature, whatever takes place between them relevant to the same subject, though at a time and place different from those at which the confidential relation began, may be entitled to protection, as well as what passed at the original interview, and it is a question for the jury whether any further conversation on the same subject, though apparently casual and voluntary, does not take place under the influence of the confidential relation already established between them, and is, therefore, entitled to the same protection. No doubt, the jury acted on this view, and we think they were quite justified in doing so. The result is, that all the grounds for a new trial fail, and the rule must be discharged.

Rule discharged.

DAINES AND ANOTHER v. HARTLEY

[COURT OF EXCHEQUER (Pollock, C.B., Alderson and Platt, BB.), June 8, December 1, 5, 1848]

[Reported 3 Exch. 200; 18 L.J.Ex. 81; 12 L.T.O.S. 271;
12 Jur. 1093; 154 E.R. 815]

Slander—Evidence—Special meaning of words—Questions to be put by counsel.

The proper course for a counsel who proposes to get rid of the plain and obvious meaning of words imputed to a defendant as spoken of the plaintiff is to ask the witness, not "What did you understand by these words?", but "Was there anything to prevent these words from conveying the meaning which ordinarily they would convey?" If there was, evidence of that may be given, and when it appears that something occurred by which the witness understood the words in a sense different from their ordinary meaning, the question then may be put: "What did you understand by them?"

Notes. Applied: *Barnett v. Allen* (1858), 3 H. & N. 376. Considered: *Simmons v. Mitchell* (1880), 6 App. Cas. 156; *Tolley v. J. S. Fry & Sons* (1929), 46 T.L.R. 108. Referred to: *Hough v. London Express Newspaper, Ltd.*, [1940] 3 All E.R. 31.

As to meaning of the statement in libel and slander, see 24 HALSBURY'S LAWS (3rd Edn.) 86 et seq.; and for cases see 32 DIGEST (Repl.) 68 et seq.

Cases referred to in argument:

Hankinson v. Bilby (1847), 16 M. & W. 442; 2 Car. & Kir. 440; 153 E.R. 1262; 32 Digest (Repl.) 55, 571.

Tempest v. Chambers (1815), 1 Stark. 67, N.P.; 32 Digest (Repl.) 54, 570.

Slater v. Franks (1616), Hob. 126; 80 E.R. 275; 32 Digest (Repl.) 36, 246.

Goldstein v. Foss (1828), 4 Bing. 489; 1 Moo. & P. 402; 2 Y. & J. 146; 130 E.R. 856, Ex. Ch.; 32 Digest (Repl.) 73, 963.

Angle v. Alexander (1830), 7 Bing. 119; 131 E.R. 46; sub nom. *Alexander v. Angle*, 1 Cr. & J. 143; 4 Moo. & P. 870; 1 Tyr. 9; 32 Digest (Repl.) 38, 279.

Fleetwood v. Curle (1620), Cro. Jac. 557; Palm. 69; Hob. 267; 79 E.R. 478; 32 Digest (Repl.) 50, 476.

Broome v. Gosden (1845), 1 C.B. 728; 135 E.R. 728; 32 Digest (Repl.) 87, 1096.

Rule Nisi obtained by the plaintiffs for a new trial of an action tried by POLLOCK,

A C.B., and brought by the plaintiffs against the defendant for slander in the way of their business.

The two plaintiffs were partners in a firm of glass merchants and they had had various business dealings with the defendant who was also a glass merchant. The defendant told a witness that he had written to his agents to settle his account with the plaintiffs and stop supplies. He said he had done this because the first plaintiff was not to be trusted. When the witness said his firm had bills from the plaintiffs the defendant said: "Then you must look sharp to get those bills met by them." Counsel for the plaintiff sought to ask the witness at the trial: "What did you understand by that?" but the question was held to be inadmissible, and judgment was subsequently entered for the defendant. The plaintiffs obtained a rule nisi for a new trial on the ground that the question was improperly rejected.

C *Sir Frederic Thesiger* and *T. Jones* for the defendant, showed cause against the rule.

M. Chambers and *Bovill* for the plaintiffs, supported the rule.

Cur. adv. vult.

Dec. 5, 1848. **POLLOCK, C.B.**, delivered the following judgment of the court.—
D In this case a motion was made for a new trial, on the ground of the improper rejection of evidence. The case was moved by counsel for the plaintiffs on the ground that he was not allowed to put the following question to a witness who heard part of the conversation: "What did you understand by that?" I stated to the learned counsel, at the time that the trial was going on, that I did not reject the question altogether, but that, in my judgment, he could not put the question in that shape; and he declined to put it in any other, but applied to the court for a rule for a new trial. The court granted a rule, and the case was fully argued.

E We are of opinion that the question could not be so put. There can be no doubt that words may be understood by bystanders to import something very different from their obvious meaning. The bystanders may perceive that what is uttered is uttered in an ironical sense, and, therefore, that it may mean directly the reverse of what it professes to mean. Something may have previously passed which gives a peculiar character and meaning to some expression; and some word which ordinarily or popularly is used in one sense may, from something that has gone before, be restricted and confined to a particular sense, or may mean something different from that which it ordinarily and usually does mean. But the proper course for a
F counsel who proposes so to get rid of the plain and obvious meaning of words
G imputed to a defendant, as spoken of the plaintiff, is to ask the witness, not "What did you understand by those words?" but "Was there anything to prevent those words from conveying the meaning which ordinarily they would convey?" If it appears that something occurred by which the witness understood the words in a sense different from their ordinary meaning, evidence of that may be given; and then, when you have laid the foundation for it, the question may be put, "What
H did you understand by them?" when I believe we may say that generally no question ought to be put in such a form as possibly to lead to an illegal answer. Taken by itself, and without more, the understanding of a person who hears an expression is not the legal mode by which it is to be explained. If words are uttered or printed, the ordinary sense of those words is to be taken to be the meaning of the speaker; but no doubt a foundation may be laid by showing something else which
I has occurred; some other matter may be introduced, and then, when that has been done, the witness may be asked, with reference to that other matter, what was the sense in which he understood the words. But the mere question: "What did you understand with reference to such an expression?" we think is not the correct mode of putting the question. The rule, therefore, for a new trial must be discharged.

Rule discharged.

A

GREVILLE *v.* BROWNE

[HOUSE OF LORDS (Lord Campbell, L.C., Lord Brougham, Lord Cranworth, Lord Wensleydale and Lord Kingsdown), July 28, 29, 1859]

[Reported 7 H.L.Cas. 689; 34 L.T.O.S. 8; 5 Jur.N.S. 849;
7 W.R. 673; 11 E.R. 275]

B

Will—Legacy—Priority—Charge on real estate—Legacies followed by gift of residuary realty and personalty—Mortgage of realty.

If there is a general gift of legacies and then the testator gives the rest and residue of his property, real and personal, the legacies come out of the realty.

A testator by will bequeathed to M. £1,000 and to A. £5,000, and "as to all the rest of my real and personal property, I bequeath and devise the same to my son M. in the fullest manner I can with liberty to him to dispose of the same as he thinks proper." Twenty-one years after the testator's death M. mortgaged the real estate which was subsequently sold, and the question arose whether the legacies were a charge upon the real estate which had priority over the mortgage.

C

Held: the legacies were a charge upon the real estate, and no power was given in the will to M. to mortgage the estate free from the legacies.

D

Notes. Applied: *Gyett v. Williams* (1862), 2 John. & H. 429. Distinguished: *Browning v. French* (1871), 24 L.T. 649. Followed: *Skiller v. Haisman* (1871), 24 L.T. 745. Applied: *Gainsford v. Dunn* (1874), L.R. 17 Eq. 405; *Brooke v. Rooke* (1876), 35 L.T. 301; *Re Bellis's Trusts* (1877), 5 Ch.D. 504. Followed: *Bray v. Stevens* (1879), 12 Ch.D. 126. Distinguished: *Wells v. Row* (1879), 48 L.J.Ch. 476. Applied: *Elliott v. Dearsley* (1880), 16 Ch.D. 322; *Re Bawden, National Provincial Bank of England v. Cresswell, Bawden v. Cresswell*, [1894] 1 Ch. 693; *Re Adams and Perry's Contract*, [1899] 1 Ch. 554; *Re Smith, Smith v. Smith*, [1899] 1 Ch. 365; *Re Balls, Trewby v. Balls*, [1919] 1 Ch. 791; *Re Rowe, Bennetts v. Eddy*, [1914] Ch. 343. Referred to: *Re Ovey, Broadbent v. Barrow* (1882), 46 L.T. 613; *Re Stokes, Parsons v. Miller* (1892), 67 L.T. 223; *Re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43; *Re Boards, Knight v. Knight*, [1895-9] All E.R.Rep. 994; *Re Dyson and Fowke*, [1896] 2 Ch. 720; *Re Grainger, Dawson v. Higgins*, [1900] 2 Ch. 756; *Re Yates, Throckmorton v. Pike* (1907), 96 L.T. 758; *Re Timson, Harper v. Timson*, [1953] 2 All E.R. 1252.

E

As to principles of construction applicable to wills in general, see 39 HALSBURY'S LAWS (3rd Edn.) 973 et seq.; and for cases see 44 DIGEST 575 et seq.

F

G

Cases referred to:

- (1) *Awbrey v. Middleton* (1717), 2 Eq. Cas. Abr. 497; 22 E.R. 422, L.C.; 23 Digest (Repl.) 516, 5798.
- (2) *Davis v. Gardiner* (1723), 2 P.Wms. 187.
- (3) *Wheeler v. Howell* (1857), 3 K. & J. 198; 69 E.R. 1079; 23 Digest (Repl.) 517, 5808.
- (4) *Cole v. Turner* (1828), 4 Russ. 376; 6 L.J.O.S.Ch. 101; 38 E.R. 847; 44 Digest 302, 1335.
- (5) *Bench v. Biles* (1819), 4 Madd. 187; 56 E.R. 676; 23 Digest (Repl.) 516, 5801.
- (6) *Mirehouse v. Scaife* (1837), 2 My. & Cr. 695; 7 L.J.Ch. 22; 1 Jur. 134; 40 E.R. 805, L.C.; 23 Digest (Repl.) 525, 5894.
- (7) *Francis v. Clemow* (1854), Kay, 435; 2 Eq. Rep. 426; 23 L.J.Ch. 288; 23 L.T.O.S. 57; 18 Jur. 223; 2 W.R. 308; 69 E.R. 184; 23 Digest (Repl.) 516, 5805.

H

I

Appeal from a decision of the Lord Chancellor of Ireland and the Lord Justice of the Court of Appeal in Ireland (BLACKBURNE) affirming the judgment of the Com-

A missioners of Incumbered Estates in an action brought to determine the construction of the will of one John Browne.

By his will, dated Jan. 27, 1825, the testator, John Browne, after giving certain legacies generally to his widow Margaret Browne, and the respondent Anne Browne, gave all the rest and residue of his property, real and personal, to his son Michael. The testator died in 1825, and his son Michael entered into possession of the real estates. In 1846 Michael mortgaged the same for £30,000, and they were afterwards sold by the Commissioners of Incumbered Estates. The question then raised was whether the legacies to Margaret and Anne Browne were charged by the will on the fee-simple and freehold estates of the testator, and whether such charges were entitled to be paid or set apart and secured out of the produce of the sale in priority to the mortgage of 1846. The Commissioners of Incumbered Estates held that the legacies were charges entitled to priority, and the Lord Chancellor of Ireland and the Lord Justice of Appeal affirmed the judgment. The present appeal was then brought.

D *Sir Richard Bethell, Q.C.*, and *Moxon* for the appellants (mortgagees) contended that the legacies were not charged on the real estates of the testator; but if they were, then Michael Browne must be taken to have mortgaged such real estate to pay the legacies, and the mortgagees ought not to be considered as bound to see to the application of the mortgage money.

E *Roundell Palmer, Q.C.*, and *Lawless* for the respondent (legatee), contended that the legacies were well charged on the real estates, and no power was given either expressly or by implication to Michael Browne to dispose of the lands discharged of the legacies.

Their Lordships took time for consideration.

July 29, 1859. The following opinions were read.

F **LORD CAMPBELL, L.C.**—In this case I am of opinion that the decision of Mr. Commissioner LONGFIELD and Mr. Commissioner HARGREAVE, confirmed by the Lord Chancellor of Ireland and the Lord Justice of Appeal in Ireland, is right; and I think that if your Lordships were to come to a contrary conclusion, you would disturb the well settled and useful rules of property which have prevailed for a century and a half.

G The first question is whether these legacies are a charge upon the real estate. If it were *res integra*, and we had to construe this will by the language employed, without any reference to the construction which has been put upon similar language in other wills, I should allow that there is great force in the very able and ingenious argument we have had from the Bar. It might well be supposed that the testator had no notion whatsoever of charging the land with these legacies; but we find that from the time of LORD MACCLESFIELD and LORD COWPER down to the time of LORD COTTENHAM and PAGE-WOOD, V.-C., a rule has prevailed upon this subject which has been acted upon uniformly by all judges, except one, LORD ALVANLEY—a very eminent authority (I do not mean in the slightest degree to disparage him), but with that exception, by all the judges that have determined such cases for nearly a century and a half this rule has been laid down and acted upon, that if there be a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass—that part of that mass is represented by legacies, and that what is afterwards given is given minus what has been before given, and, therefore, given subject to the prior gift. That seems to me to be the view which was taken in *Awbrey v. Middleton* (1) before LORD COWPER, and in *Davis v. Gardiner* (2) before LORD MACCLESFIELD. The language in which it is expressed varies from time to time, but still that rule seems to have been uniformly acted upon, and I would say, in the language of PAGE-WOOD, V.-C., in the last case upon the subject, *Wheeler v. Howell* (3), that in the present case

“I feel that I should be only introducing a useless and mischievous distinction

if we held the legacy not to be a charge, the principle of the decision being, in truth, the same in the case of legacies as in that of debt." A

I, therefore, my Lords, conceive it to be unnecessary to travel over and criticise that long series of cases which seems to establish that rule as a general rule that must be acted upon, that the testator, in using this language in his will, must be supposed to use it according to the sense in which the words have uniformly been construed, and to mean that the legacies should be a charge upon the real estate. B

Here the testator gives the legacies generally, and then he says :

"As to all the rest, residue and remainder of any property I may die possessed of or entitled to, of what nature soever, whether estates, freehold leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities, or otherwise, I hereby bequeath, devise, give and grant the same to my first object on earth, my son Michael Joseph Browne, in the fullest manner I can." C

It is quite clear that here there is first a general gift of legacies, and then there is a disposition of the rest, residue and remainder of the property real and personal, of what nature soever, to his son. Therefore, following the rule which has been so long acted upon, these legacies are clearly charged upon the real estate.

Then, my Lords, as to the second point, the discharge: twenty-one years after the death of the testator, his son mortgaged the land for £50,000, and it is allowed that upon the face of the deed there is no reference whatsoever to those legacies. No part of the legacies was paid; and I presume that after he had thus charged the land with the legacies, unless there was some special power in the will, enabling the son to sell the land discharged from the legacies, it can hardly be supposed that what has taken place can amount to a discharge of the burden that was placed upon the land in respect of the legacies. No authority has been quoted to show that this power exists. Is there, then, here any such special power? I am of opinion that the words that follow what I have read are mere surplusage. They merely express what would otherwise be implied. This testator is fond of a florid style; he deals in superlatives; he is very rhetorical, and he makes use of a great many more words than would be sufficient to accomplish his purpose. He says: "I hereby devise, bequeath, give and grant the same to my first object on earth, my son Michael Joseph Browne, in the fullest manner I can or shall have it in my power, with liberty to him to dispose of the same in any way he may think proper." We are now considering whether the lands have been discharged of the legacies. We must consider that they are charged with them. Then he having thus charged the land, did he mean by these words to give his eldest son the power of disposing of the land at any time, so that the younger children would be deprived of the security which he had before provided for them? I think that no such meaning can be educed from the language he employs; and that therefore this mortgage has not the effect of discharging the land of these legacies. My opinion is, that this appeal should be dismissed and the decree affirmed. D E F G H

LORD BROUGHAM.—I entirely concur with my noble and learned friend that these legacies are a charge upon the land. The only difference of opinion that I have with him is, that whereas my noble and learned friend said, that if it were res integra, not ruled by a long current of decisions, there might be a doubt about it. I really have no doubt at all about it. In the first place I have no doubt that the decisions which have been given upon this subject are strictly and logically correct; and then I have no doubt also upon the construction of the words themselves that the legacies are a charge upon the land. I

LORD CRANWORTH.—I concur in the opinion which has been expressed by my noble and learned friend, and I also concur with my noble and learned friend LORD BROUGHAM, that if there had not been a single decision upon this subject, if I were only called upon to say what is the meaning of such a devise, according to the natural meaning of the words, and knowing by what class of persons they are writ-

A ten, I should not have the least doubt in the world that nine persons out of ten would mean exactly what the cases have interpreted the words to mean. The distinction that is suggested between real and personal property is an artificial part of the case. It is perfectly true that we know how differently real property and personal property are dealt with by our law. In reading a devise of real estate to one person, and of personal legacies to another, and of the rest and residue of the real and personal property to a third, we may see that there might be a mode of interpreting it *reddendo singula singulis*—meaning to give the rest of the personal property to one person, and the rest of the realty to another. But that is not the natural meaning of the words. I feel the force of what was said by SIR JOHN LEACH in *Cole v. Turner* (4), where, with reference to the words “the rest and residue of my real and personal estate,” he says that the rest and residue mean something after something has been deducted. After what has been deducted? Why, that which has been given before; and that appears to me to solve the whole difficulty.

Counsel for the appellants, in his very able argument, tried to point out a distinction which exists in some of the earlier cases, for the purpose of showing that the generality of the rule as laid down in the more modern cases was not warranted by those earlier decisions; and he refers particularly to *Awbrey v. Middleton* (1) as being the earliest—which, as far as I know, is the earliest case upon the subject—and he endeavoured to distinguish that case by the circumstance that the legacies there were directed to be paid by the executor, and the gift of the general residue of the realty and personalty was to the executor. He is perfectly correct in that; but it is a singular thing that not only does LORD COWPER not put his decision upon that, but the argument of the counsel at the Bar, adverting to that circumstance of the direction of the legacies to be paid by the executor, actually puts it as an argument for the contrary result, and says that, inasmuch as the legacies were to be paid by the executor, that shows that they were to be paid only out of the personal estate. In truth, in *Awbrey v. Middleton* (1), the real question as I understood it was, whether, under the gift of “all the rest and residue of his goods and chattels and estate,” real estate was meant to be included. There had been a previous gift in the will of a particular real estate, and the question seemed to turn upon this, whether the word “estate” there was to be held to include real estate; and LORD COWPER said that inasmuch as he begins by saying, “As to all my worldly estate I give in manner following,” the word “estate” was to be taken to include real estate. But he does not put it at all upon the fact of the direction to the executor who was his nephew and sole residuary legatee. What he says is this

G (2 Eq. Cas. Abr. at p. 498):

“Now the words (rest and residue) in this place may have some stress laid upon them, and seem to refer to the introductive clause in the will (as to all his worldly estate, etc.), which certainly extend to lands in a will, and will bear a larger construction by reference to the first clause, by which he intimates that he intended to dispose of all his estate, both real and personal, by his will; and, therefore, he was of opinion that, by the devise of all the rest and residue of his goods, chattels and estate, all his lands do pass to his executor, and that he takes by the will, and not by the descent as heir-at-law.”

Then, with regard to the decision of *Bench v. Biles* (5), before SIR JOHN LEACH, the Attorney-General endeavoured, very ably, to distinguish it from the present case.

I It appears to me to be utterly indistinguishable. It is true that, in that case, the blending of the real estate with the personal took place during the life of the widow, who took the whole during her life. What difference does that make? The testator gives all his real and personal estate to his wife for life, he gives pecuniary legacies, and all the rest, residue and remainder of his real and personal estate he gave, devised and bequeathed to his two nephews. How is the effect of that altered by the fact that there had been a previous life-estate before the pecuniary legacies took effect? That authority was followed by the same learned judge in *Cole v. Turner* (4), when he was at the Rolls, and which has been evidently followed by

LORD COTTENHAM in *Mirehouse v. Scaife* (6), and it has been since followed by PAGE-WOOD, V.-C., in *Francis v. Clemow* (7) and *Wheeler v. Howell* (8). I feel perfectly confident that if we could know the quantities of property that have been distributed, of which there is no report, in reliance upon the rule of construction laid down by these decisions, we should feel that we were doing the great possible injustice if we were to swerve in the slightest degree from what I consider to be the settled canon of construction. I, therefore, concur with my noble and learned friends that the judgment below ought to be affirmed.

LORD WENSLEYDALE.—The question in this case is as to the construction of the will of Mr. Browne—what is the true meaning of that will? I take it to be a long and well-established rule that we must read the words of a will in their ordinary grammatical sense, and give them no other construction than that, unless so reading them leads to some absurdity, or some contradiction to another part of the instrument which is to be construed. There is no occasion to apply the latter part of the rule in this case. The question upon the construction of this will depends entirely upon the grammatical meaning of the words in it. I confess myself that, without reference to former decisions that have been given upon the subject, if I had read this will for the first time, and had not known that there was any decision upon it, I should not have entertained the least doubt as to the meaning of this will. The testator first begins by a charge upon the estate of £100 a year, with power to distrain. That is clearly a charge upon the real estate. He then gives other legacies of £1,000 and £5,000, and other small legacies, which are clearly *prima facie* a charge upon the personal estate, and then he gives the residue in these terms already quoted. I certainly should not feel the least doubt myself that the meaning of that was simply to leave the rest of the personal estate minus the charge upon the personal estate, and the rest of the real estate minus the charge upon the real estate. That would give effect to every word in the will. That is, "I leave the remainder of my real estate, charged as aforesaid, and I leave the rest of my personal estate, which has several charges upon it before." I should not have had the slightest doubt that that was the true construction of it, and I should never have dreamt that the testator meant to say that the charge upon the personal estate was to be transferred to the real estate. There is no doubt it is frequently done, and I have heard complaints at the Bar myself, and I have strongly shared in those complaints, that in all questions of this kind relating to wills, innumerable cases are cited which are of very little authority; because the words of one will differ so much from those of another, that there is seldom any light derived from decisions upon other wills. If, indeed, a long course of decisions has established a particular meaning as belonging to particular words, the testator must be supposed to have used those words in that sense, and they must be so construed. But, short of that, I think very little effect is to be attributed to former decided cases. My doubt is, certainly, after hearing the very able argument of counsel for the appellants at the Bar, whether you can predicate from this long bead-roll of cases, that any such principle has been established that, because a testator happens to mention real and personal property in one category, therefore, the property is liable for the legacies. But, as my noble and learned friends take a different view, and considering that it has been established as a proposition that wherever realty and personalty are united together in one fund, they are both made subject to the legacies given by the will; if that be so, of course that rule of construction must be applied to this particular will. But I own for myself that it would require a much more careful consideration of the authorities than I have now given to lead me to come to that conclusion. The impression upon my own mind is that there has been no such positive rule established.

It is, no doubt, of great importance that the House should adhere to the established rules of construction. But the citation of cases frequently misleads. I will refer as an illustration of this to a particular instance which occurred in the earlier part of my own professional career, or rather before it. There was an Act of Parlia-

A ment upon the subject of annuities, the statute 17 Geo. 3, c. 26 [repealed by S.L.R., 1861], upon which there has been a series of decisions, and the courts were in the habit of looking at the decisions instead of looking at the statute, and they gradually got extremely wrong, and at last it occurred to them that it would be proper to consider the statute itself, and the result was that almost all those decisions were done away. I think it is of the utmost importance in all those cases that we should

B see what the object of the testator is. On looking at this will, I do not feel any doubt about its true meaning.

With respect to the other part of the case, I concur entirely with my noble and learned friend on the Woolsack—I think these words at the conclusion of the will really give no power at all; they are only an amplification of his gift of the entire estate. “I give and grant the same to my son Michael Joseph Browne in the

C fullest manner I can.” That means merely, I give it to him in fee-simple, “with liberty to him to dispose of the same.” That is merely a consequence of his having the fee-simple. Therefore, I think in this case there is no power given to mortgage the estate free from the legacies.

LORD KINGSDOWN.—I confess that when I read this will at first, it appeared

D to me to be so clear upon the authorities, as I had understood them to be when I was more familiar with them than I am afraid I can boast of being now, that I thought that some subsequent decision must have altered or diminished the authority of those cases. But from the argument that has been addressed at the Bar, it appears that, instead of the rule being limited, it has, I think, been extended, I do not say at all too far, but certainly something beyond the exact principle to

E which those former authorities went, because it has been applied, I think, in the late cases (I do not mean to cast any doubt upon them) not merely to property given under the words “rest and residue,” but to property given previously to the gift either of the residue or the legacies. I confess it seems to me that the rule is one of extremely good sense. If any person unfamiliar with the technicalities of the law were to read a will to this effect—the testator gives a certain portion of his property

F to one person, and devises all the rest of his property to another—I cannot doubt that his opinion would be that “the rest” must be construed to mean that which remains after what was previously given has been withdrawn. The distinction which is relied upon by the counsel for the appellants is, I think, a distinction which is founded not upon general principles or upon the ordinary sense of mankind, but entirely upon the technical rules of the English law. If a testator having an

G estate for 999 years, or leaseholds for years, made a devise of this kind, nobody could imagine but that he intended his personal estate to be subjected to the payment of his legacies. If part of that estate, instead of being leasehold for 999 years, was in fee, or if, instead of being leaseholds for years, renewable according to custom, it was leases for lives renewable for ever, no one could suppose that he meant to distinguish between the two, and that the one should be subject to legacies

H and the other not. I believe, therefore, myself that the rule is founded in perfectly good sense and justice, and I must honestly confess that I think nothing but the great authority, and still greater ability with which the point has been argued at the Bar, would have made it a subject of reasonable doubt.

As to the other point which was hardly argued at the Bar, I think, when it comes to be considered, the point does not really arise. There is no doubt, I apprehend,

I that you may infer a power to give receipts and discharges, where you have a power of sale for the purpose of making certain payments; but where there is an absolute gift of the real and personal estate to the ultimate devisee for his own use and benefit to dispose of it as he thinks fit, in what character is he trustee? If he had accepted the executorship, possibly some argument might have been raised. I do not say that even then that would have made a difference, but in that case possibly some argument might have been raised. But he is not executor; he is in no degree liable for the payment of the legacies; he is in no degree liable for the administration of the assets; he is simply owner of the estate, subject to the charge. Even if

he had been trustee, I should have doubted very much whether there was any power. If there had been such a power, as the counsel for the appellants suggests, of disposing of the estate as he thinks fit, that would have made it a different question; but these legacies being charged upon the estate at a period which has not yet arrived, and which may never arrive, in what possible right can the owner of this estate say: "I will raise this money?" What can he do with it, except keep it in his own hands till the period arrives, if it ever should arrive, at which the legacies would become payable out of the fund? Therefore, I have not the smallest doubt in this case that your Lordships ought to affirm the decree of the court below.

Orders affirmed.

WOOD AND ANOTHER v. WAUD AND OTHERS

[COURT OF EXCHEQUER (Pollock, C.B., Parke, Alderson and Rolfe, BB.), November 22, December 1, 1848, April 27, 1849]

[Reported 3 Exch. 748; 18 L.J.Ex. 305; 13 L.T.O.S. 212;
13 Jur. 472; 154 E.R. 1047]

Water—Pollution—Defence to action—Pollution by persons other than defendant—Pollution by defendant immaterial.

A riparian owner has a right to the water of the stream flowing through his land in the state of its natural purity, and he can maintain an action against any person polluting the water. In such an action it is no defence to show that owing to the pollution of the water by other riparian owners the wrongful act of the defendant has made no practical difference as it rendered the water no less suitable for use by the plaintiff than it had been before any pollution by the defendant had occurred.

Water—Diversion—Pollution—Artificial watercourse—Temporary enjoyment.

No action lies for damage by the diversion or pollution of an artificial watercourse where from the nature of the case it is obvious that the enjoyment of it depended on temporary circumstances and was not of a permanent character and the interruption of the user of the watercourse was by a party who stood in the situation of the grantor. A watercourse, of whatever antiquity or in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water if the watercourse is proved to have been originally artificial.

Notes. For modern legislation designed to prevent the pollution of watercourses, see 39 HALSBURY'S LAWS (3rd Edn.) 730 et seq.

Applied: *Greatrex v. Hayward* (1853), 8 Exch. 291. Considered: *Beeston v. Weate* (1856), 5 E. & B. 986. Applied: *Wardle v. Brocklehurst* (1859), 1 E. & E. 1058. Considered: *Gaved v. Martyn* (1865), 19 C.B.N.S. 732. Applied: *Mason v. Shrewsbury and Hereford Rail.* (1871), L.R. 6 Q.B. 578. Considered: *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk* (1878), 4 App. Cas. 121. Applied: *Chamber Colliery Co. v. Hopwood* (1886), 32 Ch.D. 549; *Nixon v. Tynemouth Union R.S.A.* (1888), 52 J.P. 504; *Sharp v. Wilson Rotheray* (1905), 93 L.T. 155. Considered: *Whitmores (Edenbridge) v. Stanford*, [1909] 1 Ch. 427; *Schwann v. Cotton*, [1916-17] All E.R.Rep. 368. Referred to: *Embrey v. Owen* (1851), 6 Exch. 353; *Wood v. Sutcliffe* (1851), 21 L.J.Ch. 253; *Dickinson v. Grand Junction Canal Co.* (1852), 7 Exch. 282; *Rawstron v. Taylor* (1855), 11 Exch. 369, *Broadbent v. Ramsbotham* (1856), 11 Exch. 602; *Sampson v. Hoddinott* (1857), 1 C.B.N.S.

A 590; *Whaley v. Laing* (1857), 26 L.J.Ex. 327; *Chasemore v. Richards* (1859), 7 H.L.Cas. 349; *Kensit v. Great Eastern Rail.* (1883), 23 Ch.D. 566; *Ormerod v. Todmorden Joint Stock Mill Co.* (1883), 11 Q.B.D. 155; *Bunting v. Hicks* (1894), 70 L.T. 455; *Burrows v. Lang*, [1900-3] All E.R.Rep. 270; *Baily v. Clark and Morland*, [1902] 1 Ch. 649; *Bartlett v. Tottenham*, [1932] 1 Ch. 114.

As to pollution of water, see 39 HALSBURY'S LAWS (3rd Edn.) 721 et seq.; and for cases see 44 DIGEST 37 et seq.

Cases referred to:

(1) *Ricketts v. Salway* (1819), 2 B. & Ald. 360; 1 Chit. 104; 106 E.R. 398; 11 Digest (Repl.) 48, 689.

(2) *Frankum v. Earl of Falmouth* (1835), 6 C. & P. 529; 2 Ad. & El. 452; 4 Nev. & M.K.B. 330; 1 Har. & W. 1; 4 L.J.K.B. 90; 111 E.R. 175; 44 Digest 25, 170.

(3) *Mason v. Hill* (1833), 5 B. & Ad. 1; 2 Nev. & M.K.B. 747; 2 L.J.K.B. 118; 110 E.R. 692; 44 Digest 5, 1.

(4) *Tyler v. Wilkinson*, 4 Mason, U.S.Rep. 397.

(5) *Acton v. Blundell* (1843), 12 M. & W. 324; 13 L.J.Ex. 289; 1 L.T.O.S. 207; 152 E.R. 1223, Ex. Ch.; 44 Digest 34, 249.

(6) *Shury v. Piggot* (1626), 3 Bulst. 339; 81 E.R. 280; sub nom. *Shewry v. Piggot*, W.Jo. 145; sub nom. *Sury v. Pigot*, Palm. 444; Poph. 166; sub nom. *Surrey v. Piggot*, Lat. 153; Noy, 84; 44 Digest 31, 230.

(7) *Brown v. Best* (1747), 1 Wils. 174; 95 E.R. 557; 44 Digest 24, 160.

(8) *Arkwright v. Gell* (1839), 5 M. & W. 203; 2 Horn & H. 17; 8 L.J.Ex. 201; 151 E.R. 87; 19 Digest (Repl.) 69, 383.

(9) *Magor v. Chadwick* (1840), 11 Ad. & El. 571; 3 Per. & Dav. 367; 9 L.J.Q.B. 159; 4 Jur. 482; 113 E.R. 532; 19 Digest (Repl.) 160, 1053.

Action on the case for damages for fouling and diverting water away from a watercourse.

The plaintiffs were possessed of mills and premises adjacent to a stream, of which they said, they, of right ought to enjoy the advantage of the water in a state of purity, but the defendants had wrongfully discharged into the water above the plaintiffs' mills, quantities of foul and offensive materials. The defendants' works, which had been erected within twenty years previously, had, by pouring in soap-suds, woolcombers' suds, and other matter, fouled the water of the stream, but the defendants pleaded that the stream was already so polluted by similar acts of mill-owners above the defendants' mills, by dyers still further up the stream, and also by sewers in a neighbouring town that the pollution of the water by them (the defendants) did not make it less applicable to useful purposes than the water was before.

At the trial before ROLFE, B., and a special jury at the York Summer Assizes, 1845, a verdict was found for the plaintiffs on each count of the declaration subject to the opinion of the Court of Exchequer on a Case, the facts of which appear sufficiently from the judgment of the court.

Cowling for the plaintiffs.

H. Hill for the defendants.

Cur. adv. vult.

April 27, 1849. **POLLOCK, C.B.**, delivered the following judgment of the court.
I —This was an action on the case. The declaration contained four counts. [His LORDSHIP said that the first count stated that the plaintiffs were lawfully possessed of certain mills, lands, and premises, and by reason thereof of right were entitled to enjoy the advantage of the water of a watercourse called the Bowling Beck which ought to have run and flowed in great abundance and purity without the disturbance, pollution, and heating hereafter mentioned, to the said mills of the plaintiffs, to supply the same with water for working them, and enjoying the land and premises, and other necessary purposes, yet the defendants wrongfully discharged into the water of the watercourse above the mills quantities of foul, noxious,

impure, and offensive materials, to wit, lees of soap, and the washings, filth, and refuse of wool which the defendants washed near to and above the mills, and of other dirt, filth, and impurity, and also discharged and poured into and mixed with the water of the watercourse quantities of noxious water, by means whereof the water of the watercourse was rendered foul, dirty, heated, spoiled, and unfit to be used for working the plaintiffs' mills, or for the enjoyment of their lands and premises. The second count referred to other mills of the plaintiffs and alleged that the plaintiffs had suffered damage through the defendants pressing and laying on the bed of the watercourse quantities of earth, clay, stone, and other materials, and so diverting water away from these mills. The third count stated that the plaintiffs were lawfully possessed of other mills, from which the water of another watercourse, called the Bowling Sough, had been wrongfully diverted by the defendants, and the fourth count alleged that the plaintiffs had suffered damage from the diversion by the defendants into a reservoir of a watercourse called the Low Moor Sough, which flowed into the Bowling Beck. The defendants pleaded "Not Guilty" and denied that the plaintiffs were entitled to the flow of water which they claimed.]

The first question to be disposed of is in what way the issue on Not Guilty is to be found, so far as that applies to the first and second counts, which are framed to recover damages for obstructions and injuries to the natural watercourse, the Bowling Beck. It is conceded by the plaintiffs' counsel that the verdict must be found for the defendants on the plea of Not Guilty on the second count; it is conceded by the defendants' counsel, that it must be found for the plaintiff on so much of the general issue as relates to the heating of the water. The only question, therefore, on this issue is whether the remainder, which relates to the fouling the water, is to be entered for the plaintiffs or the defendants. The fact, as found by the jury, is that the defendants, whose works have been erected within twenty years (and who have no right by long enjoyment or grant so to do), have fouled the water of the natural stream, by pouring in soapsuds, woolcomber's suds, etc., but that pollution of the natural stream has done no damage to the plaintiffs because it was already so polluted by similar acts of millowners above the defendants' mills, by dyers still further up the stream, and some sewers in the town of Bradford, that the wrongful act of the defendants made no practical difference, that is, that the pollution by the defendants did not make the water less applicable to useful purposes than such water was before. We think, notwithstanding, that the plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the lands in its natural state as an incident to the right to the land on which the watercourse flowed, and that right continues, except so far as it may have been derogated from by user or by grant to the neighbouring landowners. This is the case, therefore, of an injury to a right. The defendants, by continuing the practice for twenty years, might establish a right to the easement of discharging into the stream the foul water from the works. If the dye-works and other manufactories, and other sources of pollution above the plaintiffs, should be afterwards discontinued, the plaintiffs, who would otherwise have had, in that case, pure water, would be compellable to submit to this nuisance, which then would do serious damage to them. We think, therefore, that the verdict must be entered for the plaintiffs on every part of the plea of Not Guilty to the first count.

The next question is in what way the verdict is to be entered on the third and fifth issues to the first and second counts. These issues arise on the traverse of the plaintiffs' right to the watercourse, by reason of the possession of the mills. On the part of the defendants it was contended that, although the plaintiffs might have had a right to the stream of water running along the watercourse in its natural state as incident to the right to the land, they had no right by reason of the possession of the mills, because they had not enjoyed those mills in their present condition for twenty years, and, therefore, had acquired no right in respect of them. For the plaintiffs, it was insisted that, if this argument were well founded, the plaintiffs would still be entitled to have so much of the issues as relates to the right in respect

A of the land found for them. To that we assent, not thinking that there is any distinction between this and *Ricketts v. Salway* (1). That, however, would, if the defendants should insist upon it, require a special entry, finding a part only for the plaintiffs. The plaintiffs, therefore, contend that the whole ought to be found for them, because if they had a right to the watercourse before the mill was constructed, without the abstraction by the defendants, and just before the commencement of the suit had appropriated the water to the use of the mill, they might have recovered for the injury to the mill, and might have stated that they were entitled to the use of the water for the mill by reason of the possession of the mill. The former proposition the defendants do not deny; the latter they dispute, and principally rely on *Frankum v. Earl of Falmouth* (2). We think that the plaintiffs are right on this point, and that *Frankum v. Earl of Falmouth* (2) is distinguishable.

C There the claim seems not to the flow of the water in its natural course for the supply of the mill, but to an easement to dam the water back in alieno solo, and, as the mill was not twenty years old, that claim could not be established.

The remaining questions relate to the two soughs, called Bowling Sough and Low Moor Sough, and are very important, and also novel. Both of these differ from the Bowling Beck in this respect—that was an immemorial stream, a natural stream, and flowing above ground, whereas the Bowling Sough and Low Moor Sough are not immemorial, and they are artificial and underground. They differ also between themselves in one respect, that one, the Bowling Sough, was constructed on the land now belonging to the plaintiffs, and part of the water thereof was used by them by a direct communication between the sough and the plaintiffs' reservoir for the purposes of the mill, before the alleged diversion by the defendants. The other, the Low Moor Sough, only communicated with the Bowling Beck, and not in the plaintiffs' land. Both agreed in one respect—that they were diverted before the water flowing along became part of the Bowling Beck stream. Under these circumstances, questions of considerable nicety arise. We agree with the learned counsel for the plaintiffs in his exposition of the principles which regulate the law as to natural streams, which are discussed and placed on their right footing in *Mason v. Hill* (3), and the authorities there cited. Flowing water, like light and air, is, in one sense, *publici juris*; a boon from Providence to all, and differs only in the mode of enjoyment—light and air are diffused in all directions, flowing water in some. When property was established, each one had a right to enjoy the light and air diffused over, and the water flowing through, the portion of the soil belonging to him. The property in the water itself was not in the proprietor of the land through which it passes, but only the use of it as it passes along for the enjoyment of his property, and as incidental to it. The law is laid down in KENT'S COMMENTARIES, vol. 3, pp. 439, 440, thus:

“The proprietor of a bank has naturally an equal right to the use of the water; he has no property in the water itself, but a simple usufruct as it passes along: aqua currit et debet currere is the language of the law.”

H STORY, J., in *Tyler v. Wilkinson* (4) cited in GALE AND WHATELY ON EASEMENTS, p. 131, lays down the same law. In the judgment of TINDAL, C.J., in *Acton v. Blundell* (5), he treats the right to the water flowing on the surface as arising from the acquiescence of neighbouring owners, though he also quotes the judgment of STORY, J., above referred to, which treats the right as an incident to the property;

I for STORY, J., says:

“The natural stream existing by the bounty of Providence for the benefit of land through which it flows, is an incident annexed by the operation of the law to the land itself.”

See also WHITELOCK, J., in *Sury v. Pigot* (6) (Poph. at p. 169), and CREW, C.J. (ibid. at p. 172). LEE, C.J., in *Brown v. Best* (7), treats the right as arising *ex jure naturæ*, and, consequently, it is now extinguished, and an easement in alieno solo would be by unity. This seems to us the correct opinion, though it is unnecessary

to decide that point on the present occasion, for whether the right to the natural streams be *ex jure naturæ* or by acquiescence and the presumed grant of the neighbours, the result in this case will be the same. A

But, the Bowling Sough and the Low Moor Sough being neither of them natural watercourses (being underground and not immemorial), a question of some nicety and difficulty arises as to the rights of the riparian proprietors upon these streams or below their junction with the beck. This question is not with respect to their rights as against the owners of these collieries which those soughs relieved from water, but as to the rights of those proprietors *inter se*; and it will be better to consider, in the first place, how they would stand if the stream were not underground. With respect to a claim of right as against the colliery owners, if it be true that a right was gained to these streams by the riparian proprietors, or against them, in consequence of their acquiescence for twenty years, by virtue of the presumption of a grant, or of Lord Tenterden's Act (Prescription Act, 1832), there would be no difficulty about the right of the riparian proprietors as against other persons. But counsel for the plaintiffs admitted that a grant could not be presumed, and that he should have great difficulty in establishing the right under Lord Tenterden's Act. B C

This court much considered that subject in *Arkwright v. Gell* (8). We have again considered it, and are satisfied that the principles laid down as governing that case are correct, and were properly acted upon in it by deciding that no action lay for an injury by the diversion of an artificial watercourse, where from the nature of the case it was obvious that the enjoyment of it depended upon temporary circumstances and was not of a permanent character, and where the interruption was by a party who stood in the situation of the grantor. The Court of Queen's Bench, in a subsequent case of *Magor v. Chadwick* (9), supported a verdict for the plaintiff for the disturbance of a right to the enjoyment of a stream under circumstances somewhat similar, but in that case the action was not brought against the party in whose land the artificial watercourse commenced, nor any one claiming under him, and he had not put an end to it by altering the mode of working his mines; and the action was not brought for abstracting, but for fouling the water, a species of injury which does not stand on the same footing, for though the possessor of the mine might stop the stream, it does not follow that he or any others could pollute it while it continued to run. The two cases are, therefore, distinguishable, and the expressions used by the learned judges in that case as to the similarity of natural and artificial streams are to be understood as applicable to the particular case. D E

We entirely concur with LORD DENMAN, C.J., in *Magor v. Chadwick* (9), that a watercourse, of whatever antiquity or in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial. The general proposition that under all circumstances, the enjoyment of watercourses is the same, whether they be natural or artificial, certainly cannot be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or a temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankment, evidently stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or cultivation of a person's property, and probably of an inferior character and liable to variation. The flow for twenty years of water from the eaves of a house could not give a right to the neighbours to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water from a drain for the purposes of agricultural improvement for twenty years could not give a right to the neighbours, so as to preclude the proprietor from altering the bevel of his drains for the greater improvement of the land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right. F

If, then, this had been a question between the plaintiffs and the colliery owners, I

A it seems to us that the plaintiffs could not have maintained an action for omitting to pump water by machinery (and in this case the Queen's Bench and Exchequer entirely agree in the cases above cited), nor if the colliery proprietors had chosen to pump out the water from the pit from whence the stream flowed continuously, and caused what is termed the natural flow to cease, could the plaintiffs, in our opinion, have sued them for so doing. But this case is different. The water has
B been permitted to flow in an artificial channel by the colliery owners for sixty years. The question is whether the plaintiffs can sue another person, a proprietor and occupier of land above, through which the sough passes, not claiming under or authorised by them for diverting the water? The case of the Bowling Sough differs from the Low Moor Sough in this, that the plaintiffs, in 1838, used the water of the Bowling Sough where it passes through their land by making a communication
C to their reservoir for working their mill. Had the plaintiffs a right to the water of this sough as mentioned in the third count of the declaration? It appears to us to be clear that, as they had a right to the use of the Bowling Sough as incident to their property on the banks, they would have a right to all the water which actually formed part of the stream as soon as it had become part, whether such water came
D by natural means, as from springs or from the surface of the hills above, or from rains or melted snow, or was added by artificial means, as from the drainage of lands on the colliery works; and if the proprietors of the drained land or the colliery augmented the stream by pouring water into it, it would become part of the current, it being impossible then to make any distinction between the original natural stream and such accession to it.

But the question arises with respect to an artificial stream not yet united to the natural one. The proprietor of the land through which the Bowling Sough flows
E has no right to insist on the colliery owners causing all the water from their works to flow through their land. These owners merely get rid of a nuisance to their works by discharging the water into the sough; they cannot be considered as giving it to one more than others of the proprietors of the land through which the sough is constructed. Each may take and use what passes through his land, and the proprietor of the land below has no right to any part of that water until it has reached
F his own land, and he has no right to compel the owners above to permit the water to flow through their land for his benefit. Consequently, he has no right of action if they refuse to do so. If they polluted the water so as to be injurious to the tenants below, the case would be different. We think, therefore, that the plaintiffs have no right of action for the diversion of the water. The question as to the Low
G Moor Sough is less favourable to the plaintiffs, for this sough does not pass through their land at all. We are of opinion that the plaintiffs would not be entitled to the water of these soughs if above ground; their being below ground in this case would probably make no difference. It does not certainly make a difference in favour of the plaintiffs: these issues ought, therefore, to be found for the defendants.

The next question is one also of considerable nicety. It is whether the verdict
H should be entered for the plaintiffs on the plea of Not Guilty, as to the third count complaining of the abstraction of the water from the Bowling Sough; and the fourth, complaining of the abstraction and detention of the water from the Low Moor Sough. The defendants contend that the diminution of the water, by 5 per cent. and the altering the flow of the water, are too small injuries to be the subject of an action. In considering this question, it is to be assumed that the plaintiffs'
I right is established to the use of the water. It is said that the true rule on this subject is laid down in KENT'S COMMENTARIES, vol. 3, pp. 439 and 440, that streams are meant for the use of man; that it would be unreasonable and contrary to the universal consent of mankind to debar each proprietor from the application of the water to domestic, agricultural, or manufacturing purposes, provided the use of it be made so as to work no material injury or annoyance to his neighbours; and though there would no doubt be, in the exercise of a proper use of water, some evaporation and decrease of it, some variation in the weight and rapidity of the current, the maxim *de minimis non curat lex* applies, and a right of action by the

proprietors would not necessarily follow from such use: it would depend on the nature and extent of the injury, and the manner of using the water, so as to create an apparent claim to a right of action. In America a very liberal use of water for the purposes of irrigation and for carrying on manufactures has been allowed. No doubt if the stream were only used by the riparian proprietor and his family by drinking it, or for the supply for domestic purposes, no action would lie for this ordinary use of it, and it may be conceived that if a field be covered with houses, the ordinary uses by the inhabitants might sensibly diminish the stream. Yet no action would, we conceive, lie, any more than if the air be rendered less pure and healthy by the increase of inhabitants in the neighbourhood, and by the smoke issuing from the chimneys of houses. But, on the other hand, the establishment of a manufactory, rendering the air sensibly impure by emitting noxious gases, would be actionable; so would it be if it rendered the water less pure by the admixture of noxious substances. If a mode of enjoyment quite different from the ordinary one was adopted, by which the water was diverted into a reservoir, and there delayed for the purpose of a manufactory, an action seems to us to be maintainable, and so if by that mode of dealing with the water it is sensibly diminished in quantity. We think, therefore, that the issue on Not Guilty, so far as it relates to both the Bowling Sough and the Low Moor Sough, ought to be found for the plaintiffs.

Judgment accordingly.

CALEDONIAN RAIL. CO. v. LOCKHART

[House of Lords (Lord Campbell, L.C., Lord Cranworth, Lord Wensleydale and Lord Kingsdown), March 7, 8, May 23, 1860]

[Reported 3 Macq. 808; 3 L.T. 65; 6 Jur.N.S. 1311; 8 W.R. 373]

Compulsory Purchase—Compensation—Injurious affection—Right depending on cause and effect, not on distance or proximity—Damage entirely prospective and contingent—Compensation once and for all—Relief to undertakers against possible claims by tenants—Lands Clauses Consolidation (Scotland) Act, 1845.

When an arbitrator has to determine the amount of compensation payable to a landowner part of whose land has been compulsorily acquired (i) the right to compensation extends to any land of the claimant injured by the severance of that which is purchased or by the works which the undertakers are authorised to construct: the right to compensation depends on cause and effect, not on distance or proximity: the test is whether the land which the claimant retains is proved to be injuriously affected by the severance or the works; (ii) the arbitrator must award compensation not only for the immediate value of the land taken, but also for damage which is entirely prospective and contingent. The compensation must be full compensation, once and for all, for the injury to the landowner's rights. An award of compensation for possible future damage may contain a provision that the landowner shall relieve the undertakers against certain possible claims by tenants of his to the extent of the interest accruing on the sum awarded.

Arbitration—Arbitrator—Powers—Consultation with expert—Expert required to survey and report.

An arbitrator has power in the course of an arbitration to consult an expert or to require him to survey and report. He may consult men of science in every department where it becomes necessary.

A Notes. Applied: *Palmer v. Metropolitan Rail. Co.* (1862), 31 L.J.Q.B. 259. Considered: *Bagnall v. London and North Western Rail.* (1862), 1 H. & C. 544; *Bottomley v. Ambler* (1877), 38 L.T. 545; *R. v. Poulter* (1887), 20 Q.B.D. 132; *R. v. Manley-Smith* (1893), 63 L.J.Q.B. 171. Referred to: *Ringland v. Lowdnes* (1864), 17 C.B.N.S. 514; *Stone v. Yeovil Corp'n.* (1876), 1 C.P.D. 691; *Holliday v. Wakefield Corp'n.*, [1891] A.C. 81.

B As to compensation under the Lands Clauses Consolidation Acts, see 10 HALSBURY'S LAWS (3rd Edn.) 148 et seq.; and for cases see 11 DIGEST (Repl.) 124 et seq. As to the powers of an arbitrator and the conduct of the arbitration, see 2 HALSBURY'S LAWS (3rd Edn.) 31, 34; and for cases see 2 DIGEST (Repl.) 553.

Cases referred to:

C (1) *Lawrence v. Great Northern Rail. Co.* (1851), 16 Q.B. 643; 6 Ry. & Can. Cas. 656; 20 L.J.Q.B. 293; 17 L.T.O.S. 39; 15 Jur. 652; 117 E.R. 1026; 11 Digest (Repl.) 161, 351.

(2) *R. v. Pease* (1832), 4 B. & Ad. 30; 1 Nev. & M.K.B. 690; 1 Nev. & M.M.C. 535; 2 L.J.M.C. 26; 110 E.R. 366; 38 Digest (Repl.) 39, 205.

D (3) *Vaughan v. Taff Vale Rail. Co.* (1858), 3 H. & N. 743; 28 L.J.Ex. 41; 32 L.T.O.S. 163; 23 J.P. 23; 4 Jur.N.S. 1302; 7 W.R. 120; reversed (1860), ante p. 474; 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 38 Digest (Repl.) 400, 608.

(4) *Anderson v. Wallace* (1835), 3 Cl. & Fin. 26; 6 E.R. 1347, H.L.; 2 Digest (Repl.) 568, 1018.

E (5) *R. v. Leeds and Selby Rail. Co.* (1835), 3 Ad. & El. 683; 5 Nev. & M.K.B. 246; 111 E.R. 573; 11 Digest (Repl.) 175, 433.

(6) *Lee v. Milner* (1837), 2 M. & W. 824; Murp. & H. 275; 6 L.J.Ex. 205; 150 E.R. 990; 11 Digest (Repl.) 160, 343.

Also referred to in argument:

F (7) *Piggot v. Eastern Counties Rail. Co.* (1846), 3 C.B. 229; 15 L.J.C.P. 235; 7 L.T.O.S. 209; 10 Jur. 571; 136 E.R. 92; 38 Digest (Repl.) 401, 621.

(8) *Eads v. Williams* (1854), 4 De G.M. & G. 674; 3 Eq. Rep. 244; 24 L.J.Ch. 531; 24 L.T.O.S. 162; 1 Jur.N.S. 193; 3 W.R. 98; 43 E.R. 671, L.C.; 2 Digest (Repl.) 565, 994.

Appeal from a decision of the Court of Session.

G The Caledonian Railway passed through the lands and estate of Carnworth, of which Sir Norman Macdonald Lockhart was at the material time proprietor. He claimed a certain sum as compensation, which was refused, and the dispute between the parties was submitted to Professor Low, who was asked to determine

H "all claims for the value of the said lands, and others to be taken, used and occupied by the Caledonian Rail. Co., and in general all claims or demands whatever competent to the said Norman Macdonald Lockhart against the said Caledonian Rail. Co., by or in consequence of the Caledonian Rail. Co. taking, using, or injuring any part of the said lands for the said railway, or the works or operations of the said railway company, in any manner or way whatever, . . . including accesses and every other claim competent to him against the said company; declaring hereby that the said arbiter shall conduct the proceedings to follow hereon, and determine the matters hereby submitted to him in strict conformity with the rules and regulations under the provisions and conditions specified in the Lands Clauses Consolidation (Scotland) Act and the Railways Clauses Consolidation Act."

I The arbitrator acted from time to time, enlarging the time for making his award. On Nov. 6, 1846, the parties by consent agreed to have the time enlarged, with power to make interim or final awards. An interim award was made on Jan. 22, 1848, by which the arbitrator awarded to Sir Norman Lockhart an interim payment of £6,000 on account of the value of the land and intersectional and other damage,

with certain deductions and abatements in favour of tenants. On May 9, 1849, Sir Norman Lockhart died. The railway company thereupon applied for an injunction to restrain the arbitrator from proceeding further on the ground that the submission, if under the Lands Clauses Act, was invalid inasmuch as the award was not made within the statutory period of three months, and, on the other hand, if the submission was not under that statute, it expired by the death of one of the parties. The court refused the injunction. Thereafter the arbitrator made his final award, by which he awarded to Sir Norman Lockhart an additional sum of £3,761 for the value of the land and intersectional and other damage. He also awarded £4,000 to Sir Norman, but found that he should relieve the railway company of any claims which his tenants, whose farms were not intersected by the railway, might be entitled to establish against the company in consequence of their operations, to the extent of the interest accruing on this sum of £4,000 from and after the date of the award. The railway company then applied to have the award set aside on the grounds that the award had not been made within the three months specified by the Lands Clauses Act; that the submission had expired at the death of Sir Norman Lockhart; and that the arbitrator had exceeded his powers in so far as he had awarded a sum for prospective and contingent damages, and a sum for damage likely to be incurred by tenants of Sir Norman, and in so far as he had ordered the execution of certain works and enforced their execution by pecuniary penalties. The Court of Session held the award to be good, and the objections untenable, and the railway company appealed to the House of Lords.

Rolt, Q.C., and Roundell Palmer, Q.C., for the appellants, contended that the award was bad, and referred to *Pigott v. Eastern Counties Rail. Co.* (7); *Lawrence v. Great Northern Rail. Co.* (1); *Vaughan v. Taff Vale Rail. Co.* (3); *Eads v. Williams* (8).

Sir Richard Bethell, Q.C., Anderson, Q.C., and Sir Hugh Cairns, Q.C., for the respondents.

Cur. adv. vult.

Their Lordships took time for consideration.

May 23, 1860. Opinions were delivered in which it was stated :

LORD CAMPBELL, L.C. (after dealing with points which subsequent legislation has made obsolete): What is now chiefly relied upon is the remit to Mr. Newland as an expert, which is said to be contrary to the maxim, *delegatus non potest delegare*. In answer, it has been shown to us that this proceeding was according to the established practice of courts of justice in Scotland and of judicial arbitrators. Indeed, the remit never was complained of by the company, nor by the counsel in the Court of Session. An opportunity was afterwards given of examining Mr. Newland as a witness, when a great number of witnesses were examined on both sides.

On the part of the appellants, the chief stress was laid upon the arbitrator having exceeded his authority, and the awards would be void if he had therein awarded beyond his authority anything to the prejudice of the appellants which could not be severed from what he has lawfully awarded within the scope of his authority. . . . The chief objection was made to the award of compensation for damage likely to be sustained in future from the water of the Clyde being penned back by the works of the company, and thereby damaging the land of the claimant. It was contended that such prospective damage could not properly be included in the award, and that, if any such damage should arise, the proper remedy would be an action against the company. But I am of opinion that the arbitrator was bound to take into his consideration the damage to the land of the claimant likely to be produced by the works which the company were authorised to construct, and were constructing by virtue of an Act of Parliament, and that no future action could be brought against the company except for negligence in the original construction of these works, or in the manner in which these were kept in repair. To support this objection the judgment of the court in *Lawrence v. Great Northern Rail. Co.* (1), was cited. But when the judgment of the court, delivered by PATESON, J.,

A is examined, it will be found that the action there rested on negligence, for he draws the distinction between that case and *R. v. Pease* (2), where the defendant had done nothing but in strict accordance with the Act of Parliament. He concludes thus (16 Q.B. at p. 654):

B “Here the company might, by executing their works with proper caution, have avoided the injury which the plaintiff has sustained. We think the want of such caution is sufficient to sustain the action.”

C In *Vaughan v. Taff Vale Rail. Co.* (3), in which an action was held maintainable against a railway company for damage done to a wood adjoining the railway from the sparks flying from the engine, negligence was alleged by the declaration and found by the jury. It would, indeed, have been strange if, although the mound which the appellants were constructing across the valley of the Clyde under the powers of the Act of Parliament would certainly force back the water to the injury of the claimant's land every time the Clyde was in flood, and there was a moral certainty that the Clyde would periodically be in flood, the damage likely to be done could not be calculated and included in the compensation once for all to be awarded, and if the remedy intended for him was a fresh arbitration toties quoties when the flood came down.

D Objection was then made to compensation being given for prospective damage to land of the claimant's injuriously affected, not confining the claim to the land which the company were entitled to purchase. But I think that the right to compensation extends to any land of the claimant injured by the severance of that which is purchased, or by the works which the company are authorised to construct. The test is whether the land which the claimant retains can be proved to be injuriously affected by this severance or by these works. The right to the compensation depends on “cause and effect,” not on “distance or proximity.”

E The only plausible argument, as it seems to me, for setting aside the award was founded on the second article in the final award:

F “In respect that the sums found due by this and my interim award aforesaid, include, inter alia, the sum of £4,000 awarded to the said deceased Sir Norman Lockhart as compensation for the damage occasioned to his property by the operations of the said company in carrying their line of railway across the valley of the Clyde, I find that the said Sir Norman Lockhart and the succeeding heirs of entail shall relieve the said railway company of any claims which his present tenants, whose farms are not intersected by the said railway, may be enabled to establish against the said company in consequence of their operations, to the extent of the interest accruing on the said sum of £4,000 from and after the date hereof, calculated at the rate of $3\frac{1}{2}$ per cent. per annum, but under deduction of the sum of £16 4s. per annum included in the abatement of £49 15s. to be allowed by Sir Norman Lockhart to the tenant of Wester Lampits, in terms of my said interim award; and I order accordingly.”

H This objection is distinctly made, and at first it seemed fatal upon the suggestion that the arbitrator had included in the compensation to Sir Norman Lockhart what was due to a class of his tenants, who themselves had claims for compensation which they might bring forward against the company. But upon a proper examination of the awards, it was made out to my satisfaction that no sum was awarded under this head to which Sir Norman Lockhart was not himself entitled, and that

I the company cannot be in the slightest degree prejudiced by the conditional indemnity which is provided. Indeed, there is reason to believe that this clause was introduced for the security of the company at their own request. It was suggested at the Bar, on the part of the appellants, that if the House should not give judgment for entire by setting aside the awards, we should make a declaration as to the nullity of any part of them which may be considered ultra vires and not binding. But there being nothing in the awards by which they are nullified, I am of opinion that we are not bound to follow the course proposed, and I must advise your Lordships simply to adjudge that the appeal be dismissed with costs.

LORD CRANWORTH.—The appellants contend that, supposing the arbitrator had jurisdiction to make his awards, they are void, as being in two respects *ultra vires*: first, because the arbitrator gave decree for damage entirely prospective and contingent, and, secondly, because he gave decree in favour of Sir Norman for damages assumed to be likely to be incurred by tenants whose lands are not traversed by the railway, and who were not parties to the submission. A

On the first point, the argument of the appellants rests on no foundation whatever. When the legislature authorises the working of the railway, and enables the company, for the purpose of its construction, to take the lands over which it passes, it expressly binds the company to compensate those whose lands it takes, not only for the value of the land taken, but for all incidental damage which the making of the railway may occasion. When the amount to be paid to a landowner is left to be settled by an arbitrator, it is for him to say whether the probability of this incidental damage is so great as to enable him to treat it as a matter practically lessening the value of the property of the landowner not taken for the railway. If he is satisfied that it is so, he is not only authorised but bound to award compensation. This is what has been done in the present case. B C

With respect to the second ground, the facts are as follows. The arbitrator awarded compensation to Sir Norman for contingent damage occasioned to his property by the carrying of the railway across the valley of the Clyde. The lands thus damaged were not traversed by the railway, and were, as to part at all events, in the occupation, not of Sir Norman himself, but of his tenants. Of the right of the arbitrator to award compensation to the landowner in such a case, there cannot be any doubt; and the only question is whether the decree is vitiated and made liable to be set aside, because the arbitrator has added that, in respect of the sum awarded for damage to these lands, the landowner shall, to the extent of the interest of the sum awarded, indemnify the company against any claim on them by the tenants. For that is the true effect of the award. I can discover nothing in this direction which can invalidate the award. The sum awarded on this head was £4,000, and we must assume that to have been the fair compensation for the damage occasioned to the lands, that is, to the inheritance. No claim had been made by the tenants of the lands in question, but the arbitrator thought they might set up a claim at some future time. If the arbitrator was mistaken in thinking that such a claim could be set up by the tenants of farms not intersected, then the direction in question is one which must be inoperative, and, therefore, harmless. But suppose that any such claim could be asserted, I can see nothing unjust or *ultra vires* in the direction that, to the extent of the interest of the capital sum awarded, which, in effect, becomes part of the inheritance, the company should be protected against the future claims of the existing tenants. In dealing with such a subject as that of future probable damage, and giving an immediate sum certain as the fair compensation to the landowner in consideration of his becoming exposed to evils which may be greater, or may be less, or even may never arise at all, it is impossible to do more than approximate to strict justice, and the course taken here by the arbitrator seems to me to be one which might not be unreasonable. He, in substance, increases the value of the inheritance by a sum of £4,000. If the contemplated probable evils should turn out to be less than the arbiter contemplated, he will have given too much; if greater, he will have given too little. No one can contend that on such a ground the award is bad. How is the case varied by the circumstance that the sum awarded is not an absolute sum of £4,000, but a sum of £4,000 liable to the extent of the interest thereon to indemnify the company against certain possible claims of the then existing tenants of the lands in respect of the probable damage for which the £4,000 was awarded? I see no reason for thinking that this was not within the competency of the arbitrator. The £4,000 can only be withdrawn from the bank in which it is deposited by an order of the Court of Session; and due care will, of course, be taken that it is not withdrawn till the time is past within which any claim can be made upon it. Therefore I concur in the conclusion that the decree below ought to be affirmed. D E F G H I

A LORD WENSLEYDALE.—The appellants objected that the arbitrator acted ultra vires in employing an expert to survey and report. That objection is not maintainable. An arbitrator is not bound to examine witnesses, and cannot by the law of England insist upon their being examined on oath, unless the submission provides for it. By s. 32 of the Lands Clauses Consolidation Act, 1845, he may, but is not bound to examine the parties and their witnesses on oath. [But see now **B** Arbitration Act, 1950, s. 12.] Nor is he prevented from consulting men of science in every department, where it becomes necessary. So he has a power to call in a valuer to assist him, unless restricted by the terms of the submission. This was decided in *Anderson v. Wallace* (4).

As little weight is due to the third objection that the arbitrator awarded prospective and contingent damages which he ought not to do. The answer is that he **C** really has not done so. The compensation given is for the necessary damage by the construction of the railway, and for the highly probable damage which would be occasioned in the ordinary course of events by the vicinity of the River Clyde. It becomes, therefore, unnecessary to consider what would be the effect of awarding a sum for purely speculative damage not reasonably foreseen. Generally speaking, railway and other similar companies acquire Parliamentary powers to construct **D** their works on condition of their paying the price of the land, and the compensation to the parties who may sustain damage by the exercise of the acquired power to do acts for which, if the authority of the legislature had not been given, the landowners might have maintained an action. That price should be a full compensation, once for all, for the injury to those rights. When paid, the company have obtained a lawful right to construct their works, and if they happen to injure one in the reasonable exercise of these rights so purchased, they are irresponsible for such injury. **E** Those rights are given for the public good, and if an extraordinary unforeseen damage occur, the suffering party must bear it, and is without remedy. But if those acquired rights are exercised unreasonably and without due care, those who have acquired them are responsible, as they are for their exercise of common-law rights: sic utere tuo ut alienum non lædas. *Lawrence v. Great Northern Rail. Co.* **F** (1), may have been well decided as belonging to that class of cases in which the acquired right has been negligently executed, for which, therefore, an action would lie. I much doubt whether the company would have been responsible for damage occasioned by the due exercise of their powers, though that damage was unforeseen at the time the compensation was settled and paid. In *Vaughan v. Taff Vale Rail. Co.* (3), the damage done to a distant piece of land was clearly not within the terms **G** of the arbitration, the award on which was sought to be impeached, and the dictum of the Lord Chief Baron, that the claimant might proceed for further damages under s. 68 of the Act of 1845 was clearly extra-judicial, and was founded upon the authority of *Lawrence's* case (1). These observations, of course, do not apply to cases, of which there are some (*R. v. Leeds and Selby Rail. Co.* (5), *Lee v. Milner* (6)), where, by the express terms of the special Acts compensation for damage from **H** time to time sustained is payable.

The last objection is, in my view of the case, the most serious. It is that the final award is void in consequence of the direction contained in it that the sum of £4,000 and interest is awarded to Sir Norman as compensation for the damage occasioned to his property by the operations of the company in carrying the line of the railway across the valley of the Clyde, and it proceeds to find that Sir Norman **I** and his heirs of entail shall relieve the company of any claims which his present tenants whose farms are not intersected by the railway may be enabled to establish against the company in consequence of their operations, to the extent of the interest accruing on the sum of £4,000 from the date thereof, at the rate of 3½ per cent. per annum, subject to a deduction. It is said for the appellants that it is immaterial whether those tenants had really any claim against the company or not, for it must be inferred that they were to pay more than for the actual damage done to Sir Norman as the price of his indemnity against those claims, and it was impossible to say how much more, and, therefore, the award in this respect was uncertain and

void. It is, however, in my mind, very questionable whether those supposed claims of tenants are more than imaginary, and whether this clause has not been introduced into the decree, not because there was any real danger of valid complaints by such tenants, but to satisfy the importunity of the appellants' solicitors, made before the arbitration was concluded, that the appellants should know in what way the arbitrator proposed to secure the company against the tenants' claims, if the money was paid to Sir Norman. At all events, however, it is to be observed that this provision does not affect the principal sum of £4,000. That is certainly due. It is the interest only which is affected in case any of the tenants' claims should be made good. Having heard the opinions already given by my noble and learned friends, I agree with them in thinking that a sufficient case is not made out to reverse the judgment of the Court of Session, either in the whole or in part.

LORD KINGSDOWN concurred.

Appeal dismissed.

BARRACK v. M'CULLOCK

[VICE-CHANCELLOR'S COURT (Page-Wood, V.-C.), November 12, 14, 17, 20, 1856]

[Reported 3 K. & J. 110; 26 L.J.Ch. 105; 28 L.T.O.S. 218;
3 Jur.N.S. 180; 5 W.R. 38; 69 E.R. 1043]

Bankruptcy—Fraud—Fraudulent conveyance—Voluntary settlement—Purchase of stock for benefit of infant children—Statute 13 Eliz., c. 5, s. 2—Judgments Act, 1838 (1 and 2 Vict., c. 110), s. 12.

Since the passing of the Judgments Act, 1838, an investment of money in the purchase of stock in the names of trustees on trust for the children of the investor at a time when he had not, apart from the money so invested, sufficient assets out of which to pay his debts, is void under the statute 13 Eliz., c. 5 [relating to fraudulent conveyances], because by s. 12 of the Act of 1838 money or stock may be taken in execution, and, therefore, the effect of such a settlement would be to delay, hinder, or defraud the creditors of the investor within s. 2 of the statute of Elizabeth.

Notes. The statute 13 Eliz., c. 5, was repealed by the Law of Property Act, 1925, s. 207, Sched. 7, and replaced by s. 172 (1) of that Act.

Referred to: *Neale v. Day* (1858), 7 W.R. 45; *R. v. Smith* (1870), L.R. 1 C.C.R. 266.

As to conveyances impeachable by creditors, see 17 HALSBURY'S LAWS (3rd Edn.) 650 et seq.; and for cases see 25 DIGEST (Repl.) 181 et seq. For s. 12 of the Judgments Act, 1838, see 13 HALSBURY'S STATUTES (2nd Edn.) 365, and for s. 172 (1) of the Law of Property Act, 1925, see *ibid.*, vol. 20, p. 785.

Cases referred to:

- (1) *Rider v. Kidder* (1805), 10 Ves. 360; 32 E.R. 884, L.C.; 25 Digest (Repl.) 191, 141.
- (2) *Fletcher v. Lady Sedley* (1704), 2 Vern. 490; 1 Eq. Cas. Abr. 148; 23 E.R. 913; 25 Digest (Repl.) 181, 87.
- (3) *Sims v. Thomas* (1840), 12 Ad. & El. 536; 4 Per. & Dav. 233; 9 L.J.Q.B. 399; 4 Jur. 1181; 113 E.R. 916; 25 Digest (Repl.) 171, 1.
- (4) *French v. French* (1855), 6 De G.M. & G. 95; 25 L.J.Ch. 612; 26 L.T.O.S. 172; 2 Jur.N.S. 169; 4 W.R. 139; 43 E.R. 1166, L.C.; 25 Digest (Repl.)

A Also referred to in argument:

Skarf v. Soulby (1849), 1 Mac. & G. 364; 19 L.J.Ch. 30; 13 Jur. 1109; 41 E.R. 1306; sub nom. *Scarf v. Soulby*, 1 H. & Tw. 426; 16 Sm. 481, L.C.; 25 Digest (Repl.) 214, 308.

Norcutt v. Dodd (1841), Cr. & Ph. 100; 10 L.J.Ch. 296; 5 Jur. 835; 41 E.R. 428, L.C.; 25 Digest (Repl.) 172, 11.

B *Duffin v. Furness* (1729), Cas. temp. King, 77; 25 E.R. 232; 25 Digest (Repl.) 172, 7.

Grogan v. Cooke (1812), 2 Ball. & B. 230.

Action by creditors for the administration of the estate of William Mariner who died insolvent.

C James Barrack and his wife knew William Mariner who was confidential clerk to a Mr. Heseltine, a stockbroker. In 1852 Mrs. Barrack, as her husband's agent, instructed Mariner to sell for her husband some shares and stock; Mariner did so and received the proceeds of the sale of the shares, and the dividends of the stock. James Barrack, through his wife, paid to Mariner several sums, other than the aforesaid, which sums, together with the aforesaid, were retained by Mariner for the purpose of investment by him, at his discretion, for James Barrack.

D Mariner furnished to James Barrack an account of investments alleged to have been made by Mariner for him, and such account showed a balance in favour of James Barrack. In July, 1852, Mariner purchased three sums of stock of £300 each; he was then in embarrassed circumstances; and intending to hinder, delay and defraud James Barrack and his other creditors, settled those three sums of stock on his three daughters. Mariner died insolvent in October, 1853, leaving his widow his executrix; and it was then, for the first time, discovered that Mariner had never made the investments of which he had given James Barrack an account, and that he had purchased the three sums of £300 stock and settled them as aforesaid. The debt then due from Mariner to the Barracks on the aforesaid account, and for dividends, proceeds and moneys received by him for investment, amounted to £1,091 16s. 6d.

E The bill charged that the said three sums of £300 stock had been purchased by Mariner with money belonging to the Barracks, and that the settlement thereof ought to be set aside as voluntary and fraudulent. The bill then prayed an account of what was due from Mariner's estate to the Barracks, the plaintiffs, and a declaration that the settlement of the stock might be set aside, for the above-stated reasons, as against the plaintiffs and the other creditors of Mariner. It was proved that Mariner at his death owed Heseltine £1,500, and that all Mariner's property was then worth only £300.

F The bill charged that the said three sums of £300 stock had been purchased by Mariner with money belonging to the Barracks, and that the settlement thereof ought to be set aside as voluntary and fraudulent. The bill then prayed an account of what was due from Mariner's estate to the Barracks, the plaintiffs, and a declaration that the settlement of the stock might be set aside, for the above-stated reasons, as against the plaintiffs and the other creditors of Mariner. It was proved that Mariner at his death owed Heseltine £1,500, and that all Mariner's property was then worth only £300.

G It appeared by the answer of Mrs. Mariner that there was some question whether the three sums of stock were purchased with the money of the Barracks or with that of Mariner himself or of his wife. Mrs. Mariner alleged that the purchase-money of the stock was derived from the rents of certain houses at Gravesend settled to her separate use. But the present decision of the case depended on the considerations whether (assuming Mariner to have purchased the stock with his own money) stock was a species of property liable to be seized and taken in execution within the terms of the statute 13 Eliz. c. 5, s. 2, and the Judgments Act, 1838, s. 12; and then, if it was so liable to be seized and taken, whether the settlement of the stock, in this case, could be set aside as fraudulent within the statute of Elizabeth?

I By the statute 13 Eliz. c. 5, s. 2, it was enacted:

“That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution, at any time had or made sithence the beginning of the Queen's Majesty's reign, that then

was, or at any time thereafter to be had or made to or for any intent or purpose before declared and expressed, should be from thenceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs by such guileful, covinous, or fraudulent devices and practices as was aforesaid, were, should or might be in any ways disturbed, hindered, delayed or defrauded), to be clearly and utterly void, frustrated and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing, to the contrary notwithstanding."

By the Judgments Act, 1838, s. 12, it is, among other things, enacted :

"By virtue of any writ of fieri facias, to be sued out of any superior or inferior court . . . or any precept in pursuance thereof, the sheriff or other officers having the execution thereof, may and shall seize and take any money or banknotes (whether of . . . the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects such writ of fieri facias shall be sued out. . . ."

Rolt, Q.C. (Speed with him), for the plaintiffs.

W. M. James, Q.C. (Fooks with him), for the defendants.

Cur. adv. vult.

Nov. 17, 1856. **PAGE-WOOD, V.-C.**—It is impossible to hold that Mariner was not so indebted at the time of purchasing the stock, that any voluntary settlement made by him at that time would be void as against creditors. The argument for the defendants was that inasmuch as the settlement was of property which could not be taken in execution, the case was within the principle of *Rider v. Kidder* (1), and that class of cases; and that I ought to hold that a settlement of stock was not within the statute against fraudulent conveyances.

The words of that statute are :

"all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond . . ."

and on those words it was held repeatedly that an assignment of property which could not be taken in execution was not such an assignment as was within the statute. The old authorities proceeded on the notion that it would be useless to avoid a gift of anything which, but for that gift, would not have been available for creditors. It has also been held in *Fletcher v. Lady Sedley* (2), that a purchase was not, from the mere fact of its being made with the money of the debtor, within the statute, and where a party gave money to a child who made the purchase, it was held that that did not bring it within the statute. It is now, however, no longer true that cash or notes can be given to a child by a person who is insolvent. According to *Sims v. Thomas* (3), a bond for securing an annuity is not goods and chattels within the statute, but such a bond being now liable to be taken in execution, a voluntary assignment of it would be void. By s. 12 of the Judgments Act, 1838, bank-notes and cash may be taken in execution; if, therefore, you could follow them into the hands of a volunteer, the gift would be void as against creditors. The recent case of *French v. French* (4) shows that a settlement of an annuity purchased with the proceeds of the sale of stock-in-trade when the settlor was insolvent is within the statute. On the whole, therefore, supposing this money to have belonged to Mariner, I think the settlement was void as against creditors. On that question, however, I am not satisfied with the evidence, and the case must stand over for the examination of Mrs. Mariner and her three daughters and the trustees.

[NOTE: On Nov. 20, 1856, oral evidence was taken on the question as to the ownership of the money settled, and HIS LORDSHIP held that it belonged to Mrs. Mariner. The bill was accordingly dismissed.]

A

STRAY v. RUSSELL

[COURT OF QUEEN'S BENCH (Lord Campbell, C.J., Erle, Crompton and Hill, JJ.),
May 6, June 14, 1859]

B

[Reported 1 E. & E. 888; 28 L.J.Q.B. 279; 1 L.T. 162;
5 Jur.N.S. 1295; 7 W.R. 641; 120 E.R. 1144]

[COURT OF EXCHEQUER CHAMBER (Martin, Bramwell and Channell, BB., Williams,
Willes, Byles and Keating, JJ.), February 6, 1860]

[Reported 1 E. & E. 916; 29 L.J.Q.B. 115; 1 L.T. 443;
6 Jur.N.S. 168; 8 W.R. 240; 120 E.R. 1154]

C

Company—Shares—Transfer—Registration—Refusal to register—Right of purchaser to recover purchase money—Practice of Stock Exchange.

The plaintiff authorised brokers on the Stock Exchange to purchase for him, to be paid for on the account day, twenty shares in the Royal British Bank. The brokers bought the shares of the defendant. Before the account day arrived the Royal British Bank stopped payment, whereupon the plaintiff gave notice to his brokers that he would not take the shares. The defendant had contracted with other stockbrokers for the purchase of twenty shares, and these brokers procured transfers of the shares and the certificates, which on the account day the defendant tendered to the plaintiff's brokers. The plaintiff's brokers paid for them and received them, and then tendered them to the plaintiff, who, under pressure of an action, received and paid for them. By the rules of the Royal British Bank, proprietors of shares might, with the consent of the directors, transfer their shares, and the broker of one of the sellers of the shares requested such consent, which the directors refused to give. It was established that the practice of the Stock Exchange was that the price was payable on the handing over by one broker to the other of the transfers and the certificates. The plaintiff did not execute the transfers nor apply for registration of them, and he claimed repayment by the defendant of the purchase price.

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Held: the plaintiff was not entitled to recover the purchase price because (i) having regard to the practice of the Stock Exchange he had obtained what he had bargained for, and, therefore, the consideration had not failed; (ii) he could not rely on a breach by the defendant to perform his part of a contract to sell and cause to be delivered the shares, since the evidence disclosed that the plaintiff was not ready and willing to perform his part of the contract.

Notes. Considered: *Coles v. Bristowe* (1868), L.R. 6 Eq. 149; *Sheppard v. Murphy* (1868), 16 W.R. 948. Followed: *London Founders Association v. Clarke*, [1886–90] All E.R.Rep. 192. Considered: *Hichens, Harrison, Woolston & Co. v. Jackson & Sons*, [1941] 2 All E.R. 704. Referred to: *Chapman v. Shepherd, Whitehead v. Izod* (1867), L.R. 2 C.P. 228; *Hooper v. Herts*, [1904–7] All E.R.Rep. 849; *Dies v. British and International Mining and Finance Corpn.*, [1939] 1 K.B. 724; *Hichens, Harrison, Woolston & Co. v. Jackson & Sons*, [1943] 1 All E.R. 128.

As to obligations on the transfer of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 248 et seq.; and for cases see 9 DIGEST (Repl.) 362 et seq.

I

Cases referred to:

- (1) *Wilkinson v. Lloyd* (1845), 7 Q.B. 27; 115 E.R. 398; sub nom. *Leeman v. Lloyd, Wilkinson v. Lloyd*, 14 L.J.Q.B. 165; 9 Jur. 328; sub nom. *Wilkinson v. Lloyd, Leman v. Lloyd*, 4 L.T.O.S. 432; 9 Digest (Repl.) 365, 2334.
- (2) *Taylor v. Stray* (1857), 2 C.B.N.S. 175; 26 L.J.C.P. 185; 29 L.T.O.S. 95; 3 Jur.N.S. 540; 5 W.R. 528; 140 E.R. 380; on appeal, 2 C.B.N.S. at p. 197; 26 L.J.C.P. 287; 3 Jur.N.S. 964; 5 W.R. 761; 140 E.R. 380, Ex. Ch.; 44 Digest (Repl.) 405, 120.

(3) *Remfry v. Butler* (1858), E.B. & E. 887; 31 L.T.O.S. 356; 5 Jur.N.S. 1297, A
n.; 6 W.R. 682; 120 E.R. 740, Ex. Ch.; 9 Digest (Repl.) 366, 2340.

Appeal from a decision of the Court of Queen's Bench in an action brought by the plaintiff to recover the purchase price of shares, tried by LORD CAMPBELL, C.J., and a jury, when a verdict was returned for the plaintiff subject to the opinion of the Court of Queen's Bench on a Special Case. The Court of Queen's Bench gave judgment for the defendant and the plaintiff appealed. B

Montague Smith, Q.C., and *J. Brown* for the plaintiff.
Atherton, Q.C., and *Aston* for the defendant.

Cur. adv. vult.

June 14, 1859. The following judgments were delivered.

LORD CAMPBELL, C.J.—This case was argued last term before my brothers ERLE, CROMPTON, HILL and myself. We will now give judgment. We are all of opinion that the judgment ought to be for the defendant; but there is a slight difference between us as to the reasons, and the case being one of considerable importance, we have thought it better to give our opinions seriatim. C

The plaintiff first contends that he is entitled to recover, under the common counts for money had and received, on the ground of the failure of consideration; he will succeed if he can show that the defendant was bound to see that the transfer of the shares should be registered and completed so as to give the plaintiff a perfect title to the shares; and, further, that he himself has been ready and willing to accept them. If this transaction is to be governed by the same rules as the sale and purchase of an interest in real property, the plaintiff's view of the contract would be correct. To prove that it is, *Wilkinson v. Lloyd* (1) is relied on as an authority; but although the transaction there was a sale of shares, the shares were of a different nature from those which we have to consider, and the manner in which the business was to be conducted between the vendor and purchaser was entirely different. In *Wilkinson v. Lloyd* (1) the reasoning was adopted by the court that the contract amounted to a sale by a partner of his share in the partnership, and that the partnership-deed with regard to which the contract between the parties was entered into, clearly showed that the vendor must effect all that was essential to the transaction. On this ground the court there held, that the cases applied which have been decided with respect to the obligation of the vendor of a lease to obtain the landlord's consent to an assignment when the lease requires it. Here the purchase of shares in a joint-stock banking company was made at the request of the plaintiff by a broker on the Stock Exchange in London, and the contract must be considered as made with reference to all the established usages of the Stock Exchange. D E F G

After the repeated decisions on this subject, counsel for the plaintiff very properly waived the objection made at the trial to the admissibility of the evidence respecting these usages. According to these usages the price of the shares is payable on the one broker handing over to the other the transfers and certificates. What does the vendor contract to sell and deliver? Genuine transfers and certificates, with the interests and rights which they convey. There might be a condition subsequent, imposing on the vendor the onus of procuring the consent of the directors to the transfer; but that would be no evidence of such a condition. In *Taylor v. Stray* (2) (which was an action brought against the present plaintiff by the broker) it was admitted on all sides that Russell, the present defendant, had done everything which entitled him to be paid the price of the shares. WILLES, J., there intimates an opinion that it was not the duty of the broker of the vendor to get the transfer registered; and I apprehend that this duty devolved on the purchaser, though he might have a right to call on the vendor afterwards to concur in the transfer. But the vendor's subsequent defeasance, if there were any, would not amount to a total failure of consideration, for the purchaser would still have the transfers and certificates, with the means of completing the title, and of obtaining damages commensurate to his loss. From the report of the decision of the Court of H I

A Exchequer Chamber in *Taylor v. Stray* (2), it would appear that the two judges who express an opinion both consider that the purchaser had something valuable in the transfers and certificates, even after the refusal to register them; and POLLOCK, C.B., said that what the purchaser was to get was not the shares transferred into his own name, but the *jus disponendi*.

B For these reasons, although there had been an absolute refusal on the part of the directors to consent to the transfer, I should still have been of opinion that it was not a total failure of consideration, entitling the plaintiff to recover back the purchase-money; but drawing an inference from the evidence, I am inclined to think that if the plaintiff had been sincerely desirous of having the transfer completed, and of incurring a responsibility equal to the whole of his fortune, he might have gratified his wish; for the reluctance of the directors to consent to transfers
C in the insolvent state of the bank probably arose from a desire to prevent substantial shareholders from escaping by transferring their shares to men of straw; and if the plaintiff had shown that he was as good a man as Mr. William Rowe and Col. Aitcheson, in whose name the shares stood, I can hardly doubt his request would have been complied with. But he never executed the transfer deed, without which the registration could not take place; and as he might then have insisted on a
D repudiation, even after his liability to the broker was established, and although he should have to pay the price of the shares without receiving anything for their value, he had escaped the peril of being made a contributory. The bankruptcy of the company, after the transfers and certificates had been handed over to the plaintiff's broker and the defendant had received the purchase-money, I clearly think could not work a failure of consideration entitling the plaintiff to recover back
E the purchase-money; he might still have been entitled to some benefit under the bankruptcy, and at any rate the shares before Sept. 15 were at the risk of the purchaser.

There is another ground on which I think the plaintiff is not entitled to recover. From the evidence it seems quite clear to me that he was not ready and willing to accept the shares. The letters of Sept. 11 and 12 prove that subsequently to Aug. 28
F he had become fully aware of the insolvent condition of the bank, and that, discovering how unlucky and perilous was the bargain he had made, he was determined by all means, fair or foul, to get rid of it. We are told that these were merely letters to his own broker; and I believe that if he had merely expressed such sentiments in secrecy, or in conversation with a stranger, it would not be sufficient evidence to support the plea that he was not ready and willing. But these letters were written
G to Taylor and Aston, his brokers, and were acted on and communicated by them to Russell and the parties from whom Russell and his jobber had purchased the shares. Taylor and Aston thus addressed him:

H "Mr. Stray will not take any shares in the Royal British Bank; do not pay any money on his account for or in respect of any alleged purchase by him of any such shares. Mr. Stray is advised he has a good defence to any proceedings that may be instituted against him in reference to the Royal British Bank shares."

I Accordingly, Mr. Stray disavowed the payment made by his brokers to Russell, and only paid them the amount under a judgment which they obtained against him after strenuously resisting the liability in the Common Pleas and in the Exchequer Chamber. A further objection to this action for money had and received may be, that if the plaintiff is now permitted to adopt the payment made, according to his orders by Taylor and Aston, so that the money paid by him may be considered money paid by him notwithstanding his disavowal of the payment, and notwithstanding the difficulty of fixing the point of time when the promise to repay the money is first to be implied, at all events Taylor and Aston must be his agents to make the payment, and then it may be considered a payment by him with knowledge of all the facts of the case. At the time when the payment was made he had

determined that he would not accept the shares, and he well knew that they never would be transferred to him. A

Having thus disposed of the general count for money had and received, which is chiefly relied on, I have only to point out two fatal objections to the plaintiff's right to recover on the Special Case: first, that the defendant never entered into the contract he alleged; and secondly, that one of the pleas in bar on that count is fully proved. The special count alleges that the defendant undertook that the twenty shares in the Royal British Bank should be transferred to the plaintiff, the breach being that he had not caused them to be transferred to the plaintiff; whereas it has been already shown that the defendant did not enter into any such undertaking, and that he performed the promise which he actually did make when the transfers and certificates were handed over to the plaintiff's agents, on their paying the purchase-money. Again, in answer to the other allegation of this special count of the performance by the plaintiff of all the conditions precedent, the defendant pleads in bar a want of readiness and willingness to accept the shares, and this plea, I think, is fully proved by the letter to Taylor and Aston before referred to, and by the whole scope of the plaintiff's conduct in the transaction, from the time when those letters were written. The present case resembles very closely *Remfry v. Butler* (3), which was decided by this court on Jan. 26, 1858, on the same principles, and in which on an appeal to the Exchequer Chamber our decision was affirmed, this court being of opinion that, on the facts of the case, according to the rules of the Stock Exchange, the defendant had not failed on his part in completing the contract. B C D

In the present case the conduct of the plaintiff has, I think, been very discreditable, in trying to get rid of a fair bargain when he found it would turn out disadvantageous to him, and in trying to throw the loss of the £140 on his own brokers, without imputing to them the slightest misconduct or failure of duty, and in trying to recover the amount from the defendant, who he knew had acted with perfect propriety in the transaction, and who he knew was liable to the parties from whom the shares were actually purchased. Still, the plaintiff must have obtained our judgment if according to the rules of law he be entitled to it; but I think, according to the rules of law as well as of the principles of justice, we are bound to give judgment for the defendant. E F

ERLE, J.—It appears to me that the plaintiff has had no value for his money. He contracted for shares in a bank, to be delivered at a future day; before that day the bank was known to be insolvent, and very soon after that day it stopped payment, so that the shares on that day were worse than useless. It also appears that no shares could be transferred without the consent of the directors; that consent they were inclined to withhold because the bank was insolvent, and in the honest discharge of their duty as trustees for the shareholders and creditors they decided that no change of liability should be made while they were on the brink of declaring insolvency. Then, if the contract be construed only by its terms, without importing the usage of the Stock Exchange and the course of business for the vendee to execute transfers before applying to the directors for their consent thereto, I am of opinion the vendor was bound to obtain that consent, according to *Wilkinson v. Lloyd* (1), and that he had failed to do so, and so could not restore the money paid for a purchase which went off by the default of the vendor. But, according to the course of the Stock Exchange, the contract of the vendor was in fact performed by the delivery of transfers executed by the vendor with certificates to the brokers of the vendee. Thus the defendant can maintain that the consideration has not entirely failed; and, therefore, the count for money had and received cannot be supported. G H I

Then, with respect to the evidence that the plaintiff was not ready and willing to perform his part of the contract set out in the Special Case, I think the plaintiff's desire to annul the contract declared on by his own act, and the direction to the agent not to pay the purchase-money, which was obeyed by him, is no evidence to prove this issue for the defendant. But on the letters there is evidence that he

A would not have executed the transfers as vendee, and as such execution was a condition for obtaining the consent of the directors, on this ground the defendant can defeat the special count also, and so obtain judgment in the action.

HILL, J. (read by **CROMPTON, J.**).—In this case the declaration contained two counts—first, money had and received; secondly, on a special contract, alleging that it was agreed that the plaintiff should buy, and the defendant should sell and cause to be delivered, twenty shares in the Royal British Bank, and that the defendant had not sold, or caused to be transferred, the said shares. The defendant pleaded, denying the debt in the first count, and the agreement in the second; and also, as to the second count, denying that the plaintiff was ready and willing to perform the contract on his part; and, lastly, averring that the defendant had sold and caused to be transferred the said shares.

It appears from the Case that, on Aug. 20, 1856, the plaintiff, through his brokers Messrs. Taylor and Aston, bought in the Stock Exchange in London, of the defendant, who was also a broker there, twenty shares in the Royal British Bank, a joint-stock bank then carrying on business in London. According to the deed of settlement of that bank, shares therein were transferable with the consent of the directors, and also the terms of the deed required seven days' notice before any transfer. Such notice was not usually required by the bank in cases of transfer. The contract made by the plaintiff was for Sept. 15, and according to the practice of the Stock Exchange it was the duty of the plaintiff on that day, by his brokers, to give to the selling broker, the defendant, the names of the parties to whom the transfer was to be made, and afterwards to pay the price of the shares in exchange for transfers executed by the party holding the shares and certificates. The Case expressly states that all such transfers required execution by the purchaser before registration of the company, and by the practice of the Stock Exchange the purchaser requiring registration and new certificates ought to execute the transfer and leave it, with the then existing certificates, at the office of the company for registration, and then new certificates are granted to him in his own name. Until this is done, the purchaser's title to shares is not completed. It further appears from the Case, that on Sept. 3 the British Bank was in such a condition that to have become a member after that day would have been to incur responsibility. On Sept. 11 the plaintiff, through his attorney, informed his brokers that he would not accept any of the shares, and instructed them not to pay for the same. They, however, in accordance with the rules and practice of the Stock Exchange (having previously informed the plaintiff to that effect) on Sept. 15 gave the plaintiff's name as the purchaser of twenty shares to the defendant, and afterwards, on Sept. 18 paid the price of the shares to the defendant in exchange for stamped certificates duly executed by the parties transferring, and also certificates for twenty shares.

It does not appear that any consent to the fact of transfer to the defendant was ever applied for to the bank or refused by them. A written application to the directors to prepare a transfer of sixteen shares to the defendant was sent to him on Sept. 15, which application was refused by them on Sept. 17; and between Sept. 15 and 17 a personal application was made to the bank for the bank to prepare a transfer, which was answered by one of the officers desiring the applicant to prepare it himself, and the officer handed to the applicant blank forms for the purpose. This occurrence took place in the presence of one of the plaintiff's brokers, but there is no statement whether the plaintiff's brokers knew of the written application and refusal. It further appears that the plaintiff had first refused to recognise the payment made by his brokers, and they proceeded by action against him to recover the amount, and after they obtained judgment, and the judgment was affirmed in error, the plaintiff paid to them the amount; and on Dec. 28, 1857, the brokers delivered up the transfers, shares and certificates to the plaintiff, who has ever since kept the same, and has now brought this action without having offered to return the certificates and shares, and without having demanded back the money which he seeks to recover under the count for money had and received. On the argument of the case

before us, the special count was not much insisted on, but on that count I am of opinion that the plaintiff is not entitled to recover. I am not satisfied that the contract set out in that count was entered into. Looking at the subject of the sale—shares in a bank—and the place in which the sale took place—the Stock Exchange—and having regard to the rules and practice of the Stock Exchange, I do not think that the vendor in such a case contracts that the directors shall accept the vendee as a proper person to be admitted a shareholder in the bank.

The case differs materially from *Wilkinson v. Lloyd* (1), which was relied on in the argument. The contract in that case was not made on the Stock Exchange, so that there was no usage binding the bank to procure the transfers to be registered for the perfecting of the transfer to him, and in that case the deed of the company, which was in the knowledge of both parties, cast the duty of obtaining the consent of the directors on the vendor, by whose default alone it was that the consent of the directors was not obtained. It may be also not undeserving of consideration whether a different rule may not well prevail in the sale of shares in a commercial company on the Stock Exchange from that which should be applied to the sale of mining shares, which confer an interest in real estate, made between two private individuals, which rather would appear to fall within the analogy adopted in *Wilkinson v. Lloyd* (1), of a sale by a termor of his lease when there is a covenant in the lease against assignment without the consent of the lessor.

Further, on the special count, I am of opinion that the plaintiff has failed to prove that he was ready and willing. It is manifest that he was desirous to avoid a responsibility; that he never did nor was he willing to do any of the acts necessary to complete the transfer, and which, according to the practice of the Stock Exchange and the contract which he made, it was his duty to do.

The plaintiff's counsel in the argument, however, mainly relied on the count for money had and received, and contended that the plaintiff had a right to recover the money as on a total failure of consideration. I am of opinion that the facts do not support such a case. As the money was paid according to the terms of the contract, in order to recover it the burden was on the plaintiff to show such circumstances as would entitle him to say that the consideration for which he paid his money had wholly failed without any default on his part. This, however, the plaintiff has not done. The only application to the bank was prior both to the payment of the purchase-money and to the handing over the transfers duly executed, and the certificates of the shares. If the plaintiff was desirous that the transfers should be completed and his title perfected, it was his duty to execute the transfers, and leave them, with the then existing certificates, with the bank for registration. If he had done so, and the bank had unqualifiedly refused to permit the transfer, the plaintiff might be in a position to raise the question which he has submitted to the court. As the facts, however, stand, he himself is in default in obtaining the completion of the transfers; and he cannot be permitted to say that the consideration has wholly failed, when the failure, if such there be, rests on the default of himself, and not on any omission or default of the defendant. It is not shown that the defendant was guilty of any neglect or omission of any act required to be done by him to complete the contract on his part.

There is another ground which, in my opinion, is conclusive against the claim to recover the money, viz., that at the time the money was paid in exchange for the transfers and certificates, the plaintiff's broker, who paid the money, had full knowledge of all the circumstances. Certainly the brokers had full opportunity of knowing all the facts, and the plaintiff has not made out that the money was paid by the brokers either in ignorance or forgetfulness of any material fact. On this point the case appears to fall within, and be governed by, *Remfry v. Butler* (3), relied on by the defendant's counsel in the argument. If it were necessary to express any opinion whether the plaintiff could maintain an action for money had and received, without demanding the money or tendering back the transfers and certificates, I should hesitate before affirming that proposition. However, I express

A no opinion thereon, but merely mention it, that it may not be thought that I acquiesce in the view that such demand or tender was necessary.

On the whole, therefore, I am of opinion that the judgment must be for the defendant.

CROMPTON, J.—I am of opinion that the plaintiff is not entitled to recover in this action. It appears to me that he fails as to the special count, as he most clearly was not ready and willing to accept the transfer of the shares and do his part towards completing the transfer; and probably also on the ground that the contract set out in the declaration was not the one entered into by the defendant, and that the defendant performed his part of the contract really entered into by him. The plaintiff, however, in the argument before us, mainly relied on the count for money had and received, in which he sought to recover the price which he had paid for the shares, as on a total failure of consideration.

The money appears to have been paid by agents of the plaintiff, according to the terms of the contract, on the name being given, and the certificate and the transfer being handed over; and it lies on the plaintiff to show such circumstances as would make out a case of total failure of consideration. I am not satisfied that the contract was such as the plaintiff must make it out to be in order to treat the supposed breach of it by the defendant as amounting to a case of total failure of consideration, or that the plaintiff lost the whole of the consideration and got nothing for his money, by reason of the defendant's breach of the contract, or that the money was paid in ignorance of the facts. In the first place, I am not satisfied that, according to the contract, the defendant engaged that the banking company should accept the plaintiff as a member of the co-partnership. By the contract, as explained by the usage of the Stock Exchange, the name was to be given on a certain day, so that the vendor might get the transfer made out to the vendee or to his nominee, and he was then to hand over the transfer and certificate of the shares and to receive the money, and there is nothing that satisfies me that anything more was to be done by the vendee. It seems from the statement as to the usage that the vendee was then to bind himself to hold the shares according to the terms of the contract by executing the transfer. It is sufficient for the decision of this case to say that it is not made out by the plaintiff that it was incumbent on the vendor to do more. The fact of the payment being to be made on the handing over the certificates and transfers, and the practice stated of a prior consent being never asked for, and as to no assent being ever refused, make it very probable that the vendee in such case bargains only for delivering the shares and transfers, and takes the chance of getting himself or his nominee or sub-vendee accepted and registered. The plaintiff must be taken to have known of the course in the bank as to the consent, and he may well have bought, taking the chance of procuring such acceptance or registration for himself. He seems to have bought the shares, certificates and transfers, on an agreement to pay for them on the delivery of the documents.

H In *Wilkinson v. Lloyd* (1) the court assumed that the consent to the assignment was a fact of the vendor's title, as in the case of the sale of a lease; but whatever may have been the case of a purchase of partnership shares in mines—real property to some extent—that is a sale between the parties not according to any course of business on the Stock Exchange. I can make no such assumption in the present case, where the sale was according to the regulations of the Stock Exchange, which I made the price payable on handing over the shares and transfers, according to which it is at least probable that the vendee was to take on himself the duty of getting the transfers completed, and the shares registered, and where from the nature of the transaction it seems to me it is unlikely that the vendor should undertake for the acceptance of any particular name or person when he may have been entirely ignorant at the time of the contract of the name and the responsibility of the intended transferee. But further, it is left uncertain on the evidence whether the plaintiff might not have got his name accepted if he had chosen. The evidence of the refusal on one occasion by the bank is very unsatisfactory for the purpose of

making out that they would not have ever allowed the plaintiff or some one on his behalf to have the shares; and it is quite clear to my mind that the plaintiff was not ready and willing, and never would have accepted the transfer of the shares. How can he then say that he has made out that he did not get the transfers owing to the default and breach of contract of the defendant.

Again, it is not made out to my satisfaction that the payment by the plaintiff's agent was made in ignorance of the fact. It is stated that it did not appear whether the refusal by the bank was known to the brokers or not, and it is quite consistent with the special case that it may have been made with full knowledge of the facts. Again, it does not seem to me to be made out that the plaintiff did not get all he bargained for, or that he was entitled to say that he got nothing, or that he lost the whole of the consideration. According to the judgment of the Lord Chief Justice and the Lord Chief Baron in the Exchequer Chamber, and the reasons of CRESSWELL, J., in the Common Pleas in *Taylor v. Stray* (2), he seems to have got what he bargained for; and at all events he had, and kept, the certificates and transfers. If the shares had risen, he would have disposed of them, and he would probably have been entitled to the equitable rights, and to have used the vendor's name in the assertion of such rights, and he would have been entitled to participate in the distribution of any surplus which might have arisen if the affairs of the bank had turned out well. It seems impossible to suppose that it was part of such a bargain that he should have any guarantee of the soundness or solvency of such a company.

I, therefore, think the plaintiff has failed in making out that the bargain was such as entitled him to say that there was a breach of contract by reason of which the total failure of consideration arose, or that he was prevented by such bargain from getting the shares transferred, or that there was a total failure of consideration by his not getting anything he bargained for, or that the money was paid in ignorance of the circumstances. And I therefore think that the defendant is entitled to our judgment on the count for money had and received, as well as on the special count. Judgment, therefore, must be entered for the defendant.

After what has fallen from the other members of the court, I think it right to add—though it is and ought to be no part of my judicial determination—I am by no means surprised at the plaintiff endeavouring to recover back his money. The case is not without difficulty, either in respect of principle or of apparent authority, and I do not attribute to the plaintiff any motive of impropriety, either in resisting the payment made by the brokers after his direction not to pay, or instituting these proceedings.

The plaintiff appealed to the Court of Exchequer Chamber.

Montague Smith for the plaintiff.

Atherton, Q.C., for the defendant, was not called on to argue.

WILLIAMS, J.—We are all of opinion that the judgment must be affirmed. We all think that, construing the contract in this case by the usage of the Stock Exchange, subject to which it was made, there was no undertaking by the vendor of the shares to obtain, absolutely, the consent of the directors to the transfer. At the most, his contract was to obtain it only after the vendee had done what was reasonable towards obtaining it in the usual course. The special count of the declaration fails in two respects. It does not correctly state the contract; and the denial, in the third plea, of the plaintiff's readiness and willingness to accept the shares is proved. Nor can the common count be supported; for the transaction did not fail, and the transfer did not fail, by any failure on the part of the vendor without the default of the vendee. The vendee himself was in fault for not taking the proper steps to obtain the transfer.

MARTIN, BRAMWELL and CHANNELL, BB., BYLES and KEATING, JJ., concurred.

Appeal dismissed.

EADS v. WILLIAMS

[COURT OF APPEAL IN CHANCERY (Lord Cranworth, L.C.), November 11, 13, 14, 15, December 2, 1854]

[Reported 4 De G.M. & G. 674; 3 Eq. Rep. 244; 24 L.J.Ch. 531; 24 L.T.O.S. 162; 1 Jur.N.S. 193; 3 W.R. 98; 43 E.R. 671]

Arbitration—Arbitrator—Duty—Inspection of site—Examination of witnesses—Independence of view—Signature of award by two arbitrators at same time. Specific Performance—Refusal of decree—Lapse of time—Delay in bringing action.

By an agreement dated Feb. 11, 1848, E. agreed to lease a coalmine to W. for such term and at such rent as two named referees, or, in case they should be unable to agree, an umpire appointed by them, should within three weeks determine. The time for the making of the award by the referees was extended to April 14, 1848. The referees' award was made on April 13, 1848, and it was signed, not only by the referees, but also by an umpire appointed by them. In August, 1848, W. rejected the award on the grounds that (a) one of the referees had not inspected the mine himself, but had relied on the report of another; (b) the referees examined none of the witnesses who were available; (c) they did not form their own judgment, but relied on the opinion of the umpire; and (d) they did not both sign the award at the same time. W. (who had been let into possession before the signing of the agreement) ceased to work the mine in December, 1848, because it was unprofitable. Three and a half years later, E. brought this action against him claiming specific performance of the agreement of 1848.

Held: notwithstanding the signature of the award by the umpire, the award should be treated as that of the referees alone, and it was not incumbent on them either to inspect the mine themselves or to examine witnesses; it was, however, a valid objection that (as the evidence disclosed) one of the referees accepted the view of the umpire without forming an opinion of his own, and it was necessary for both referees to sign the award at the same time; but a decree of specific performance would not be granted owing to the delay in bringing the action.

Notes. Applied: *Barclay v. Messenger* (1874), 43 L.J.Ch. 449. Considered: *Bottomley v. Ambler* (1877), 38 L.T. 545. Followed: *Levy v. Stogden*, [1898] 1 Ch. 478; *Mediterranean and Eastern Export Co. v. Fortress Fabrics (Manchester) Ltd.*, [1948] 2 All E.R. 186. Referred to: *Whitmore v. Smith* (1860), 5 H. & N. 224.

As to powers of arbitrator, see 2 HALSBURY'S LAWS (3rd Edn.) 31 et seq.; and for cases see 2 DIGEST (Repl.) 555 et seq.

Cases referred to:

- (1) *Watson v. Reid* (1830), 1 Russ. & M. 236, Taml. 381; 39 E.R. 91; 44 Digest (Repl.) 113, 932.
- (2) *Southcomb v. Bishop of Exeter* (1847), 6 Hare, 213; 16 L.J.Ch. 378; 9 L.T.O.S. 293; 11 Jur. 725; 67 E.R. 1145; 44 Digest (Repl.) 113, 935.

Also referred to in argument:

Gregory v. Mighell (1811), 18 Ves. 328; 34 E.R. 341; 30 Digest (Repl.) 406, 496. *Clarke v. Moore* (1844), 1 Jo. & Lat. 723; 30 Digest (Repl.) 432, *240.

Marquis of Townshend v. Stangroom, *Stangroom v. Marquis of Townshend* (1801), 6 Ves. 328; 31 E.R. 1076, L.C.; 30 Digest (Repl.) 411, 550.

Lloyd v. Collett (1793), 4 Bro.C.C. 469; 4 Ves. 689, n.; 29 E.R. 992, L.C.; 44 Digest (Repl.) 100, 808.

Stalworth (Stallworth) v. Inns (1844), 13 M. & W. 466; 2 Dow. & L. 423; 14 L.J.Ex. 81; 9 Jur. 285; 153 E.R. 194; 2 Digest (Repl.) 589, 1203.

Heaphy v. Hill (1824), 2 Sim. & St. 29; 57 E.R. 255; 30 Digest (Repl.) 431, 742. A
Coslake v. Till (1826), 1 Russ. 376; 38 E.R. 146; 44 Digest (Repl.) 97, 788.
Walker v. Jeffreys (1842), 1 Hare, 341; 11 L.J.Ch. 209; 6 Jur. 336; 66 E.R. 1064; 44 Digest (Repl.) 102, 819.
Wright v. Howard, Howard v. Wright (1823), 1 Sim. & St. 190; 1 L.J.O.S.Ch. 94; 57 E.R. 76; 44 Digest (Repl.) 112, 921.

Appeal by the defendant from a decree of STUART, V.-C., declaring specific performance of an agreement alleged to have been entered into by the defendant to take a lease of a coalmine in Worcestershire upon terms which were settled by an award. The award was made but its validity was objected to by the defendant on the ground of misrepresentation, and that the terms awarded by the arbitrators in consequence of the rejection of certain evidence were not fair and such as had been contemplated by the plaintiff and defendant when they entered into the agreement. C

Malins and Metcalfe for the plaintiff.

Wigram and Toller for the defendant.

LORD CRANWORTH, L.C.—This was a bill filed for the specific performance of an agreement dated Feb. 11, 1848, made between Williams, the defendant, and Parker (who was then his partner, but who, soon after the agreement, died) of the one part; and several persons who claim under the will of a Mr. Holmes, of the other part. The agreement is this: D

“Whereas the said John Williams and George Parker are working a mine of coal and ironstone called the Broadwell Colliery, situate in the county of Worcester, in copartnership together; and whereas the representatives of Holmes and the parties claiming under them, possess lands and mines adjacent to the said colliery, and the said Williams and Parker have driven gate roads into the vein of coal in such mines called the thick coal, and have proved the quality thereof—Now these presents witness that each of the said parties of the second part agree that Williams and Parker shall have liberty and licence to dig, win, and get the several beds, veins, and seams of thick and ten-yards coal, heathen coal, ironstone, and white ironstone lying in and under the several pieces or parcels of land and hereditaments delineated on the plan indorsed hereon and coloured blue, and formerly the property of Holmes, deceased, at such price or prices, and for such number of years not exceeding twenty-one, and upon such terms, but subject nevertheless to the several terms and stipulations of this agreement, as shall be determined upon by Richard Haines and John Southern, persons indifferently chosen for the purpose by the parties to this agreement, and who, it is agreed, shall have full liberty to decide the value of such mines and minerals as between the several parties hereto, and to direct the payment of the same to be made at such times and by such instalments as they deem right; and also the number of years for which such mines and minerals should be held by the said Williams and Parker, but subject nevertheless to the terms and stipulations of this agreement; and in case of the said Haines and Southern not agreeing upon the price or terms for the working of the said mines and minerals, and declaring the same in writing under their hands within three weeks of the day of the date of this agreement, then that the said Williams and Parker shall have liberty and licence to dig, win, and get the aforesaid several beds, veins, and seams of thick or ten-yards coal, &c., at such price or prices, and for such number of years not exceeding twenty-one years, and upon such terms, but subject nevertheless to the terms and stipulations of this agreement, as shall be determined upon by a person to be nominated and chosen by the said Haines and Southern, before they enter upon the aforesaid reference.” E F G H I

Then, in consideration of the agreement, Williams and Parker undertake to work the coal and make the payments, etc.

The time for making the award was afterwards enlarged by an instrument under the hands of the solicitors of each of the parties. It is thus—after reciting that the

A time limited by the agreement for making the award had expired, and that they were desirous of extending it, Wainwright as agent of the parties of the one part, and Robinson as agent of the parties of the other part, agreed to extend the time to April 14 for making the award by the arbitrators; and, if they did not, then the umpire was to make it within a certain other time therein mentioned.

B From the date of that agreement, and, indeed, previously to it, the mine was worked by Williams and Parker to some extent. After the execution of this agreement, the right of the defendant Williams, and Parker, was to have a lease on the terms which were to be fixed by those referees. The extended time for making the award was up to April 14; in point of fact, the award was made on April 13. It purports to be made by Haines and Southern, the two referees, and not by the umpire; though, before they proceeded to make this inquiry, they did appoint an umpire, a Mr. Peacock. The award is thus:

C "By virtue of the powers given to us by an agreement of Feb. 11, 1848, made between [&c.] and by virtue of the extended time, by a memorandum [&c.] whereby the time was extended, having, previously to entering on the consideration of the matters to us by such agreement, appointed Mr. Peacock to be umpire, finally to decide the matters in the event of our disagreement; and having examined witnesses, and duly investigated the matters referred to us by the before-mentioned agreement, do, by this writing under our respective hands, declare and award that the price to be paid by Williams and Parker for the mines [&c.] in the before-mentioned agreement, on a lease thereof for a term of fourteen years, from April 11 last, shall be £400 per acre, according to the surface measure, and without deduction for faults or otherwise, payable as follows: £400 to be paid down at the time of signing the lease, and £400 per year afterwards, payable quarterly on the usual quarter-days of payment."

D The mines were to be worked in the usual way, under and subject to certain formal directions. That award was made within the time, and therefore purports to be a proper award by the referees. On May 10, 1848, Messrs. Bourne and Wainwright, who were the solicitors for the lessors, sent a draft of the proposed lease to Messrs. Robinson and Fletcher, who were the solicitors of the proposed lessees. It was returned on May 30 to Messrs. Bourne and Wainwright, without any written approval thereof, but with a verbal statement to the effect that they had not then seen their client, meaning Mr. Williams, who had survived Mr. Parker, but that, provided the terms were correctly stated, they had no objection to the draft lease.

E There could be no objection to it, because it was merely a lease on the terms which had been approved of and settled; therefore the lease was returned with a sort of conditional approval. Messrs. Bourne and Wainwright then caused the lease to be engrossed, and sent it so engrossed to Messrs. Robinson and Fletcher; and, on May 31, Mr. Robinson, on the behalf of Williams, wrote to Messrs. Bourne and Wainwright a letter of that date, in which he says:

F "Mr. John Williams has been here to-day; he says he has never seen any copy of the award made by Mr. Haines and Mr. Southern, and is perfectly unacquainted with the periods within which the money is payable; that he has no wish to create delay, or throw any obstacle in the completion of your present arrangements; but he cannot consent to execute the lease until he is better acquainted with the facts."

I No doubt that was a very reasonable objection. He says that he agreed to take a lease on certain terms, which were to be settled by two referees. He never heard what were the terms the referees had settled, therefore, until he knows that, he can say nothing. In consequence of that, a copy of the award was procured and sent to Messrs. Robinson and Fletcher on June 10, when it must be taken that notice was given to Williams of the terms of that arbitration. Nothing, however, seems to have been done on that for some weeks afterwards; but on July 27 Messrs. Bourne and Wainwright again wrote to Messrs. Robinson and Fletcher to ask whether he

meant to abide by the award. No answer was sent to that until Aug. 8, when A
Messrs. Robinson and Fletcher wrote :

"Mr. Williams is advised that the award is invalid on several grounds, and he,
therefore, declines acceding to the terms of it. We are requested, however, to
state that he is willing to enter into an equitable arrangement with the parties,
notwithstanding his surveyor has ordered the mines to be abandoned, as the
produce will not pay the wages." B

There is no doubt that Williams was entitled, under the terms of his agreement of
Feb. 11 to have a valid award; and if, therefore, the award was invalid, and
objected to in due time, then there was nothing to bind the defendant. These are
propositions which are not controverted.

The objections to the award which were made are, first of all, that Haines, being C
one of the arbitrators in estimating the amount, relied exclusively on his grandson's
report as to the state of the mine, and did not examine it himself; secondly, that
the arbitrators examined no witnesses; thirdly, that they left it to Mr. Peacock to
say what it should be, and did not form their own judgment, but adopted his;
fourthly, that the parties did not sign the award both together and at the same time.

The award has evidently something strange connected with it, which is this—it is D
signed not only by the referees but by the umpire. I, however, treat it merely as
the award of the referees, and take the signature of the umpire for nothing, except
perhaps as indicating his concurrence; but it was not the award of the umpire, it
was the award of the referees. I do not agree that it was incumbent on the referees
to examine witnesses; I do not think that is required when a matter is referred to a
surveyor and people of skill to settle what the value of property to be bought or let E
is. They are entrusted, from their experience and from their observation, to form
a judgment which the parties referring to them agree shall be satisfactory; there-
fore, I do not think that there was anything of importance in their not examining
witnesses, provided bona fide they meant to say, "We know sufficient of the subject
to decide properly without examining witnesses." That, I think, is not a valid
objection. F

I am not prepared to say whether it would be a valid objection merely that Mr.
Haines did not go down the mine himself, but left it to his grandson; because,
when you are forming a judgment as to the value of anything, you necessarily
proceed in a great measure on the report of others. If a person is to value an
estate, nobody intends that he shall examine every rood of land. He takes a cur- G
sory view, examines it here and there, he knowing the land and the neighbourhood,
he asks some questions, and is in some respects guided by them. Therefore I do
not think that it was incumbent on Mr. Haines to go down himself; and I do not
think that it is fatal that he relied on the report of his grandson.

Neither should I have brought it an objection that they consulted Mr. Peacock as
to his opinion. One must trust to the reports of others as to different matters con-
nected with the property. If, therefore, the result of this had been, that they, H
having a doubt as to what they ought to say was the value, among other means of
enabling them to form a correct judgment, took the opinion of Mr. Peacock, evi-
dently a person of skill and competent experience in these matters, I should not
have thought that any objection. But the evidence as to the mode in which these
persons arrived at a conclusion as to the value is to be found in the depositions.
Mr. Haines says that he inspected the mines, and found Williams and Parker I
working them. In March, 1848, he inspected the mine in company with Mr.
Southern and Mr. Peacock, and found the workings going on. He examined it, and
thought £400 an acre was a proper price. The result of the evidence is that Mr.
Haines, the referee, was guided either entirely or mainly by the report of his grand-
son, coupled with his own fifty years' knowledge of the neighbourhood, which of
itself, I think, was quite a legitimate ground to entitle him to sign an award. But
what the other referee says is not that he consulted Mr. Peacock but was satisfied
with his decision on it as being worth £400 an acre. Mr. Peacock had valued it at

A £400 and though Mr. Haines did not think it worth £200, he concurred with the other because he thought it no use differing.

That is not an award to which the persons who had agreed to make the reference were bound. They were entitled to have the unbiased judgment of the two; or, if the two could not concur, then the unbiased judgment of the third, acting, not in a loose way, but giving an opinion deciding judiciously on that which it had become
B his duty to decide; I think that was an objection to the award. I am inclined to think contrary to my first impression when the matter was stated, that it was also an objection that they did not sign together. On that I give no opinion, for reasons which will appear, inasmuch as it is not necessary to decide it. One objection to the validity of an award, if taken in a proper way, and the parties are not now precluded, is as good as a hundred. I think that there is a great deal of good sense in
C saying, when a matter is referred to two persons to decide a thing by a statement in writing, that that writing must be made by the two together a contemporaneous act; because if one person signs at York on one day, and another signs at Exeter another day, how are we to know that something may not have occurred in the meantime to induce one party to change his mind if he could. It is the duty of two persons to keep the matter open to the last moment, and it is not competent for
D the one to sign at one time and the other to sign at another. That is not a question necessary to decide here, but I wish to guard myself against the notion that I do not accede to that as being a correct statement of the law. On Aug. 8 Mr. Williams objected to this award. Take it on the objection, which I consider a valid one, that it was not the genuine opinion of the two, is that objection taken in due time? He had a knowledge of the award on June 10, it was sent to his solicitor, on that day, or at least a day or two afterwards, it must be taken he knew of it. I think that
E there was considerable, though not quite warrantable, delay; it was no doubt a matter which he ought to have had some little time to inquire into, as to whether this award had been duly made; he said he did not think it was worth half the money, he does inquire, and he does not make an objection until August. Mr. Williams coupled the objection with saying that, though he objected to the award
F himself, he was willing still to negotiate on equitable terms, by which he meant terms other than those which had been stated in this reference. The suggestion on the part of the plaintiff is this, that, supposing the award to be bad, the objection was not made in good time.

I feel myself released from deciding the very difficult question how much delay will be conclusive to shut a person out from making a complaint because I come to
G the conclusion, irresistible to my mind, whether it was made in proper time or not, that the plaintiff concurred in treating it as being open to a new negotiation; that is the important question. Going on, therefore, by steps, there was an award, which, in my view of the law was erroneously made, it was objected to as doubtful, and it is irrelevant whether it was objected to in good time or not, because the parties interested in objecting to it concurred in treating it as having been objected
H to in good time, for they opened fresh negotiations. I have arrived at this conclusion mainly from the evidence of the plaintiff. [His LORDSHIP considered the evidence, and continued:] It appears to me to establish conclusively that, the objection being made to the award on Aug. 8, the plaintiff, by his solicitor and by his agent, assented to that objection so far as to agree that the mine should be examined again with the view of fixing a value; the persons who went down on the
I part of the plaintiff adhered to the opinion which Mr. Thomas Haines had originally formed, that it was worth £400 an acre. Mr. Bettle, on the part of the defendant, comes to a totally opposite conclusion. This carried the matter on into November. The statement of the plaintiff is that the defendant continued working the mine until the following month of December; the defendant says that that is true, but not the whole truth. He says he continued it, in truth, in the hopes that he might find that it could be worked profitably: he continued working until February, and then he abandoned it; the plaintiff supposed that it had been abandoned in December. The defendant alleged that he was not bound by the award, and that he would not

take it up, not being worth anything or worth little or nothing. That establishes conclusively that the defendant had given up the working of this mine, either in December, 1848, or in February, 1849. Three years and a half elapsed and nothing was done. Counsel for the plaintiff says that this case is to be distinguished from other cases because, in truth, possession here had been taken, and to a certain extent the mine had been actually worked and coal gotten; therefore, he says, it is more like an action for goods sold and delivered, for the defendant had actually had the goods. I think that there is a fallacy in that. It is true that the defendant had some goods; but what this court is asked to do is to make itself instrumental in compelling him to take other goods. The fact that he has taken some goods may be most important in showing whether or not he is bound to take the remainder. That may be very important in other points of view, but the fact that he had taken some, under some circumstances (for example, under protest) may, as to the others, prove nothing—he may be liable to account for what he has taken; but that does not give the other party a right to compel him to take that which he has not.

It appears to me, on all principles and all the authorities, that lapse of time is conclusive if there had not been anything like an abandonment of possession. It may be that one is not too late to have brought an action; but specific performance is relief which this court will not give, unless the parties seeking it come promptly and as soon as the nature of the case will permit.

In *Watson v. Reid* (1), SIR JOHN LEACH refused specific performance after the party had been waiting for twelve months, and no sufficient reason given. *Southcomb v. Bishop of Exeter* (2) was a case of the same description, but the delay there was much less than the delay in this case.

It appears to me that the case may be shortly stated thus: The award was made on April 13, invalid if properly objected to. It was objected to on Aug. 8. It may be doubtful whether it was objected to soon enough, having regard to the nature of the objection; but the conduct of the parties shows that the lessors, or intended lessors, did not mean to avail themselves of any objection for delay up to that time, and that they acquiesced by again sending down their agent to meet the agent of the other parties, in order to fix the value—that no agreement ever was come to, and that, either in December, 1848, or February, 1849, the mine was abandoned. Having been so abandoned, if the plaintiff's view of this case is correct, he might, if he had come forward in good time, have insisted on specific performance, because he might have said there was no objection to the award; but he did not agree to waive the fact that the award had been adopted. He might have put forward either of those grounds. I am of opinion, if it were necessary to decide it, that he was wrong on both those points. I think that there was a valid objection to the award; and I am inclined to think that that objection was made in due time. Even if there was no valid objection to the award, there was a contest on the part of the intended lessees, who say that there is a valid objection to the award; and repudiate the contract in consequence. They quit in December or February, and three years and a half elapse. It appears to me, with all deference to the vice-chancellor, that this is not a case in which the court can give a decree for specific performance.

Bill dismissed so far as it sought specific performance.

A

COOPER v. LLOYD

[COURT OF COMMON PLEAS (Willes and Byles, JJ.), May 12, 1859]

[Reported 6 C.B.N.S. 519; 33 L.T.O.S. 149; 6 Jur.N.S. 125;
141 E.R. 559]

B

Husband and Wife—"Necessaries"—*Right of wife to pledge husband's credit—Spouses living apart—Adultery by wife—Casual visits by husband to wife.*

Where a wife who is living apart from her husband commits adultery, her authority to pledge his credit for necessities is gone. If the jury find that there has been no condonation, it is not the duty of the judge to leave it to the jury to say whether any authority is to be inferred from some casual visits by the husband to the wife.

C

Notes. Considered: *Durnford v. Baker*, [1924] All E.R.Rep. 309. Referred to: *Wickins v. Wickins* (No. 2), [1918-19] All E.R.Rep. 1125; *Welton v. Welton*, [1927] All E.R.Rep. 431; *Marczuk v. Marczuk*, [1956] 1 All E.R. 657.

D

As to the effect of adultery by a wife upon her right to bind her husband for necessities, see 19 HALSBURY'S LAWS (3rd Edn.) 866-867; and for cases see 27 DIGEST (Repl.) 193-194.

Cases referred to:

(1) *Govier v. Hancock* (1796), 6 Term Rep. 603; 2 C. & P. 25, n.; 101 E.R. 726; 27 Digest (Repl.) 82, 624.

E

(2) *Atkins v. Pearce* (1857), 2 C.B.N.S. 763; 26 L.J.C.P. 252; 29 L.T.O.S. 212; 3 Jur.N.S. 1180; 140 E.R. 616; 27 Digest (Repl.) 193, 1522.

Also referred to in argument:

Norton v. Fazan (1798), 1 Bos. & P. 226; 126 E.R. 873; 27 Digest (Repl.) 193, 1525.

F

Reneaux v. Teakle (1853), 8 Exch. 680; 155 E.R. 1525; sub nom. *Renaux v. Teakle*, 22 L.J.Ex. 241; 17 Jur. 351; 1 W.R. 312; 1 C.L.R. 61; 27 Digest (Repl.) 184, 1388.

Application for leave to move for a rule to set aside an order of WILLIAMS, J., on the verdict of a jury in an action brought by the plaintiff against the defendant for the price of certain necessities supplied to the defendant's wife.

G

The learned judge left two questions to the jury: (i) Whether there had been adultery? and (ii) Whether that had been condoned, and whether, if there had been a condonation, there had been subsequent adultery?

Patchett for the plaintiff.

H

WILLES, J.—As to the misdirection, that is said to have been in this way. The wife was living apart from her husband, and the judge appears to have told the jury that if the wife, while living apart from her husband, committed adultery which was not condoned, he was not liable for necessities supplied to her. The substance of his direction was what I have stated, and I think that was good law. Counsel for the wife says that was not sufficient. He contends there was evidence of authority which ought to have been left to the jury. He points to visits by the husband to the wife at other places than that at which the goods were supplied. But the jury have found that there was no condonation. They must, therefore, have found that these were casual visits, not showing condonation; and it would be an abuse, when the law lays it down broadly that adultery relieves the husband from liability, if the court left it open to the jury on small matters to infer authority: *Govier v. Hancock* (1); *Atkins v. Pearce* (2).

I

Then it is said there was no evidence of the adultery, which ought to have been left to the jury. In many cases it may be true that the evidence of the wife might be collusive. But although the objection might prevail in the ecclesiastical courts.

such an exception has never been introduced into these courts. The objection would go rather to the weight of the evidence than its admissibility. But at any rate the privilege, if any, is the privilege of the witness, and not of the counsel, and as he could not object at the trial, he cannot do so now.

BYLES, J.—I am of the same opinion. I am of opinion that the authority of the wife living apart from her husband ceases upon adultery.

As to the remaining question, i.e., whether the verdict was against the evidence, their Lordships said they would consult **WILLIAMS, J.**

Rule refused.

FERET v. HILL

[COURT OF COMMON PLEAS (Jervis, C.J., Maule, Cresswell and Crowder, JJ.), May 5, 27, 29, 1854]

[Reported 15 C.B. 207; 23 L.J.C.P. 185; 23 L.T.O.S. 158;
18 Jur. 1014; 2 W.R. 493; 2 C.L.R. 1366; 139 E.R. 400]

Landlord and Tenant—Lease—Illegality—Lease obtained by fraud—Term vested in tenant and tenant let into possession—Estate not to be divested by collateral fraud.

By fraudulently misrepresenting that he was a perfumer the plaintiff induced the defendant to let him certain premises and he went into possession under the terms of an agreement. At the time the plaintiff went into possession he intended to use the premises for immoral purposes. A few days after he went into possession the defendant forcibly ejected him because of his use of the premises for immoral purposes, and he brought an action for ejectment to recover possession.

Held: the agreement having been made, the term vested in the plaintiff, and the plaintiff having been let into possession the estate had so passed as to prevent it being divested by the collateral fraud of the plaintiff.

Per **MAULE, J.**: It would be extremely inconvenient if a title could be impeached in a court of law by showing that a conveying party had been induced to execute it by misrepresentation.

Notes. Considered: *Canham v. Barry* (1855), 15 C.B. 597; *R. v. Saddlers' Co.* (1863), 10 H.L.Cas. 404. Distinguished: *Taylor v. Chester*, [1861-73] All E.R.Rep. 154. Explained: *Gordon v. Metropolitan Police Chief Comr.*, [1908-10] All E.R.Rep. 192. Considered: *Alexander v. Rayson*, [1935] All E.R.Rep. 185. Referred to: *Anderson v. Radcliffe and Walker* (1858), 5 Jur.N.S. 704; *Fisher v. Tully* (1878), 3 App. Cas. 627; *Re Wait*, [1927] 1 Ch. 606.

As to ignorance of illegality in general, see 8 HALSBURY'S LAWS (3rd Edn.) 128; and for cases see 12 DIGEST (Repl.) 324-325.

Cases referred to:

- (1) *Ritchie v. Smith* (1848), 6 C.B. 462; 3 New Mag. Cas. 56; 18 L.J.C.P. 9; 12 L.T.O.S. 148; 12 J.P. 822; 13 Jur. 63; 136 E.R. 1329; 12 Digest (Repl.) 309, 2382.
- (2) *Gas Light and Coke Co. v. Turner* (1840), 6 Bing.N.C. 324; 8 Scott, 609; 9 L.J.Ex. 336; 133 E.R. 127, Ex. Ch.; 12 Digest (Repl.) 309, 2381.

Also referred to in argument:

Cornfoot v. Fowke (1840), 6 M. & W. 358; 9 L.J.Ex. 297; 4 Jur. 919; 151 E.R. 450; 31 Digest (Repl.) 192, 3229.

- A** *Holman v. Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Repl.) 313, 2404.
- Fivaz v. Nicholls* (1846), 2 C.B. 501; 15 L.J.C.P. 125; 6 L.T.O.S. 319; 135 E.R. 1042; sub nom. *Finan v. Nicholls*, 10 Jur. 50; 12 Digest (Repl.) 288, 2219.
- Stephens v. Robinson* (1832), 2 Cr. & J. 209; 2 Tyr. 280; 1 L.J.Ex. 85; 149 E.R. 90; 37 Digest (Repl.) 417, 10.
- B** *Colburn v. Patmore* (1834), 1 Cr.M. & R. 73; 4 Tyr. 677; 3 L.J.K.B.Ex. 317; 149 E.R. 999; 1 Digest (Repl.) 48, 362.
- Evans v. Edmonds* (1853), 13 C.B. 777; 1 C.L.R. 653; 22 L.J.C.P. 211; 21 L.T.O.S. 155; 17 Jur. 883; 1 W.R. 412; 138 E.R. 1407; 35 Digest (Repl.) 33, 239.
- Bowry v. Bennett* (1808), 1 Camp. 348, N.P.; 12 Digest (Repl.) 308, 2370.
- C** *Hart v. Windsor* (1844), 12 M. & W. 68; 13 L.J.Ex. 129; 2 L.T.O.S. 440; 8 J.P. 233; 8 Jur. 150; 152 E.R. 1114; 31 Digest (Repl.) 133, 2716.
- Edwards v. Brown* (1831), 1 Cr. & J. 307; 1 Tyr. 182; 9 L.J.O.S.Ex. 84; 148 E.R. 1436; 35 Digest (Repl.) 12, 58.
- Emanuel v. Dane* (1812), 3 Camp. 299; 170 E.R. 1389, N.P.; 39 Digest (Repl.) 581, 1039.

D **Rule Nisi** obtained by the plaintiff to enter a verdict or for the new trial of an action of ejectment tried by CROWDER, J., and a jury, and brought by the plaintiff against the defendant to recover possession of premises in Jermyn Street, London.

The plaintiff, on applying for a lease of the premises, said that he wanted them as a perfumer, and, on being asked if he could give a respectable reference, wrote down the name of a Mr. Pilon, a perfumer in Golden Square. Pilon, on being applied to, said that he had dealt with the plaintiff for four years, that he was a perfumer, and a highly respectable man. The defendant, being satisfied, signed an agreement, and the plaintiff was let into possession, but, after a few days, was forcibly expelled by the defendant. For the defendant evidence was offered to show that the plaintiff was a very disreputable person, and that he did not intend to carry on the trade of a perfumer, but that he had occupied the premises with two women, with one of whom he lived, and who was a common prostitute; and that the defendant had expelled the plaintiff in consequence of the complaints of the neighbours.

E The learned judge thought that this was no defence, but allowed it to go to the jury in order that the point might be raised, and, at the request of the defendant's counsel, put the two following questions to the jury: (i) Whether the plaintiff, at the time that he took the premises, intended to use them for an immoral and illegal purpose; (ii) whether he obtained possession of the premises by fraud and misrepresentation.

G The jury found in the defendant's favour on both points and also that the fraud was that he represented that he wanted the premises for the purposes of a perfumer. The learned judge entered judgment for the defendant with leave to the plaintiff to move to enter the judgment for him. Subsequently the plaintiff obtained a rule to show cause why the verdict should not be entered for the plaintiff.

H *M. Chambers, Q.C.*, and *Raymond*, for the defendant, showed cause against the rule.

Massey Dawson and *Giffard*, for the plaintiff, supported the rule.

I **JERVIS, C.J.**—I must confess I have entertained considerable doubt during the course of the discussion, but the argument of counsel for the plaintiff has satisfied me that this rule ought to be made absolute.

It is unnecessary to pronounce any opinion upon some of the points which have been suggested. In the first place, it was urged that certain evidence as to a criminal charge made against the plaintiff before a magistrate and as to his having been fined for being found in a common gaming house, which was offered for the purpose of depreciating the plaintiff's character, was improperly admitted. Further,

it was said that there was no evidence of fraud. I incline to think the evidence alluded to was inadmissible, and I think there was abundant evidence of fraud. But it is unnecessary to give any distinct decision upon either of those points, because I am of opinion that, assuming the evidence in question to have been properly received and assuming that the plaintiff was guilty of a fraudulent misrepresentation when he said that his object in taking the premises was that he might carry on therein the perfumery business, when he really intended to devote them to the infamous purpose to which the jury found he intended to devote them and did devote them, the plaintiff still is entitled to recover in this action.

Counsel for the defendant contended that an agreement to let apartments to be used by the tenant for immoral purposes is an illegal and void agreement; that the defendant was justified in forcibly evicting the plaintiff the moment he discovered the improper use he was making of the apartments; and that, if we hold the plaintiff entitled to recover, and so reinstate him in the possession, we shall be lending our aid to the enforcing an agreement which is tainted with fraud and illegality. I thought at first that that argument presented the true view of the case, but the argument of counsel for the plaintiff has convinced me that the real question is whether, the agreement having been made, the term vested in the plaintiff, and the plaintiff having been let into possession, the estate has not so passed as to prevent its being divested by a collateral fraud. There can be no doubt whatever that the defendant intended to do, and in fact did do, everything that was requisite to constitute a valid lease. He executed the instrument—an instrument sufficient for the purpose of conveying the term—well knowing its effect—and he delivered possession of the premises to the plaintiff, with the intention of passing the term to him, if any were created by the instrument. What is there to avoid that, or to divest the plaintiff of the interest which has passed to him? The defendant seeks to dispossess the plaintiff, not by reason of any misrepresentation as to the legal effect of the contract he was entering into, but because the plaintiff, at the time of the negotiation for the lease, represented (falsely, it may be) that he was about to use the premises for a particular purpose. That was, as counsel for the plaintiff justly observes, a representation as to something altogether collateral to the contract. I do not think that the immoral intention in the mind of the plaintiff at the time, or the immoral use made by him of the premises after he got possession, can have any affect at all upon the validity of the contract.

In the cases relied on for the defendant, the aid of the court was invoked to enforce a contract which was either contrary to public policy or contrary to some statute. Thus, in *Ritchie v. Smith* (1), the plaintiff was seeking to enforce the payment of rent under an agreement which was an express violation of a positive law. So, in *Gas Light and Coke Co. v. Turner* (2), there was not, as here, a mere intention on one side to do an illegal act, but the lease which the plaintiffs were seeking to enforce was executed by both parties for the express purpose of carrying into effect something which was prohibited by law. Here the lease upon the face of it is a perfectly valid one. A bare intention such as is shown here is not enough to avoid it. The defendant intended to demise the premises to the plaintiff, and he did all he could to carry that intention into effect. The plaintiff entered under that demise, and became possessed of the term. I, therefore, think his title to maintain this ejectment cannot be impeached in a court of law.

MAULE, J.—I am of the same opinion. The plaintiff is not calling upon the court to enforce any agreement at all. The agreement was an agreement on the part of the defendant to demise certain premises to the plaintiff for a given term. When the instrument was executed, and possession was given under it, it received its full effect: no aid of a court of justice was required to enforce it. This action of ejectment is brought, not for the purpose of enforcing the agreement, but the plaintiff asks the court to afford him a remedy against one who has extruded him from a lawful possession. There is, therefore, a manifest distinction between this case and those where the court was called upon to assist the plaintiff in enforcing

A an agreement the object of which was to do an illegal act, as in *Ritchie v. Smith* (1). In that case both plaintiff and defendant were parties to an agreement, the very object and intention of which was, to enable one of them to commit an infraction of the law. If the court there had refused to listen to the defence, they would have been helping the plaintiff to enforce something which lay in contract, viz., the payment of rent, when both parties to the agreement were intending to apply the premises to an illegal purpose: the plaintiff was seeking to enforce the performance of an illegal agreement. Such also was *Gas Light and Coke Co. v. Turner* (2).

B Here, it is said, not that the defendant did not intend to create the term and to vest the interest therein in the plaintiff, but that the execution of the instrument by which that interest in the premises was conveyed to the plaintiff, was procured by means of a fraudulent representation as to the plaintiff's intention. But, however fraudulent and immoral the plaintiff's conduct may have been, I am aware of no authority which supports the position that the plaintiff's title can be impeached in a court of law by showing that the deed under which he claims has been obtained by such fraud. I think it would lead to most inconvenient and mischievous consequences, if we were to hold that a title once vested might afterwards be impeached, on the ground that one of the contracting parties had been induced by a fraudulent representation of the other as to the uses to which he meant to apply the premises, to execute the conveyance. The defendant's proper remedy, if any, is in a court of equity. With respect, therefore, to the misrepresentation, I conceive that the defendant, if he has been imposed upon, might have a remedy against the plaintiff: but I think it cannot be said that the term did not pass. As to the plaintiff's intention at the time of the contract—I think neither that nor the use he made of the premises subsequently will avoid the lease. The plaintiff was to have some locus penitentiæ; it is not to be presumed that he will continue to do that which is unlawful.

CRESSWELL, J.—I concur with my Lord and MAULE, J., in thinking that this rule ought to be made absolute. The subsequent user of the premises for the illegal and immoral purpose suggested, will not avoid the lease: still less will the intention so to use them. The only question is whether the fraudulent representation made for the purpose of inducing the defendant to grant the lease, will prevent its having effect. I think the argument of counsel for the plaintiff, and the cases he has cited, clearly show that the plaintiff's misrepresentation of the purpose for which he wanted the premises, has not the effect of preventing the term from vesting in him.

C H CROWDER, J.—I am of the same opinion. At the trial, it appeared to me that the cause was absolutely undefended. The lease was executed by the defendant with full knowledge of what he was about. The only ground upon which it was sought to be impeached, was, that the plaintiff had misrepresented the purpose for which he wanted the premises, and his intention to put them to an immoral use. I was pressed by counsel for the defendant to leave to the jury the two questions I did leave, viz., whether the defendant was induced by the plaintiff's false representations to grant him the lease, and whether at the time he hired the premises he intended to use them for immoral purposes. I thought at the time, and I still think, that there was no defence. It seems to me to be perfectly clear, that, notwithstanding the falsehood of the plaintiff's representations and the iniquity of his intentions, the term passed by the lease, an interest was created in the plaintiff, from which he was illegally expelled. The plaintiff's fraudulent representations and intentions led to an inquiry that was wholly collateral. The case is in no degree varied by the fact that the plaintiff is seeking by this action to regain the possession of which he has been deprived. He is not calling upon the court to aid him in enforcing or carrying into effect an illegal agreement: all he seeks, is, to recover the possession of premises to which he is lawfully entitled. His misrepresentation will not prevent the demise from taking effect. Suppose the defendant had, instead of turning the plaintiff out,

brought an ejectment, would not the agreement have afforded a good answer? No case has been cited to show that it would be any answer, that the lease was obtained by a false representation. All those referred to were very different from this case: they were all cases where the aid of the court was invoked for the purpose of carrying into effect an illegal agreement into which the parties had entered. No intention existing in the plaintiff's mind could make the contract void. He might have repented. For these reasons, I am of opinion that the rule to enter a verdict for the plaintiff should be made absolute.

Rule absolute.

R. v. THURBORN

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Pollock, C.B., Patteson, J., Rolfe, B., Cresswell, Williams and Coltman, JJ., and Parke, B.), April 30, 1849]

[Reported 1 Den. 387; 2 Car. & Kir. 831; T. & M. 67;
18 L.J.M.C. 140; 13 L.T.O.S. 548; 13 J.P. 459; 13 Jur. 499;
4 New Mag. Cas. 27; 3 New Sess. Cas. 581; 3 Cox, C.C. 453]

Criminal Law—Larceny—Larceny by finding—Appropriation of goods to finder's own use—Reasonable belief that owner cannot be found—Subsequent disposal of goods after awareness of existence of owner.

Where a man finds goods which have in fact been lost or which he reasonably believes to have been lost and he appropriates them to his own use, in the absence of anything to rebut the presumption that he believed the owner could not be found he is not guilty of larceny, even though he disposes of the goods after he is aware of the existence of the true owner, for the original taking is lawful and the subsequent conversion is not a trespass. But where the evidence shows that at the time of appropriating the goods he believed that the true owner could be found, the original taking was felonious.

Notes. Larceny by finding is dealt with by s. 1 (2) (d) of the Larceny Act, 1916 (5 HALSBURY'S STATUTES (2nd Edn.), 1012).

Applied: *R. v. Preston* (1851), 5 Cox, C.C. 390. Distinguished: *R. v. Riley* (1853), ante p. 675; *R. v. West* (1854), 6 Cox, C.C. 415; *R. v. Dixon and Lee* (1855), Dears. C.C. 580. Approved: *R. v. Christopher* (1855), 28 L.J.M.C. 35. Considered: *R. v. Moore* (1861), 8 Cox, C.C. 416. Followed: *R. v. Glyde* (1868), L.R. 1 C.C.R. 139. Applied: *R. v. Deaves* (1869), 11 Cox, C.C. 227; *R. v. Brown Matthews* (1873), 28 L.T. 645; *R. v. Ashwell* (1885), 16 Q.B.D. 190. Distinguished: *R. v. Mortimer* (1908), 99 L.T. 204. Referred to: *R. v. Knight* (1871), 20 W.R. 122; *R. v. Middleton* (1873), 28 L.T. 177.

As to larceny by finding, see 10 HALSBURY'S LAWS (3rd Edn.) 768; and for cases see 15 DIGEST (Repl.) 1049 et seq.

Cases referred to:

- (1) *Constable's Case* (1601), 5 Co. Rep. 106a; 77 E.R. 218; 41 Digest 818, 6777.
- (2) *Lamb's Case* (1694), 2 East, P.C. 664; 15 Digest (Repl.) 1052, 10,367.
- (3) *R. v. Wynne* (1786), 1 Leach, 413; 2 East, P.C. 664; 15 Digest (Repl.) 1052, 10,368.
- (4) *R. v. Sears* (1786), 1 Leach, 415, n.; 15 Digest (Repl.) 1052, 10,369.
- (5) *Merry v. Green* (1841), 7 M. & W. 623; 10 L.J.M.C. 154; 151 E.R. 916; 15 Digest (Repl.) 1048, 10,323.

A Case Stated for the opinion of the Court of Crown Cases Reserved by PARKE, B. The prisoner was indicted at the Summer Assizes for the County of Huntingdon, 1848, for stealing a bank-note which he found and intended to appropriate. The jury found that the prisoner did not know who the owner was when he picked up the note, but that he did know who the owner was when he changed it. PARKE, B., directed a verdict of Guilty to be entered, but discharged the prisoner on his own recognisance, in order that the opinion of the court might be taken on the case.

No counsel appeared.

Cur. adv. vult.

April 30, 1849. **PARKE, B.**, read the following judgment of the court.—The prisoner was tried before me at the last Summer Assizes for the county of Huntingdon for stealing a bank-note. It appeared that he found the note, which had been accidentally dropped on the high-road. There was no name on it indicating who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up, nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally. He then changed it, and appropriated the money to his own use. The jury found that he had reason to believe it to be the prosecutor's property before he thus changed the note. I directed a verdict of Guilty, intimating that I should reserve the Case for further consideration. Upon conferring with MAULE, J., it seemed to us that the original taking was not felonious, and that in the subsequent disposal of it there was no taking; and, therefore, I declined to pass sentence, and ordered the prisoner to be discharged, on entering into his own recognisance to appear when called upon. I requested the opinion of the judges, and the Case has now undergone much consideration. It was not argued by counsel, but the judges who attended the sitting of this court after the last term—namely, POLLOCK, C.B., PATTESON, J., ROLFE, B., CRESSWELL, COLTMAN and WILLIAMS, JJ., and myself, have given it much consideration on account of its importance and the frequency of the occurrence of cases, in some degree similar, in the administration of the criminal law, and the somewhat obscure state of the authorities upon it.

In order to constitute the crime of larceny, there must be a taking of the chattels of another *animo furandi*, and against the will of the owner. This is not the full definition of larceny, but so much only of it as is necessary to be referred to for the present purpose. By the term *animo furandi* is to be understood the intention to take, not a partial or temporary, but the entire dominion over the chattels, without colour of right. As the rule of law, founded on justice, is, that *actus non facit reum nisi mens sit rea*, the guilt of the accused must depend upon the circumstances as they appear to him, and the crime of larceny cannot be committed unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of the owner. In the earliest times it was held that chattels which were apparently without an owner, "*nullius in bonis*," could not be the subject of larceny. STAUNFORD, one of the oldest authorities on criminal law, who was a judge in the reign of Philip and Mary, says (PLEAS OF THE CROWN, bk. 1, c. 16):

"Treasure trove, wreck of the sea, waife, or stray, taken and carried away, is not felony; 'Quia dominus rerum non apparet, ideo cujus sunt incertum est.'"

For this he quotes FITZHERBERT'S ABRIDGMENT, Coron. at pp. 187, 265. These passages are taken from 22 Ass. 99; 22 Edw. 3; 23 Edw. 3; and mention only "treasure trove," "wreck," and "waife"; and FITZHERBERT says the punishment for taking such is not the loss of life or limb. The passage in 3 Co. INST. 108,

goes beyond this. LORD COKE mentions three circumstances as material in larceny: First, the taking must be felonious, which he explains; secondly, it must be an actual taking, which he also explains; and, thirdly, it must not be by trover. He then proceeds as follows:

"If one lose his goods and another find them, though he convert them '*animo furandi*' to his own use, yet it is no larceny, for the first taking is lawful. So, if one find treasure trove, or waife, or stray [here '*wreck*' is omitted and '*stray*' introduced], and convert them, ut supra, it is no larceny, both in respect of the finding, and also for that '*dominus rerum non apparet*.'"

The only authority given is that before mentioned (22 Ass. 99: FITZHERBERT'S ABRIDGMENT, Coron. 265; 22 Edw. 3).

Treasure trove and waife seem to be subject to a different consideration from goods lost. Treasure trove is properly money supposed to have been hid by some owner since deceased, the secret of the deposit having perished, and therefore belongs to the Crown. As to a waife, the original owner loses his right to the property by neglecting to pursue the thief. The very circumstances under which these are assumed to have been taken and converted show that they could not be taken from any one, there being no owner. Wreck and stray are not exactly on the same footing as treasure trove and waife. Wreck is not properly so called if the real owner is known, and it is not forfeited until a year and a day. The word "*estrays*" is used in the books in different senses, as may be seen in COMYNS' DIGEST. "*WAIFE*," F., where it is used in the sense of cattle forfeited after being in a manor one year and one day without challenge, after being proclaimed, when the property vests in the Crown, or its grantee of estrays; and also of cattle straying in the manor before they are forfeited. 2 BLACKSTONE'S COMMENTARIES, p. 561 (Stephen's edition), defines estrays to be

"such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them, in which case the law gives them to the sovereign."

In the passage in STAUNFORD, no doubt the word is used not exclusively in the former sense, but generally as to stray cattle not seized by the lord. Treasure trove and waife, properly so called, are clearly "*bona vacantia, nullius in bonis*," and but for the prerogative would belong to the first finder absolutely.

"*Hæc quæ nullius in bonis sunt et olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium*": BRACTON.

Wreck and stray, in the sense we ascribe to those words, are not in the same situation, for the right of the owner is not forfeited until the end of a year and a day; but LORD COKE, in *Constable's Case* (1) (5 Co. Rep. at p. 108a), treats wreck also as nullius in bonis, and estrays "*animalia vagantia*," he terms "*vacantia*," "because none claims the property." Wreck and stray, however, before seizure, closely resemble goods lost, of which the owner has not actual possession, and afford an analogy to which LORD COKE refers in the passage above cited. Whether LORD COKE means, what the language at first sight imports, that under no circumstances would the taker of goods, really lost and found, be guilty of larceny, is not clear, but the passage is a complete and satisfactory authority that a person who finds goods which are lost may convert them *animo furandi*, under some circumstances, so as not to be guilty of larceny. The two reasons assigned by him are, that the person taking has a right in respect of the finding; and also that they are apparently without an owner. *Dominus rerum non apparet*—an owner or the owner does not appear. The first of these reasons has led to the opinion that the real meaning of LORD COKE was, not that every finder of lost goods, who takes *animo furandi*, is not guilty of felony, but that if one finds and innocently takes possession, meaning to keep for the real owner, and afterwards changes his mind and converts to his own use, he is not a felon, on the principle that LORD COKE had previously laid down, that

- A "the intent to steal must be when the thing stolen cometh to his possession, for if he hath the possession of it once lawfully, though he hath *animus furandi* afterwards, and carrieth it away, it is no larceny";
- and LORD COKE also cites GLANVILLE (bk. 10, c. 13): "*Furtum non est ubi initium habet detentionis per dominum rei.*"
- B It is said, therefore, that the case of finding is an instance of this beginning with lawful title, which, consequently, cannot become a felony by subsequent conversion; but that if it be originally taken not from the true owner, but with intent to appropriate it to his own use, it is a felony, and of this opinion the Commissioners for the Amendment of the Criminal Law appear to have been, as stated in their first report. This opinion appears not to be well founded,
- C for LORD COKE puts the case of lost goods on the same footing as waife and treasure trove, which are really *bona vacantia*, goods without an owner, and with respect to which we apprehend that a person would not be guilty of larceny, though he took originally *animus furandi*—that is, with the intent not to take a partial or temporary possession, but to usurp the entire dominion over them; and the previous observations have reference to cases in which the original possession of the chattel stolen is with the consent of, or by contract with, the owner. But any doubt on this question is removed by what is said by LORD
- D HALE (1 HALE, PLEAS OF THE CROWN, at p. 506):
- "If A. finds the purse of B. in the highway, and take and carry it away, and hath all the circumstances that may prove it to be done *animus furandi*, as denying or secreting it, yet it is not felony. The like in case of taking a
- E wreck or treasure trove [citing 22 Ass. 99], or a waife or stray."
- LORD HALE clearly considers, that if lost goods are taken originally *animus furandi* in the sense above mentioned, the taker is not a felon; and, when it is considered that by the common law larceny to the value of above 12d. was punishable by death; and that the quality of the act in taking *animus furandi* goods from the possession of the owner differs greatly from that of taking them
- F when no longer in his possession, and quasi derelict, as respects its injurious effects on the interests of society—the true ground for the punishment of crime—it is not surprising that such a rule should be established, and it is founded on strict justice, for the cases of abstraction of lost property are of rare occurrence when compared with the frequent violation of property in the possession of an owner; there was no need of so severe a sanative, and the civil remedy
- G might be deemed amply sufficient. HAWKINS (PLEAS OF THE CROWN, bk. 1, c. 33, s. 3) says:
- "Our law, which punishes all theft with death, if the thing stolen be above the value of 12d. and with corporal punishment if under, rather chooses to deal with such cases as civil than criminal offences, perhaps for this reason,
- H in the case of goods lost, because the party is not so much aggrieved where nothing is taken but what he had lost before."
- It cannot, indeed, be doubted, that if at this day the punishment of death was assigned to larceny, and usually carried into effect, the appropriating of lost goods would never have been held to constitute that offence, and it is certain that the alteration of punishment cannot alter the definition of the offence.
- I To prevent, however, the taking of goods from being larceny, it is essential that they should be presumably lost—that is, that they should be taken in such a place, and under such circumstances, as that the owner would be reasonably presumed by the taker to have abandoned them, or, at least, not to know where to find them. Therefore, if a horse is found feeding upon an open common, or on the side of a public road, or a watch found apparently hidden in a haystack, the taking of these would be larceny, because the taker had no right to presume that the owner did not know where to find them, and consequently had no right to treat them as lost goods. In the present case there is

no doubt that the bank-note was lost; the owner did not know where to find it; the prisoner reasonably believed it to be lost; he had no reason to know to whom it belonged, and therefore though he took it with the intent, not of taking a partial or temporary, but the entire dominion over it, the act of taking did not in our opinion constitute the crime of larceny. Whether the subsequent appropriation to his own use, by changing it with the knowledge at that time that it belonged to the prosecutor, does amount to that crime will be afterwards considered. It appears, however, that goods which do fall within the category of lost goods, and which the taker justly believes to be lost, may be taken and converted so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, as if there is any mark upon them presumably known by him, by which the owner can be ascertained. Whether this is a qualification introduced in modern times, or which always existed, we need not determine. It may have proceeded on this rule: "Quia dominus rerum non apparet ideo cuius sunt incertum est," and the rule is held not to apply when it is certain who is the owner; but the authorities are many, and we believe this qualification has been so generally adopted in practice, that we must, therefore, consider it to be the established law.

There are many reported cases on this subject. Some, where the owner of the goods may be presumed to be known from the circumstances under which they are found; among these are mentioned the cases of articles left in hackney-coaches by passengers, which the coachman appropriates to his own use, or a pocket-book found in a coat sent to a tailor to be repaired, and abstracted and opened by him. In these cases the appropriation has been held to be larceny. Perhaps these cases might be classed among those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretence to consider them abandoned or derelict: *Lamb's Case* (2); *R. v. Wynne* (3); *R. v. Sears* (4). Some appear to have been decided on the ground of bailment determined by breaking bulk, which would constitute a trespass, as *R. v. Wynne* (3): but it seems difficult to apply that doctrine which belongs to bailment, where a special property is acquired by contract, to any case of goods merely lost and found, where a special property is acquired by finding. The appropriation of goods by the finder has also been held to be larceny where the owner could be found out by some mark on them, as in the case of lost notes, cheques, or bills with the owner's name upon them. This subject was considered in *Merry v. Green* (5), in which the Court of Exchequer acted upon the authority of these decisions; and in the argument in that case difficulties were suggested, whether the crime of larceny could be committed in the case of a marked article, a cheque, for instance, with the name of the owner on it, where a person originally took it up, intending to look at it and see who was the owner, and then, as soon as he knew whose it was, took it *animo furandi*, as, in order to constitute a larceny, the taking must be a trespass; and it was asked, when in such a case the trespass was committed? In answer to that inquiry the dictum attributed to me in the report was used, that in such a case the trespass must be taken to have been committed, not when he took it up to look at it, and see whose it was, but afterwards, when he appropriated it to his own use *animo furandi*. It is quite a mistake to suppose, as Mr. Greaves has done (1 RUSSELL ON CRIMES, c. 14), that I meant to lay down the proposition in the general terms contained in the extract from the report of *Merry v. Green* (5) (7 M. & W. at p. 629), which, taken alone, seems to be applicable to every case of finding unmarked as well as marked property; it was meant to apply to the latter only.

The result of these authorities is, that the rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriate them with intent to take the entire dominion over them, really believing when he takes them that the

A owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. In applying this rule, as indeed, in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance

B with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would probably be presumed that the taker would examine the chattel, as an honest man ought to do, at the time of taking it, and if he did not restore it to the owner, the jury might conclude that he took it when he took complete possession of it *animo furandi*. The mere taking

C of it up to look at it would not be a taking possession of the chattel.

To apply these rules to the present case. The first taking did not amount to larceny, because the note was really lost, and there was no mark on it nor other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, that he believed the owner would not be found,

D and, therefore, the original taking was not felonious. And if the prisoner had changed the note, or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note the owner became known to him, and he then appropriated it *animo furandi*; and the point to be decided is whether that was a felony. Upon this question we have felt considerable doubt. If he had taken

E the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, Does that make a difference? We think not, it was punishable, as we have already

F decided, and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case more than the others, and consequently no larceny. We, therefore, think the conviction was wrong.

Conviction quashed

R. v. LIGHT

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Sir Alexander Cockburn, C.J.; Erle and Williams, JJ., Martin and Channell, BB.), November 14, 1857]

[Reported Dears. & B. 332; 27 L.J.M.C. 1; 30 L.T.O.S. 137; 21 J.P. 758; 3 Jur.N.S. 1130; 6 W.R. 42; 7 Cox, C.C. 389]

Criminal Law—Assault—Assault on police officer in execution of duty—Arrest without warrant—Arrest soon after assault on third party and before danger of further violence has ceased.

If a constable sees an assault committed and, having no warrant, arrests the offender shortly after that assault and before all danger of further violence has ceased, the offender, if he assaults the constable during the arrest, may be convicted of assaulting a constable in the execution of his duty.

Notes. Assault, etc., of police in due execution of duty, is dealt with by s. 38 of the Offences against the Person Act, 1861 (5 HALSBURY'S STATUTES (2nd Edn.) 801).

As to resisting a peace officer in due execution of duty, see 10 HALSBURY'S LAWS (3rd Edn.) 634, 635; and for cases see 15 DIGEST (Repl.) 852 et seq.

Case referred to:

- (1) *R. v. Walker* (1854), Dears.C.C. 358; 13 L.J.M.C. 123; 23 L.T.O.S. 99; 18 J.P. 281; 18 Jur. 409; 2 W.R. 416; 6 Cox, C.C. 371, C.C.R.; 15 Digest (Repl.) 991, 9709.

Also referred to in argument:

Turbervell v. Savage (1669), 2 Keb. 545; 1 Mod. Rep. 3; 84 E.R. 341; 15 Digest (Repl.) 981, 9573.

Timothy v. Simpson (1835), 1 Cr. M. & R. 757; 3 Nev. & M.M.C. 127; 5 Tyr. 244; 4 L.J.M.C. 73; 4 L.J.Ex. 81; 149 E.R. 1285; 14 Digest (Repl.) 198, 1636.

Case Stated for the opinion of the Court of Crown Cases Reserved.

On July 1, 1857, at the Sussex Quarter Sessions held at Horsham, the prisoner, George Light, was convicted of an assault on George Cross, a constable of the West Sussex Police, the constable then being in the due execution of his duty.

The prisoner was a married man and lived with his wife and three children in a cottage at Patfield, adjoining the city of Chichester. On the night of May 11, 1857, a few minutes before 11 p.m., the constable was informed of a disturbance in Patfield, and shortly after 11 p.m. he went with the wife into the cottage. The wife stated to the constable, in the prisoner's presence, that the prisoner had knocked her down and beaten her, and Henry Cook, a near neighbour, who was present, confirmed this. The constable left the cottage leaving the prisoner and his wife and children inside. The constable remained outside. Hearing the prisoner using violent language, he opened the outside shutters and he and Henry Cook looked in. Both saw the prisoner take up a shovel and hold it in a threatening attitude over his wife's head, and heard him say at the same time: "If it was not for the bloody policeman outside, I would split your head open, for 'tis you that sent for the policeman." The prisoner was near enough to his wife to have struck her with the shovel at the time he raised it, and spoke those words. About twenty minutes later the prisoner went down the highway towards his father's house, which was about 200 yards from his own cottage. The constable followed him, and when the prisoner had walked about seventy yards from his own cottage the constable took him into custody. The constable had no warrant. The prisoner, on being taken into custody, put his hands into the constable's neckcloth and struggled with him, the constable became exhausted and fell, and the prisoner got away from him. He was afterwards taken on a warrant, tried, and convicted.

A It was objected on behalf of the prisoner that the constable was not in the "due execution of his duty" when he arrested the defendant, inasmuch as he had no warrant; that the words spoken at the time when prisoner lifted up the shovel disproved the intention to commit an assault; and further, that the constable suffered considerable time to elapse before he took the prisoner into custody, and that when he did so, prisoner was peaceably walking away in a direction from his cottage. The court overruled the objection, and the jury found the prisoner guilty. He was sentenced to imprisonment, but with a view to the propriety of the conviction being submitted to the Court of Crown Cases Reserved, he was discharged on bail in order that the judgment of that court should be taken.

Hurst for the prisoner.

C No counsel appeared for the Crown.

SIR ALEXANDER COCKBURN, C.J.—I am of opinion that the conviction is right, the policeman had witnessed an assault by the prisoner on his wife in the house, and when the prisoner came out, he was in such a frame of mind, that the policeman, not unreasonably, considered that he still entertained the intention of returning and using violence. The language used by **POLLOCK, C.B.**, in *R. v. Walker* (1) applies in this case, because there was a continued pursuit and recent ground for apprehending danger.

ERLE, J.—I am of the same opinion. In this case the offence had been recently committed, and I apprehend that a constable is not obliged to arrest upon the instant. Here he had seen an assault committed, with a threat of murder. Was it to be taken, then, that because the prisoner had come a few yards from the house, the constable was bound to conclude that the wife was safe from further violence? I think he arrested him recently after the offence which he had seen committed, and that he was doing his duty in making that arrest.

WILLIAMS, J., MARTIN and **CHANNELL, BB.**, concurred.

Conviction affirmed.

Re DOWNES. VERITY *v.* WYLDE

[VICE-CHANCELLOR'S COURT (Kindersley, V.-C.), February 11, 1859]

[Reported 4 Drew. 427; 28 L.J.Ch. 561; 32 L.T.O.S. 368;
7 W.R. 270; 62 E.R. 164]*Solicitor—Lien—Extent of lien—Fund in court—Money recovered for client in course of suit—Money received by client personally in suit to exclusion of solicitor.*

A solicitor has no lien for his costs on a fund in court, but only on what he may recover for his client in the course of the suit, and he has a right to have that lien protected if his client should himself receive any money in the suit so as to exclude his solicitor.

Notes. Referred to: *Re Wright's Trust, Wright v. Sanderson, Re Sanderson's Trust, Wright v. Sanderson*, [1901] 1 Ch. 317.

As to solicitor's lien on funds recovered, see 36 HALSBURY'S LAWS (3rd Edn.) 180 et seq.; and for cases see 43 DIGEST (Repl.) 306 et seq.

Petition presented by Mr. Downes, who had been the former solicitor of Mr. Verity, the plaintiff in this suit, praying for an order that no decree or order for disposing of a sum of £600, ordered to be brought into court in the suit, might be made, without providing for the costs which should be found due to the petitioner; or, in the alternative, that no such order might be made without notice to the petitioner.

On May 23, 1858, the plaintiff filed his bill to enforce the execution of the trusts of a creditor's deed, by which he had assigned his property to the defendant Wild and another, upon trust for the plaintiff's creditors, with a resulting trust in favour of himself. Among the provisions of the deed there was a clause by which it was expressly provided that any sum above £50 received by the trustees should be paid into a particular bank to their joint account. The bill alleged various breaches of trust, and in particular that the trustees had permitted a sum of between £500 and £600, part of the assets, to remain for a long time to the private account of one of the trustees at his own banker's. On the motion for an injunction and receiver, made in June, 1858, the above allegation having been proved, the court ordered a receiver. The petitioner was the plaintiff's solicitor from the filing of the bill till June 15, 1858, when the plaintiff changed him as his solicitor, but leaving a balance due to him for costs. On the motion for a receiver, the money in the hands of the trustees had been ordered to be brought into court and certain costs, amounting to £35 ordered to be paid by the trustees to the plaintiff, were paid by them to the plaintiff, and not to the petitioner, whose costs were still due. In support of the petition it was alleged that the plaintiff and defendant had agreed not to bring the money into court, and were arranging the terms of the compromise, under which the costs of the trustees were to be paid, and the creditors were to receive a compensation, but that no provision was intended to be made for the costs due to the petitioner.

Drewry for the petitioner.

H. C. Ward for the plaintiff.

J. H. Palmer and Langworthy for the creditors.

Sheffield for the trustees.

KINDERSLEY, V.-C.—This is a petition praying that no order for the disposition among the parties to the suit, or any of them, of a sum of money ordered to be brought into court may be made until after provision for certain costs due to the petitioner, or that no order may be made with respect to the fund without notice to the petitioner. It appears that the parties to the suit are now proposing to come to an arrangement under which the fund is to be appropriated in payment of the

A costs of the trustees, and, as far as it goes, in satisfying the creditors. I see no doubt in this case as to how the law stands. The solicitor for the plaintiff has no lien on the fund, the subject of the suit, as against the other parties, but a right that whatever he can recover for his client shall not be paid to him until his solicitor's costs are paid. That is not a lien against the particular fund in court. Here the petitioner prays that the right of all persons on the particular fund shall not be dealt with without notice to him. The right, as I have said before, is, that if anything in the suit should be payable to the plaintiff, or payable as the plaintiff's costs, that then the plaintiff's solicitor has a right to say: "Do not let it go until my costs are provided for, as I have been the person who has obtained that benefit for him." It is not consistent with any principle that the right of the solicitor should preclude any compromise between the parties. If it had that effect, the sooner such a right is abolished the better. I recognise no such right as that asked by the petition. I recognise the right of the plaintiff's solicitor to be protected, if the plaintiff shall receive any of the money in question in the suit so as to exclude him. Here I find that £35 of costs due to the petitioner have actually been paid to the plaintiff. I think, therefore, that the petitioner's application is justified to that extent; and so far he may have an order on that petition.

D I think, however, that no order should be made in this suit by way of compromise or otherwise for the payment of any sum of money to the plaintiff without notice being given to the petitioner. The trustee of the creditors deed and the two creditors who appear as respondents, must be paid their costs by the petitioner, and the plaintiff must pay his own costs.

Order accordingly.

F

LABOUCHERE AND OTHERS v. TUPPER AND OTHERS

[PRIVY COUNCIL (Dr. Lushington, Knight-Bruce and Turner, L.JJ., and Sir Edward Ryan), June 17, 1857, June 27, 1859]

G

[Reported 11 Moo.P.C.C. 198; 29 L.T.O.S. 357; 5 W.R. 797;
14 E.R. 670]

Executor—Powers—Power to carry on business of testator—Liability for debts contracted after trader's death—Indemnity by testator's personal estate—Continuance of business with surviving partner.

H

The executor of a trader carrying on the trade after his death, though doing so avowedly in the character of executor, is nevertheless personally liable for all the debts contracted in the trade after the trader's death, whether he is entitled or not entitled to be wholly or to any extent indemnified by the testator's personal estate, and whether it is sufficient or insufficient for the purpose. The propriety of his conduct as between himself and those beneficially interested in the testator's personal estate does not give creditors of the trade becoming so after the trader's death the rights of creditors of the trader, and, so far as they are concerned, it is immaterial whether the trader, if he had a partner, was bound by a covenant with him that the trader's executor should continue to trade in partnership with the surviving partner.

I

Notes. Referred to: *Strickland v. Symons* (1884), 26 Ch.D. 245.

As to the liabilities of personal representatives carrying on the testator's business, see 16 HALSBURY'S LAWS (3rd Edn.) 367-368; and for cases see 24 DIGEST (Repl.) 613-614.

Cases referred to :

- (1) *Re Ballman, Ex parte Garland* (1804), 10 Ves. 110; 1 Smith, K.B. 220; 32 E.R. 786, L.C.; 24 Digest (Repl.) 614, 6112.
- (2) *Re Hodson, Ex parte Richardson* (1818), 3 Madd. 138; 56 E.R. 461; affirmed (1819), Buck, 421, L.C.; 24 Digest (Repl.) 614, 6118.

Also referred to in argument :

Re North of England Joint Stock Banking Co., Straffon's Executor's Case (1852), 1 De G.M. & G. 576; 22 L.J.Ch. 194; 19 L.T.O.S. 78; 16 Jur. 435; 42 E.R. 676, L.C.; 9 Digest (Repl.) 387, 2495.

Re Monmouthshire and Glamorganshire Banking Co., Cape's Executor's Case (1852), 2 De G.M. & G. 562; 22 L.J.Ch. 601; 20 L.T.O.S. 253; 17 Jur. 355; 1 W.R. 85; 42 E.R. 991, L.C. & L.J.J.; 9 Digest (Repl.) 362, 2314.

Re Northern Coal Mining Co., Ex parte Blakeley's Executors' (1852), 3 Mac. & G. 726; 18 L.T.O.S. 311; 16 Jur. 299; 42 E.R. 439, L.C.; 9 Digest (Repl.) 425, 2748.

M'Neillie v. Acton (1853), 4 De G.M. & G. 744; 2 Eq. Rep. 21; 23 L.J.Ch. 11; 22 L.T.O.S. 111; 17 Jur. 1041; 43 E.R. 699, L.J.J.; 24 Digest (Repl.) 611, 6091.

Re Pennant and Craigwen Consolidated Lead Mining Co., Mayhew's Case (1854), 5 De G.M. & G. 837; 24 L.J.Ch. 353; 24 L.T.O.S. 150; 1 Jur.N.S. 566; 3 W.R. 95; 43 E.R. 1095, L.C. & L.J.J.; 10 Digest (Repl.) 1191, 8316.

Warwick v. Richardson (1845), 14 Sim. 281; 60 E.R. 366; 24 Digest (Repl.) 876, 8744.

Kershaw v. Matthews (1826), 2 Russ. 62; 38 E.R. 259, L.C.; 36 Digest (Repl.) 535, 975.

Downs v. Collins (1848), 6 Hare, 418; 12 L.T.O.S. 102; 67 E.R. 1228; 36 Digest (Repl.) 536, 976.

Re North of England Joint Stock Banking Co., Dodgson's Case (1849), 3 De G. & Sm. 85; 14 L.T.O.S. 207; 14 Jur. 386; 64 E.R. 391; 9 Digest (Repl.) 260, 1646.

Re Liverpool Marine Assurance Co., Greenshield's Case (1852), 5 De G. & Sm. 599; 21 L.J.Ch. 773; 19 L.T.O.S. 162; 16 Jur. 517; 64 E.R. 1260; 9 Digest (Repl.) 428, 2775.

Kirkman v. Booth (1848), 11 Beav. 273; 18 L.J.Ch. 25; 13 L.T.O.S. 482; 13 Jur. 525; 50 E.R. 821; 24 Digest (Repl.) 611, 6086.

Cutbush v. Cutbush (1839), 1 Beav. 184; 8 L.J.Ch. 175; 3 Jur. 142; 48 E.R. 910; 24 Digest (Repl.) 615, 6115.

Stocken v. Dawson (1845), 9 Beav. 239; 50 E.R. 335; affirmed (1848), 17 L.J.Ch. 282, L.C.; 4 Digest (Repl.) 462, 4042.

Morgan v. Morgan (1851), 14 Beav. 72; 51 E.R. 214; 43 Digest 617, 581.

Appeal from two decrees of the Court of Chancery in the Isle of Man, in an original suit and a cross-suit. The original suit was commenced by a bill filed by Emily Tupper and others against Williams, Deacon & Co., bankers in London, the appellants, and the cross-suit was filed by the respondents against the appellants. The suits related to a debt due from the Isle of Man Joint-Stock Banking Co. to the appellants. The principal questions raised and at issue by the pleadings, and in the present appeal, were (i) whether the real and personal estate of John Colton Tupper, deceased, who was at the time of his decease a shareholder in respect of 300 shares in the Isle of Man Joint-Stock Bank, was liable to the appellants for the debt due to the appellants from the bank when the bank stopped payment on Aug. 14, 1843; and, (ii) whether, if the said real and personal estates were not so liable, such estates were liable to the appellants for the debt owing to the appellants from the bank at the decease of the said J. C. Tupper.

In July, 1836, a partnership was formed in the Isle of Man, for the purpose of carrying on the business of a bank at Douglas, in the Isle of Man, under the name of "The Isle of Man Joint-Stock Banking Co." This partnership was constituted

A by a deed dated July 2, 1836. By the deed it was provided (cl. 8), that the name and place of abode of each proprietor for the time being, together with the number of shares, shall be entered in a book called "the Shareholders' Register"; and every proprietor, etc., and the personal representatives of any proprietor who shall die shall, immediately upon and after any of the said events, leave a notice at the banking-house or office of the company, stating his name, or new name and place of abode. Clause 59 provided that in case any person, to whom any shares in the capital of the company shall, by purchase, etc., representation or other mode of acquisition, become vested, and who shall not have executed or acceded to these presents, shall, after notice in writing, neglect or refuse to execute these presents, etc., the directors might declare the shares so vested in such person neglecting, and all benefit and advantage whatsoever to be incident thereto should be forfeited to the company. Clause 60 provided that whenever the shares should be forfeited or effectually transferred, the responsibility of the previous owner should cease, and he should be released from all subsequent claims. By cl. 61 it was provided that before any executor, administrator or legatee of a deceased proprietor should sell, transfer or assign any shares vested in him in such capacity, or should become a proprietor in respect of such share or shares, or receive dividends in respect of the same, he should produce to the directors satisfactory evidence of his title.

John Colton Tupper died in January, 1840. In the two following years an entry, "the representatives of J. C. Tupper," was inserted among the proprietors' names. Carre Cook Tupper received the dividends on the 300 shares as executor. In August, 1843, the company stopped payment, and a bill and action were commenced by the appellants against all the shareholders claiming a sum of £60,000 as due to the appellants' firm upon the promissory note of the manager, and by a supplemental bill they claimed a sum of £99,943 18s. 1d. Carre Cook Tupper was included among the defendants, both in his own right and as executor. A decree was pronounced in the suit in 1849 by the Court of Chancery in the Isle of Man, to the effect that Carre Cook Tupper, executor of J. C. Tupper, and the various persons therein named as shareholders, ought to pay to the appellants the sum of £96,793 4s. 6d. with interest and costs, and in this suit part of the estate of John C. Tupper was arrested. The plaintiffs in the first suit were the widow and children of J. C. Tupper, who claimed to be interested under his will in his residuary real and personal estate, and his eldest son and heir-at-law, since deceased; and the defendants were the appellants and Carre Cook Tupper, the executor of J. C. Tupper. In 1851 the appellants filed a cross-bill against the widow and children of J. C. Tupper and Carre Cook Tupper. Answers having been put in, and both suits having come on for hearing, the court decreed in the first cause that Carre Cook Tupper, executor of J. C. Tupper, had made himself personally liable as partner in the said Isle of Man Joint-Stock Banking Company in respect of the shares previously held by J. C. Tupper in the said company, and that he had no power to pledge the estate of the said J. C. Tupper beyond the amount invested in the said shares, and the court was of opinion that the debt owing by the said banking company to the appellants at the time of the death of the said J. C. Tupper was discharged, and, therefore, the arrests laid on his property and effects ought to be rescinded and laid aside. The court dismissed the cross-bill filed by the appellants and the cross-bill filed by Carre Cook Tupper. The present appeal was brought from these decrees.

I *Sir Richard Bethell, Q.C., and Simpson for the appellants.*
Roundell Palmer, Q.C., and Cotton for the respondents.

KNIGHT-BRUCE, L.J.—This appeal has been argued on each side upon the supposition that there is no difference between the law of England and that of the Isle of Man as to the principles and rules applicable to the particular questions between the parties; and it seems to their Lordships reasonable and right to believe that no such difference exists. The first point in dispute is whether the debt which at the time of the death of John Colton Tupper in January, 1840, was due

to the appellants' house of business from the joint-stock banking company called "The Isle of Man Joint-Stock Banking Co.," the company instituted and intended to be regulated by the deed of July 2, 1836, and the memorandum of Aug. 22, 1837, and the liabilities under which that joint-stock company was to the appellants' house at John Colton Tupper's death, were paid and discharged before the stoppage and failure of the joint-stock company in August, 1843; and their Lordships think it plain that this point must be decided against the appellants, namely, that the payment and discharge just mentioned must, upon the materials before the committee, be deemed to have taken place (as to principal and interest) before August, 1843. The appellants' answer seems to us decisive on the matter.

There is not any reason or ground on which, as it appears to their Lordships, it can be reasonably suggested that a sufficient amount of the receipts of the appellants' house on account of the joint-stock company between the death of J. C. Tupper and the stoppage, ought not, according to the regular and ordinary course, to be ascribed to the debt and liabilities existing at the former period. Then comes the question, whether the appellants, in respect of the debt which became newly due to their firm from the joint-stock company after the death of John Colton Tupper (I mean, of course, debt not connected with any liability in his lifetime) have a right of recourse against the assets of John Colton Tupper, the same right in effect as they would have had for the debt due at his death had it not been discharged. The appellants assert the affirmative of this proposition upon the ground that Carre Cook Tupper, the only acting executor of John Colton Tupper, did, in that character, upon and from his death, claim the shares in the company which he held; that this claim, this title of Carre Cook Tupper was recognised by the directors of the company, and that accordingly in that character he received the dividends which between the death and the stoppage were declared on the shares under cl. 46 of the deed, there having been no transfer of any of the shares after the death, but the shares having been uniformly from the death treated by the executor and the directors as belonging to the executor in that character. It is certainly, we apprehend, true, nor denied on either side, that Carre Cook Tupper became personally liable as a partner in the company to the appellants' house in respect of the dealings subsequent to John Colton Tupper's death, and that Carre Cook Tupper would, by the course of conduct that has been mentioned, have made himself so, even if he had not been, as he was, a shareholder in his own right independently of John Colton Tupper's shares. It may possibly likewise be, though we do not assert, that the assets of John Colton Tupper are liable to the company or to Carre Cook Tupper, or to both, in respect of John Colton Tupper's shares by reason of the partnership deed and the transactions and course of dealing subsequent to his death. But any such consideration seems to their Lordships not for any present purpose material. The question is whether the debt and liabilities to the appellants' house, existing at John Colton Tupper's death, having been satisfied, the appellants can come upon his assets as creditors by reason of the shares held by him, and of what took place after his death, and their Lordships' opinion is that, whatever the construction of the partnership deed, and whatever the true interpretation of his will, they cannot.

If it was competent to Carre Cook Tupper to charge the assets in their favour, no such thing was done. The fact that he traded or dealt with the appellants' house as executor, and in his own right also, had not the effect of creating such a charge, nor is it material that all John Colton Tupper's property, actually placed or invested in the joint-stock banking business, must probably be treated as lost, and that the separate estate of John Colton Tupper has not claimed, nor does, nor probably can, claim anything from the joint estate.

The executor of a trader carrying on the trade after his death, though doing so avowedly in the character of executor, is nevertheless personally liable for all the debts contracted in the trade after the trader's death, whether he is entitled or not entitled to be wholly or to any extent indemnified by the testator's personal estate, and whether it is sufficient or insufficient for the purpose; nor does the propriety of

A his conduct as between himself and those beneficially interested in the testator's personal estate, give the creditors of the trade becoming so after the trader's death the rights of creditors of the testator, it being immaterial, also, so far as they are concerned, whether the testator, if he had a partner, was bound by a covenant with him that the testator's executors should continue the trade in partnership with the surviving partner. The latest authorities on the point are, we conceive, thus, and appear to their Lordships preponderant and correct. A sufficient number of these authorities, including *Ex parte Garland* (1) and *Ex parte Richardson* (2), were cited at the Bar during the argument.

The terms of the decree in the principal suit—that in which the appellants are defendants—might perhaps, without impropriety, receive some alteration; but substantially that decree seems to us to be as well as the dismissal of their dismissed bill right.

C It was argued that the decree of January or February, 1849, of which execution was awarded on Mar. 10, 1849, entitled the appellants to success in the present appeal. That however is not our opinion. The state of the parties to the suit in which that decree was made, and the nature of the cause, rendered the decree in our judgment of no avail against the suit of Emily Tupper and others, in which the principal decree now under appeal was pronounced. It has been contended also that whatever the merits, there was not a right according to the proper course of judicial proceedings in the Isle of Man to institute such a suit against the appellants. We think, however, that the appellants had taken such proceedings and so acted as to expose themselves to the suit, and that it was regularly and properly instituted against them. The arrests of 1843 were of themselves enough for the purpose. As there must, we think, substantially at least, if not formally, also be a dismissal of the appeal, the appellants, in their Lordships' opinion, ought to pay the costs of it.

Appeal dismissed.

F

G ATTORNEY-GENERAL *v.* CHAMBERS AND OTHERS

[COURT OF APPEAL IN CHANCERY (Lord Cranworth, L.C., assisted by Alderson, B., and Maule, J.), June 6, July 1, 15, 1854]

[Reported 4 De G.M. & G. 206; 23 L.J.Ch. 662; 2 Eq. Rep. 1195;
23 L.T.O.S. 238; 18 Jur. 779; 18 J.P. 583; 2 W.R. 636;
43 E.R. 486]

H

Foreshore—Right of Crown—Limits—Average height of medium tides.

The average height of the medium tides in each quarter of a lunar revolution during the whole year gives the limit, in the absence of all usage, to the rights of the Crown to the seashore.

I **Notes.** Considered: *Ilchester v. Raishleigh* (1889), 61 L.T. 477; *Pearce v. Bunting, R. v. Wedd, Ex parte Pearce*, [1896] 2 Q.B. 360; *Mellor v. Walmesley*, [1905] 2 Ch. 164. Referred to: *Lind v. Isle of Wight Ferry Co.* (1862), 7 L.T. 416; *R. v. Hughes* (1866), L.R. 1 P.C. 81; *Hastings Corp'n. v. Ivall* (1875), L.R. 19 Eq. 558; *Brinckman v. Matley*, [1904–07] All E.R.Rep. 941; *Philpot v. Bath* (1904), 20 T.L.R. 589; *Secretary of State for India in Council v. Fourcar & Co., Ltd.* (1934), 50 T.L.R. 241; *Symes and Jaywick Associated Properties, Ltd. v. Essex Rivers Catchment Board*, [1936] 3 All E.R. 908.

As to the Crown's right to the foreshore, see 7 HALSBURY'S LAWS (3rd Edn.)

453-457; and for cases see 44 DIGEST 70, 71. As to the limits of the foreshore, see **A**
39 HALSBURY'S LAWS (3rd Edn.) 557-559; and for cases see 44 DIGEST 66.

Cases referred to:

- (1) *Blundell v. Catterall* (1821), 5 B. & Ald. 268; 106 E.R. 1190; 44 Digest 77, 580.
- (2) *Lowe v. Govett* (1832), 3 B. & Ad. 863; 1 L.J.K.B. 224; 110 E.R. 317; 44 **B**
Digest 71, 527.
- (3) *A.-G. v. Burridge* (1822), 10 Price, 350; 147 E.R. 335; 44 Digest 72, 530.
- (4) *A.-G. v. Parmeter, Re Portsmouth Harbour* (1811), 10 Price, 378; 147 E.R.
345; on appeal, sub nom. *Parmeter v. Gibbs, Re Portsmouth Harbour*
(1813), 10 Price, 412, H.L.; 44 Digest 72, 529.

Also referred to in argument:

- Berry v. Holden*, 3 Durl. (Ct. of Sess.) 205. **C**
- Smith v. Officers of State for Scotland* (1849), as reported in 13 Jur. 713, H.L.;
44 Digest 66, 472.
- Re Hull and Selby Rail. Co.* (1839), 5 M. & W. 327; 8 L.J.Ex. 260; 44 Digest 68,
492.
- Scrutton v. Brown* (1824), 4 B. & C. 485; 6 Dow. & Ry.K.B. 536; 107 E.R. 1140; **D**
44 Digest 69, 504.

Information filed by the Attorney-General against the defendants, the owners and lessees of lands abutting on and extending along the seashore in the parish of Llanelly, in the county of Carmarthen, South Wales, to recover from the defendants certain lands called Old Marsh and Stradey Marsh, situated to the west of Llanelly **E**
harbour, and a piece of frontage land called Penrhos, within the harbour, and the mines under them, alleged by the Crown to belong to it in right of its prerogative as part of the seashore in the parish of Llanelly in the lordship of Kidwelly, Carmarthenshire. The issue was one of considerable importance in the pecuniary point of view for the entire tract of land affected by it was stated to be some thirty miles in length and a mile and a half in breadth. The question raised on the **F**
information was: What, in the absence of all evidence of particular usage, is the limit of the title of the Crown to the seashore? The general right of the Crown to the seashore was not in dispute.

The Solicitor-General (Sir Richard Bethel), *W. M. James* and *Hanson* for the Crown.

Roundell Palmer, *Goldsmid* and *Mellish* for the respondent Chambers. **G**

Roupell and *Dickenson* for the other respondents.

Cur. adv. vult.

July 1, 1854. The opinion of the judges was delivered by

ALDERSON, B.—In this case, on which your Lordship has requested the assistance of my brother MAULE and myself, I am now to deliver our joint opinion, on **H**
the only question argued before us. That question, as I understand it, is this: What, in the absence of all evidence of particular usage, is the limit of the title of the Crown to the seashore? The Crown is clearly in such a case, according to all the authorities, entitled to the litus maris as well as to the soil of the sea itself adjoining the coasts of England. What then, according to the authorities in our law, is the extent of this litus maris? This, in the absence of any grant or usage **I**
from which a grant may be presumed, is, according to the civil law, defined as the part of the shore bounded by the extreme limit to which the highest natural tides extend—quatenus hybernus fluctus maximus excurrit—that is, the highest natural tide; for, according to LORD STAIR's exposition [INSTITUTIONS OF THE LAW OF SCOTLAND, vol. 2, p. 190], the definition does not include the highest actual tides, for these may be produced by peculiarities of wind, or other temporary or accidental circumstances, concurring with the flow produced by the action of the sun and

A moon upon the ocean. But this definition, even thus expounded by the authorities of the civil law, is clearly not the rule of the common law of England. HOLROYD, J., no mean authority, in his very elaborate judgment in *Blundell v. Catterall* (1) mentions this as one of the instances in which the common law differs from the civil law, and says that it is clear that, according to our law, it is not the limit of the highest tides of the year, but the limit reduced by the highest ordinary tides of the sea, which is the limit of the shore belonging, *prima facie*, to the Crown. What then are these "highest ordinary tides?"

We know that in fact the tides of each day, nay, even each of the tides of each day, differ in some degree as to the limit which they reach. There are the spring-tides at the equinox, the highest tides of all. These clearly are excluded in terms by LORD HALE, both in p. 12 and in p. 26 of his treatise *DE JURE MARIS*, for although in one sense these are ordinary, that is, according to the usual order of nature, and not caused by accidents of the winds and the like, yet they do not ordinarily happen, but only at two periods of the year. These then are not the tides contemplated by the common law, for they are not "ordinary tides," not being of common occurrence. This may, perhaps, apply to the spring tides of each month, exclusive of the equinoctial tides; and, indeed, if the case were without distinct authority on this point, that is the conclusion at which we might have arrived. But then we have LORD HALE's authority, p. 26 of *DE JURE MARIS*, who says:

"Ordinary tides, or neap tides, which happen between the full and change of the moon, are the limit of that which is properly called *littus maris*;"

and he excludes the spring tides of the month, assigning as the reason that the lands beyond them are for the most part of the year dry and maniorable, that is to say, not reached by the tides. To the same effect is *Lowe v. Govett* (2), which excludes these monthly spring tides also. But we think that LORD HALE's reason may guide us to the proper limit.

What then are the lands which for the most part of the year are reached and covered by the tides? The same reason that excludes the highest tides of the month, which happen at the springs, excludes the lowest high tides, which happen at the neaps; for the highest or spring tides, and the lowest high tides (those at the neaps), happen as often as each other. The medium tides, therefore, of each quarter of the tidal period afford a criterion which we think may be best adopted. It is true of the limit of the shore reached by these tides, that it is more frequently reached and covered by the tide than left uncovered by it; for about three days it is exceeded, and for about three days it is left short, in each week, and on one day it is reached. This point of the shore, therefore, is about four days in every week—that is, for the most part of the year—reached and covered by the tides; and as some, not indeed perfectly accurate construction, but approximate, must be given to the words "highest ordinary tides," used by HOLROYD, J., we think, after fully considering it, that this best fulfils the rules and the reasons for them given in our books. We, therefore, beg to advise your Lordship that, in our opinion, the average of these medium tides, in each quarter of a lunar revolution during the whole year, gives the limit, in the absence of all usage, to the rights of the Crown on the seashore.

Cur. adv. vult.

I July 15, 1854. LORD CRANWORTH, L.C.—The question for decision in this case is, What is the extent of the right of the Crown to the seashore. The right of the Crown to the *littus maris* (whatever that means) is not disputed. The question is, What is the *littus maris*? Is it so much as is covered by ordinary spring tides, or is it something else? The rule of the civil law was *est autem litus maris quatenus hybernus fluctus maximus excurrit*. This is certainly not the doctrine of our law. All the authorities concur in the conclusion that the right is confined to what is covered by "ordinary" tides, whatever be the right interpretation of that word "ordinary." By "hybernus fluctus maximus" is clearly meant extraordinary high

tides, though, speaking with physical accuracy, the winter tide is not generally the highest. Land covered only by these extraordinary tides is not what is meant by the seashore. Such tides may be the result of wind or other causes independent of what ordinarily regulates the flux and reflux. Setting aside these accidental tides, the question is, what is the meaning of "ordinary"? It is evidently a word of doubtful import. In one sense the highest equinoctial spring tides are "ordinary," that is, they occur in the natural order of things. But this is evidently not the sense in which the word "ordinary" is used, when designating the extent of the Crown's right to the shore. A

This is apparent from LORD HALE's treatise *DE JURE MARIS*, pp. 12 and 25, which is, in truth, nearly all the authority we have to guide us. LORD HALE says in his treatise (p. 12): B

"The next evidence of the King's right and property in the sea and arms thereof, is his right of property to the shore and the *maritima incrementa*. The shore is that ground that is between the ordinary high-water and low-water mark. This doth *prima facie* and of common right belong to the King, both in the shore of the sea and in the shore of the arms of the sea; and herein there will be these things examinable: First, what shall be said the shore or *litus maris*? Secondly, what shall be said an arm or creek of the sea? Thirdly, what evidence there is of the King's property thereof? For the first of these it is certain, that that which the sea overflows, either at high spring tides or at ordinary tides, comes not as to this purpose under the denomination of *litus maris*; and consequently the King's title is not of that large extent, but only to land that is usually overflowed at ordinary tides; and so I have know it ruled in certain cases." C

Those cases I have not been able to discover—indeed, I do not know whether they are reported—I have looked at all the indices and references in which I thought it was likely I might find them, but I have been unable to do so. Then, D

"for the third, it is admitted *de jure communi* that that between the high-water and low-water mark doth, *prima facie*, belong to the King." E

Then in a subsequent passage, to which reference has been made, pp. 25 and 26, concerning the right the subject may have in the seashore, he says: F

"As to the shore of the sea: There seems to be three sorts of shores, or *litora marinà*, according to the various tides, viz.: the high spring tides, which are the fluxes of the sea at those tides that happen at the two equinoctials; and certainly this doth not *de jure communi* belong to the Crown. For such spring tides many times overflow ancient meadows and salt marshes, which yet unquestionably belong to the subject; and this is admitted of all lands. The spring tides, which happen twice every month at full and change of the moon; and the shore in question is by some opinion not denominated by these tides neither; but the lands overflowed by these fluxes ordinarily belong to the subject, *prima facie*, unless the King hath a prescription to the contrary. And the reason seems to be, because for the most part the lands covered with these fluxes are dry and maniorable; for at other tides the sea doth not cover them, and therefore touching these shores some hold, that common right speaks for the subject, unless there be an usage to enable the Crown; for this is not properly *litus maris*, and therefore it hath been held, that where the King makes his title to land as *litus maris*, or *parcella litoris marini*, it is not sufficient for him to make it appear to be overflowed at spring tides of this kind." G

Then he refers to those two old cases to which he referred before. Then he says, H

"ordinary tides or neap tides" [using those two words as synonymous] "which happen between the full and change of the moon, and this is that which is properly *litus maris*, sometimes called *marettum*, sometimes *warettum*—and touching this kind of shore, viz., that which is covered by the ordinary flux of the sea, is the business of our present inquiry." I

- A** Disregarding, then, these extreme high tides, we next come to the ordinary spring tides, that is, the spring tides of each lunar month. No doubt, speaking scientifically, they probably may differ; but practically these may be disregarded. LORD HALE gives no absolutely decided opinion; but he evidently leans very strongly against the right to the lands covered only by spring tides, and refers to decisions which support his views. Then he describes ordinary tides as if synonymous with
- B** neap tides. This leaves the question very much at large, and there is very little of modern authority. In *Blundell v. Catterall* (1), HOLROYD, J., says, by the common law it, that is, the seashore, is confined to the flux and reflux of the sea at ordinary tides—meaning the land covered by such flux and reflux; still the question remains, what are ordinary tides? The nearest approach to direct authority is *Lowe v. Govett* (2). There certain recesses on the coast, covered by the high water
- C** of ordinary spring tides, but not by the medium tides between spring and neap tides, were held not to pass under an Act of Parliament which vested in a company an arm of the sea daily overflowed by it. LORD TENTERDEN held that these recesses were not ordinarily overflowed by the sea, which shows clearly that he did not consider the overflowing by ordinary spring tides to be what is meant by ordinarily overflowing; and both LITLEDALE, J., and PARKE, J. (now PARKE, B.), concur in
- D** saying that the recesses in question were above ordinary high-water mark, clearly showing their opinion to be, that what is meant by ordinary high-water mark is not so high as the limit of high water at ordinary spring tides. There is, in truth, no further authority to guide us; for the question did not arise in either of the cases of *A.-G. v. Burridge* (3) and *A.-G. v. Parmeter* (4), as to the buildings at Portsmouth.
- E** In this state of things, we can only look to the principle of the rule which gives the shore to the Crown. The principle I take to be, that it is land not capable of ordinary cultivation or occupation, which was described by LORD HALE as generally dry and maniorable, and so it is in the nature of unappropriated soil. LORD HALE gives as his reason for thinking that lands only covered by the high spring tides do not belong to the Crown, that such lands are for the most part dry and maniorable;
- F** and, taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is, that the Crown's right is limited to land which is, for the most part, not dry or maniorable. The learned judges whose assistance I had on this very obscure question, point out that the limit indicating such land is the line of the medium high tide between the springs and the neaps; all land below that line is more often than not covered at high water, and so may justly be said, in the
- G** language of LORD HALE, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line; and, I therefore concur with the able opinion of the judges, whose valuable assistance I had, in thinking that that medium line must be taken as the boundary of the right of the Crown.

Order accordingly.

SAVERY v. KING AND ANOTHER

[HOUSE OF LORDS (Lord Cranworth, L.C., Lord Brougham, and other Peers),
February 14, 15, 18, 19, 21, 22, May 9, 1856]

[Reported 5 H.L.Cas. 627; 25 L.J.Ch. 482; 27 L.T.O.S. 145;
2 Jur.N.S. 508; 4 W.R. 571; 10 E.R. 1046]

*Undue Influence—Parent and child—Gift by son to father without consideration—
Need for son to have independent advice—Proof of absence of inducement.*

Where a son, after recently attaining his majority, makes over property to his father without consideration or for an inadequate consideration, the court expects that the father will be able to justify what has been done, and to show that the son was really a free agent, that he had adequate independent advice, that he was not taking an imprudent step under parental influence, and that he perfectly understood the nature and extent of the sacrifice he was making, and that he was desirous of making it. Although where, when an eldest son comes of age, an arrangement is made of the family property for the personal benefit of its members, a court of equity does not nicely scan its terms, or inquire whether each party has had a due share of benefit, yet such a doctrine does not apply where the whole arrangement consists in a transaction by which a son, without consideration, gives up valuable rights to his father. Undoubtedly a son may give up all or any portion of his property to his father without consideration, but it is then incumbent on the father accepting such a benefit to satisfy the court before which the transaction is impeached that the son fully understood what he was doing, that no artifice or contrivance was made use of to induce him to do the act complained of, and that the son had competent means of forming an independent judgment.

Solicitor—Duty to client—Sale of property by client to solicitor—Duty of solicitor to disclose all material facts—No advantage to be taken of solicitor's position—Utmost value to be given for property—Action by client independent of solicitor's influence—Duty more onerous where client young person.

Where a solicitor purchases or obtains a benefit from a client, the court expects him to be able to show that he has taken no advantage of his professional position—that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect his client's interest as he would have done for a stranger. This duty exists on the part of the solicitor in all cases where he is dealing with any client, but when the client is a very young man, who has just obtained his majority and is so far unemancipated as to be still living under his father's roof as part of his family, the duty is, if not stronger, at all events more obvious. In the case of the sale of property to a solicitor the solicitor who purchases is bound to show that he has put his client in a situation to act independently of his influence. He must, to use the words of LORD ELDON in *Gibson v. Jeyes* (1) (1801), 6 Ves. at p. 271, be able "to prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger." To sustain his purchase he must show, not only that he gave the utmost value for the property, but further that none of the circumstances likely to influence the vendor or other interested party in his determination to concur or not to concur in the sale was kept from him.

Notes. Referred to: *Barnard v. Hunter* (1856), 28 L.T.O.S. 152; *Turner v. Collins* (1871), 7 Ch. App. 334, n.; *Pisani v. A.G. for Gibraltar*, [1874-80] All E.R.Rep. 975; *Allcard v. Skinner* (1887), 36 Ch.D. 145; *Hoblyn v. Hoblyn* (1889), 60 L.T. 499; *De Witte v. Addison* (1899), 80 L.T. 207; *Moody v. Cox and Hatt* (1917), 116 L.T. 740.

A As to undue influence, see 17 HALSBURY'S LAWS (3rd Edn.) 672 et seq.; and for cases see 12 DIGEST (Repl.) 110 et seq. As to transactions between solicitor and client, see 36 HALSBURY'S LAWS (3rd Edn.) 85 et seq.; and for cases see 43 DIGEST (Repl.) 80 et seq.

Cases referred to:

B (1) *Gibson v. Jeyes* (1801), 6 Ves. 266; 31 E.R. 1044, L.C.; 43 Digest (Repl.) 85, 731.

Appeal by the defendant in the action from a decree of STUART, V.-C., made on a bill filed by one of the respondents by which he sought to have set aside a mortgage of a certain estate and also its subsequent sale.

Sir Richard Bethell, Q.C., and *Willcock, Q.C.*, for the appellant.

C *Bacon, Q.C.*, *Follett, Q.C.*, *Malins, Q.C.*, and *Nicholls* for the respondents.

Their Lordships took time for consideration.

May 9, 1856. **LORD CRANWORTH, L.C.**, delivered an opinion in which he said: This was an appeal against a decree of STUART, V.-C., by which he set aside a mortgage created by the respondent Richard King, and a subsequent sale of the property included in the mortgage. Savery, the defendant in the action, appealed.

D The respondent Richard King is the elder son of the other respondent John King. Under the will of Richard King, who died in 1811, the respondent John became tenant for life of an estate in Devonshire called Fowelscombe, with remainder to his first and other sons in tail male, with remainder to Richard King, a brother of the respondent John, for his life, with remainder to his issue male, with remainder

E over. The respondent John had issue, two sons and a daughter, the respondent Richard being the elder son. He attained the age of twenty-one on Mar. 7, 1835. Mr. Savery, the appellant, at the time when Richard attained his majority, was and had for many years been the friend and confidential family solicitor of the respondent John, who was then largely indebted to him for money lent to and business done for him. In order to secure the money so due to him, Mr. Savery had a

F mortgage of the life interest of John in the Fowelscombe estate, and also a number of policies of insurance, eleven in all, effected on the life of John at various dates, beginning in April, 1829, and ending in September, 1834. The sum due, or alleged to be due, from John King to Savery in March, 1835, was £9,667. The principal sums secured by the policies amounted to £8,700 only, and so did not cover the whole demand. The premiums payable on the policies amounted to an annual

G sum of £312 4s. 9d., which premiums, as well as the principal money due to Savery and the interest, were charged by the mortgage on the life-estate of John. Previously to April 9, 1835, it was agreed between the respondents John and Richard and the appellant that the respondent Richard should charge the inheritance of the Fowelscombe estate with a sum of £10,000, in consideration of the £9,667 then due from the respondent John, and a further sum of £333 to be then advanced by the

H appellant to the respondents. It was stipulated that the rate of interest on the debt, which had up to that time been payable at 5 per cent., should be reduced to 4 per cent., and that the policies should be assigned by the appellant to the respondent Richard for his own use. This arrangement was carried into effect, first by a disentailing deed executed by John and Richard, dated April 7, 1835, whereby Richard's remainder in tail was converted into a remainder in fee; secondly, by

I indentures of lease and release, dated April 6 and 7, 1835, whereby John and Richard, in consideration of the sum of £9,667 16s. 8d. so due from John, and of a further sum of £332 3s. 4d. then alleged to be advanced by Savery to John and Richard, conveyed the Fowelscombe estate to Savery and his heirs by way of mortgage, to secure £10,000 and interest at 4 per cent. with a power of sale; and, thirdly, by an indenture dated April 8, 1835, whereby Savery assigned the policies to Richard, and John covenanted with him to pay the premiums, but that covenant was not secured by any charge on the real estate. After this mortgage had been completed, the two respondents raised from time to time various sums on mortgage

or charge of their equity of redemption, amounting in the whole to £6,855; and the money so raised, or a considerable part of it, was employed in the purchase of some property in Hampshire, which was conveyed to the respondent Richard with the concurrence of his father. A

In the latter part of 1838 the respondents agreed with Savery to sell to him the Fowlescombe estate for a sum of £23,700, out of which all the mortgages and charges were to be satisfied, and this agreement was carried into effect by deeds of lease and release, dated Mar. 21 and 22, 1839, whereby the respondents joined in conveying the property to the appellant in fee, in consideration of the above-mentioned sum of £23,700. On Mar. 1, 1847, the respondent Richard filed his bill against Savery and his father for the purpose of setting aside, so far as relates to his interest, as well the original mortgage of April, 1835, for £10,000 as also the subsequent sale in 1839 on the ground that his concurrence had been obtained by the undue influence of the respondent John his father, and of the appellant Savery the family solicitor. The vice-chancellor, by whom the case was heard, made a decree in favour of the plaintiff, Richard King, setting aside both the mortgage and the subsequent sale. The appellant Savery, being dissatisfied with that decree has brought it by way of appeal before your Lordships' House. B C

It is hardly necessary to say that where any person seeks the aid of a court of equity to enable him to get rid of the effect of deeds which he has executed, the burden of proof is on him to make out a case for such intervention. The question here is, whether the respondent, Richard King, has made out such a case—that is, whether the circumstances, first in the mortgage and afterwards in the sale, were such as entitle him to treat what was done as a fraud or imposition, and so not binding on him. The doctrine of equity on this head is well established. The legal right of a person, who has attained the age of twenty-one, to execute deeds and deal with his property is indisputable. But where a son, recently after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, a court of equity expects that the father will be able to justify what has been done, and to show that the son was really a free agent, that he had adequate independent advice, that he was not taking an imprudent step under parental influence, and that he perfectly understood the nature and extent of the sacrifice he was making and was desirous of making it. So again, where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position—that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess—and that the solicitor has done as much to protect his client's interest as he would have done for a stranger. This duty exists on the part of the solicitor in all cases where he is dealing with any client, but, of course, when the client is a very young man who has only just attained his majority and is so far unemancipated as to be still living under his father's roof as part of his family, the duty is, if not stronger, at all events more obvious. D E F G

What is here contended for is (applying ourselves first to the mortgage), that it was obtained from the respondent Richard, the plaintiff below, by the two defendants below, in violation of both these principles—that, in order to suit the purposes of the father and of the solicitor, the son was induced by them within a month after he came of age to burden his inheritance with a mortgage to the amount of nearly half the value of the estate, for which he received no consideration whatever, and that he did this without having the benefit of any adequate independent advice to explain to him the consequences of what he was doing, and fairly to put him on his guard. That he received no consideration for his concurrence in the mortgage is clear, for it was made to secure a debt contracted by his father for his own purposes, before the son attained his majority. It is true indeed that this debt amounted to only £9,667 16s. 8d., whereas the mortgage was for £10,000, and the difference £332 3s. 4d. is stated on the face of the deed to have been paid to the father and the son. But no evidence was given tending to show that any part of this sum actually came to the hands of the son. The reasonable inference is, that H I

A it did not—more especially as in the deed of April 8, whereby the policies were assigned, the whole £10,000 is stated to be the proper debt of the father. Then it was contended that part of the arrangement was, that the interest on the father's debt, which had theretofore been paid at the rate of 5 per cent., should be reduced to 4 per cent. This would be a saving of £100 per annum to the father, and, as the son made part of his father's family, it was argued that this was a substantial benefit to him as well as to his father. This, however, cannot be treated as a valuable consideration for the son, for the father was under no obligation to continue him as part of his family, and though, where, when an eldest son comes of age, an arrangement is made of the family property for the personal benefit of its members, a court of equity does not nicely scan its terms, or inquire whether each party has had a due share of benefit, yet such a doctrine does not apply where the whole arrangement consists in a transaction by which the son, without consideration, gives up valuable rights to his father. I must not be understood as questioning the position that a son may give up all or any portion of his property to his father without consideration. Undoubtedly he may do so. But then it is incumbent on the father accepting such a benefit to satisfy the court before which the transaction is impeached that the son fully understood what he was doing, that no artifice or contrivance was made use of to induce him to do the act complained of, and that the son had competent means of forming an independent judgment. The father is bound to make this out.

This brings us to the second point—has the appellant made out that in this case the respondent Richard had the means of thus forming an independent judgment? In order to come to a just conclusion on this point, we must look to the facts as disclosed by the pleadings and evidence in the cause. Richard attained his majority on Mar. 7, 1835. At that time Mr. Savery was on a visit at the house of John King, the father, in Hampshire. His visit commenced on or about Feb. 21, and he returned home to Modbury, in Devonshire, two days after Richard had come of age, namely, Mar. 9. On the Saturday following his return, namely, on Mar. 14, Mr. Savery wrote a letter to Mr. Shortland, a gentleman at the Bar in London, whom it appears Mr. Savery was in the habit of consulting and employing as his conveyancing counsel, and in that letter occur these words :

“I will send you instructions for King's recovery deeds early in next week, and must claim your early attention to them.”

G On the same day he wrote to Mr. King, the father, the following letter on which much reliance has been placed :

“My dear Sir, I have this day looked into your uncle's will, and I find the Fowelscombe property is settled to you for life, and to your sons in tail male, and in case of your having no male heir, or such dying under age, or in your lifetime without a recovery being suffered, the property goes off to Richard King's family. I should, therefore, advise that you and Richard should without loss of time (if he be of age) join in suffering a recovery, which would enable him at once (subject to your life interest) to give the property by will to his brother or sister, or to do in fact what he pleased with it. This, you understand, will effectually prevent the property going away from his sister, in case his brother John and himself should die unmarried and without issue. In case of Richard's death in your lifetime without a recovery, and John's dying under age, the sister could not possess the property, and I think it, therefore, most desirable the recovery should be suffered immediately. The uses of this recovery may be as you and Richard think proper, that is to say, either settle to you for your life (as is now the case), with remainder in fee simple to Richard after your death, thereby barring all risk of the property going away from the family to Richard King's family, and in this case the insurance on your life must be kept up by you as now done to secure the sum due from you at your death, or the uses may be declared to secure the sum on the property, and subject thereto in fee to Richard, and in this way you may keep up the insurance, so as to

secure the whole sum again at your death to Richard, and thereby save in interest about £100 per annum. This will be the least expensive mode of proceeding, and be more desirable to all parties. As to the sale of the estate, you are quite aware that it is a most desirable property; and although the money would give a large income, I confess, were I you and Richard, I should be more inclined to keep it, and if you come to the above arrangement I see no reason why you should not do so. However, the recovery being suffered, you and Richard can then do as you both think best; but, as this is of consequence to your family, I do advise most strenuously that no time be lost to secure the property. Life is very uncertain, and the death of the two boys in your lifetime without a recovery, would leave Mrs. and Miss King deprived of that estate which is now in your and his power to avert. I write this with a view only to the benefit of your family, and I hope you will both give it your best consideration."

There is some difficulty in reconciling those two letters. That to Mr. King would lead to the inference that neither the recovery, nor, of course, the mortgage, had then been agreed on. Yet Savery's letter to Mr. Shortland refers to the recovery as something already agreed on, as to which, apparently, there had been previous correspondence between them. I find it impossible not to come to the conclusion that the recovery had been agreed on between Mr. Savery and Mr. John King, the father, during the visit of the former in Hampshire, and that the letter of Mar. 14 was written to the father in order that it might be shown by him to his son with the view of obtaining his concurrence to a course thus recommended by Savery.

The question, however, so far as it relates to the recovery, is not important, except as it may throw light on the mortgage, which accompanied or followed it. What we have to decide is whether, in concurring in the mortgage, Richard had all the protection which, as against his father and his legal adviser, he was entitled to—whether, before Richard had so bound his inheritance, he had been duly and properly put on his guard as to the nature and consequences of what he was doing, so as to enable him to act independently and free from the influence of his father and the family solicitor. That he had no such independent advice previously to the preparation of the deeds is plain. What is the evidence as to the intermediate period, that is, the time which elapsed after Mr. Savery had left Hampshire on Mar. 9, and given instructions to Mr. Shortland, and April 9, when the deeds were executed? It appears that when Mr. Shortland sent the drafts of the deeds to Mr. Savery, they were accompanied by a letter dated Mar. 28, in which occurs the following passage:

"As the son gives up so much without any apparent consideration, it will be necessary for you to have evidence within your power to show that no undue influence was exercised by his father, but that he (the son) fully understands what he is about, more particularly as the money is due to you, and you are, I presume, the family solicitor."

At, or very soon after this time, Richard King and his father were on a visit to Thomas King, the uncle of Richard. He resided at Huish, which is four or five miles distant from Modbury, where Mr. Savery resided and carried on his business. Mr. Savery tells us in his answer, that on April 3, while Richard and his father were visiting Thomas, he communicated to Richard the advice which he had received from Mr. Shortland, and that Richard thereupon desired him to send the drafts of the proposed deeds to Mr. Kelly, a solicitor residing at Modbury, which direction was accordingly complied with. Mr. Savery says that he at the same time explained to Richard the nature of the transaction, and that on or about that same day it was arranged that on April 7 the deeds should be executed.

The draft of the mortgage deed, having been in conformity with the directions of Richard submitted to Mr. Kelly, was returned by him to Mr. Savery, approved, on behalf of Richard, and all the deeds were then engrossed, in order that they might be executed on April 7, at the office of Mr. Savery, at Modbury. On that day, John and Richard King came to Mr. Savery's office, where Mr. Kelly also

A attended. Mr. Kelly was at that time an entire stranger to Richard King, and the account he gives of what then took place is as follows. He says :

B "What took place, as near as I can recollect, is as follows : The draft of the mortgage deed had been previously submitted to me for approval on behalf of Mr. Richard King, and, as far as the contents of the deed went, I saw nothing objectionable, and I had returned the same to Mr. Savery approved ; but at my introduction to the plaintiff at Mr. Savery's office, never having seen him before, I thought it but fair, as he was a very young man, only having attained majority a few weeks previously, to inquire of him if he was aware that the effect of the business then in progress would deprive him of his reversionary estate in the Fowelscombe property, which, but for this, he would become entitled to at the death of his father. To this he replied that he was not aware that such would be the effect."

C It was said in the argument that that was a misrepresentation of Mr. Kelly's, and so, no doubt, to a certain extent it was. It did not deprive him of the estate, but it would deprive him of the estate to the extent of £10,000. Mr. Kelly goes on to say :

D "I then told him, as I was a total stranger to him, I declined to take upon myself the responsibility of advising him to execute the deeds, and advised him to consult his uncle, Mr. Thomas King, of North Huish, or Mr. Baron, a solicitor at Plymouth, who I knew had been solicitor for some years to parts of his family. Previously to the above conversation, I and the plaintiff had retired into another room alone. None of the deeds were executed on that day. I considered my office as solicitor to Mr. Richard King ceased from that time, and with it my responsibility as to the whole of the transaction both as to the mortgage and disentailing deeds ; and if they were afterwards attested by me, they were so merely as a witness, and not as a responsible adviser of any of the parties. . . . I understood the reason for calling on the plaintiff to execute the disentailing deed was for the purpose of giving the defendant Servington Savery a mortgage in fee of the Fowelscombe estate, instead of the subsisting mortgage of the defendant, John King's life-interest for, I believe, £10,000, in order to save the expense of keeping up life insurances for the security of the mortgagee. Some allusion was made to policies of insurance effected on the life of John King, but I never saw any deed or deeds in relation thereto, nor had I any draft of assignment sent to me to peruse on behalf of Richard King."

G Mr. Savery stated that, according to the suggestion of Mr. Kelly, he gave the deeds to Richard, that is, the mortgage-deed and the disentailing deed, in order that he might show them to his uncle Thomas King. Two days later, namely, on April 9, John and Richard went to stay with Mr. Savery on a visit, Richard bringing with him the deeds, which were then executed.

H On these facts can your Lordships say that due protection was thrown around Richard King ; that the various suggestions which would occur to the minds of men of mature age and businesslike habits as to the prudence of the course which he was about to take had been fairly presented to his mind, and that, nevertheless, he chose, for the purpose of relieving or assisting his father, to burden his inheritance in favour of Mr. Savery with the £10,000 due to him from the father ? It is impossible to answer this question in the affirmative. The burden of proof is on the father and Mr. Savery. What passed between Thomas King, the uncle, who is now dead, and his nephew, cannot be ascertained. Mr. Savery says that Richard told him his uncle saw no objection to the disentailing deed or to the mortgage, and he adds his belief that the uncle advised him to consult Mr. Andrews, a solicitor of eminence, on the subject. This advice was not followed, for though Mr. Andrews was consulted, nothing was laid before him for his opinion except the disentailing deeds, and even they were not submitted to him till on the evening of the 13th, which was after they had been executed. The only independent advice, therefore,

which Richard had was that of Mr. Kelly, who declined all responsibility, and referred him to his uncle, and of the uncle, whose advice as to consulting Mr. Andrews was not followed. I think it clear, therefore, that this transaction of the mortgage is one which, according to the principles guiding courts of equity on such subjects, could not be sustained. A

The next question is whether, though not originally binding, it was afterwards made valid and obligatory by the conduct of Richard, who alone could impeach it? B It was argued that he, by his subsequent dealing with the property, had cured any defects existing in the original mortgage. As to his dealings with the property after the mortgage, his acts consisted in having concurred with his father in raising several sums of money, amounting to between £6,000 and £7,000 by way of charge on the equity of redemption, and, secondly, in selling the whole to Mr. Savery. C With respect to the sums so raised by way of charge, the decree does not impeach them, and the question, so far as relates to them, is not whether they are valid, but assuming them, as the decree assumes them to be, good and effectual charges, whether the concurrence of Richard in them prevents him from disputing the original mortgage for £10,000? I am of opinion that they had no such operation, for at the time of their creation Richard evidently laboured under the same ignorance with respect to his rights in relation to the first mortgage as he was under in April, 1835. D Even if he had, at the several times when these subsequent charges were created, in express terms ratified the original mortgage, such ratification would have been of no avail unless it could be shown that he had on those occasions the means of forming an independent judgment which he had not at the time of the original transaction. In fact, however, he had no other advice or assistance than that of his father and Mr. Savery. These additional charges were all made two or three E years after the time when he attained his majority, and while he continued to live under his father's roof as part of his family. The same principles which impeach the mortgage itself must destroy also the effect of any subsequent confirmations made in the same absence of independent advice and assistance. Just so as to the sale. Supposing for the present that the sale itself, like the charges subsequent to April, 1835, is to be deemed valid, yet it cannot, for the reasons I have indicated, F have any effect in setting up the original mortgage. Richard had no intention, when he concurred in the sale, to cure any defect in the mortgage. He was not aware that any such defect existed, and he had no more professional or independent advice than that which he had on the former occasions. I see, therefore, no reason to think that the invalidity of the original mortgage was cured by any of Richard's subsequent dealings with the property. G

This, therefore, brings me to the next question, which relates, not to the mortgage, but to the sale made in the autumn of 1838, and carried into effect by the deeds of Mar. 21 and 22, 1839. This, it will be observed, was a sale by the father and son, who together were owners of the fee (subject, of course, to the charges), to Mr. Savery their common solicitor. In such a transaction the solicitor who purchases is bound to show that he has put his clients in a situation to act independently of his influence. He must, to use the words of LORD ELDON, in *Gibson v. Jeyes* (1) (6 Ves. at p. 271), be able H

"to prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger."

Here several attempts had been made to sell the estate by auction and by private contract. The sum given by Mr. Savery was £23,700, which was more than had been offered by any other person. If the question had turned on the point whether he had done the best for his client, whether, in short, he had complied with the rule as laid down by LORD ELDON, I am much disposed to think that he had. But, in truth, the question here does not depend on any such doctrine. This sale cannot stand against Richard, because it was made by him without his having been made aware that the original mortgage was invalid. He concurred in the sale of what, from the conduct of Mr. Savery, he had been led to suppose was a reversionary I

A interest in an estate worth only £23,700, and burdened to the extent of £20,000 or thereabouts. He was under a pressing necessity of obtaining an immediate sum of £30,000 to enable him to marry, and with that object in view, he might well consent to a sale to which, if he had known that as against him the charges were only £6,000 or £7,000, he never would have acceded. Mr. Savery, in order to sustain his purchase, must show, not only that he gave the utmost value for the estate, but further that none of the circumstances likely to influence Richard in his determination to concur or not to concur in the sale were kept from him—that he was aware of the invalidity of the mortgage so far as he was concerned, and so knew the real nature and extent of his interest. It is obvious that this was not the case. Mr. Savery had by his conduct led Richard to believe that his interest was much less than it really was. He cannot, therefore, set up against him a sale which but for the erroneous impression thus created never might have been made. I am, therefore, of opinion that neither the sale nor the mortgage can stand so far as Richard is concerned.

The only remaining question is as to the terms on which relief ought to be given. With respect to the mortgage, it is plain that Richard must, as far as possible, put Mr. Savery in the condition in which he would have been if no such mortgage had been made and if his security had rested solely on the life-estate of the father, and the several policies of insurance. [To effect this His LORDSHIP said that the vice-chancellor's decree would be varied with regard to certain matters.]

LORD BROUGHAM concurred.

Decree varied.

FOLEY v. FLETCHER AND ANOTHER

[COURT OF EXCHEQUER (Pollock, C.B., Bramwell, Watson and Channell, BB.), November 17, 1858]

[Reported 3 H. & N. 769; 28 L.J.Ex. 100; 33 L.T.O.S. 11; 22 J.P. 819; 5 Jur.N.S. 342; 7 W.R. 141; 157 E.R. 678]

Income Tax—Annual payment—Liability to tax—Sale of asset—Purchase money payable by instalments.

Contract—Time of performance—Payment of money—Payment to be made on appointed day—Interest computed from such day to be paid if principal not paid within one month of appointed day.

The plaintiff sold her interest in certain lands to the defendants. Part of the purchase money was paid on completion, and the defendants covenanted to pay the balance by equal half-yearly payments over thirty years on the days appointed in the conveyance, and, in case of non-payment of an instalment upon the appointed day or within one month thereafter, to pay interest on the instalment computed from the day appointed for payment. The defendants having fallen into arrear, the plaintiff instituted this suit claiming payment of several instalments. As regards one such instalment less than a month had elapsed after the day appointed for payment thereof and before the commencement of the suit.

Held: (i) the instalments were not liable to income tax, not being "annuities, yearly interest of money or other annual payments" within s. 102 of the Income Tax Act, 1842, and the defendants were not entitled to make any deduction in respect of tax; and (ii) the covenant for payment had to be

construed together with the proviso relating to non-payment, with the result that no suit ought to be commenced for the payment of an instalment until one month had elapsed from the day appointed for payment thereof.

Notes. The Income Tax Act, 1842, and the Income Tax Act, 1853, have been repealed. See now the Income Tax Act, 1952, ss. 122, 123, as amended. This case establishes that income tax is only to be charged on payments that are properly income, and not on capital payments that happen to be made annually; this distinction between income and capital payments is fundamental to the law of income tax.

Applied: *Scoble v. Secretary of State in Council for India*, [1903] 1 K.B. 494. Distinguished: *Chadwick v. Pearl Life Insurance Co.*, [1905] 2 K.B. 507; *Delage v. Nugget Polish Co.* (1905), 92 L.T. 682. Considered: *East Indian Rail. Co. v. Secretary of State in Council of India* (1905), 92 L.T. 495; *Jones v. I.R.Comrs.*, [1920] 1 K.B. 711. Applied: *Perrin v. Dickson*, [1929] All E.R.Rep. 685. Considered: *Boyce v. Whitwick Colliery Co.*, [1934] All E.R.Rep. 706; *I.R.Comrs. v. Ramsay*, [1935] All E.R.Rep. 847; *Dott v. Brown*, [1936] 1 All E.R. 543; *Sothorn-Smith v. Clancy*, [1941] 1 All E.R. 111; *Vestey v. I.R.Comrs.*, *I.R.Comrs. v. Vestey*, [1961] 3 All E.R. 978. Referred to: *Horton v. Sayer* (1859), 29 L.J.Ex. 28; *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), 2 App. Cas. 394; *City of London Contract Corp'n. v. Styles* (1887), 2 Tax Cas. 239; *Clerical, Medical and General Life Assurance Society v. Carter* (1888), 21 Q.B.D. 339; *Secretary of State in Council of India v. Scoble*, [1903] A.C. 299; *Surbiton U.D.C. v. Callender's Cable and Construction Co.* (1910), 8 L.G.R. 244; *Lord Massy v. I.R.Comrs.* (1915), [1919] 2 K.B. 345, n.; *Earl Howe v. I.R.Comrs.*, [1918-19] All E.R.Rep. 1088; *Leeming v. Jones* (1929), 141 L.T. 472; *Brodie v. I.R.Comrs.* (1933), 17 Tax Cas. 432; *Ainley v. Edens* (1935), 19 Tax Cas. 303; *Beck v. Howard de Walden* (1940), 84 Sol. Jo. 369.

As to Case III of Schedule D, see 20 HALSBURY'S LAWS (3rd Edn.) 245 et seq.; as to deductions on making payment, see *ibid.*, 361 et seq.; as to construction of revenue statutes, see 36 HALSBURY'S LAWS (3rd Edn.) 416-418; as to covenant not to sue, see 8 HALSBURY'S LAWS (3rd Edn.) 218; and for cases see 28 DIGEST (Repl.) 167-169. For the Income Tax Act, 1952, ss. 122, 123, 169, 170, see 31 HALSBURY'S STATUTES (2nd Edn.) 112, 116, 162 and 165, respectively.

Case referred to:

(1) *Re Micklethwait* (1855), 11 Exch. 452; 25 L.J.Ex. 19; 156 E.R. 908; 42 Digest 734, 1571.

Also referred to in argument:

Ford v. Beech (1848), 11 Q.B. 852; 17 L.J.Q.B. 114; 11 L.T.O.S. 45; 12 Jur. 310; 116 E.R. 693, Ex. Ch.; reversed (1846), 11 Q.B. 842; 12 Digest (Repl.) 563, 4273.

Taylor v. Evans (1856), 1 H. & N. 101; 25 L.J.Ex. 269; 27 L.T.O.S. 110; 20 J.P. 711; 156 E.R. 1134; 28 Digest (Repl.) 167, 670.

Edmonds v. Eastwood (1858), 2 H. & N. 811; 27 L.J.Ex. 209; 22 J.P. 275; 157 E.R. 334; sub nom. *Edmunds v. Eastwood*, 30 L.T.O.S. 304; sub nom. *Edwards v. Eastwood*, 6 W.R. 331; 28 Digest (Repl.) 142, 541.

Aloff v. Scrimshaw (1689), 2 Salk. 573; 91 E.R. 482; sub nom. *Ayliff v. Scrimshire*, Holt, K.B. 619; 1 Show. 46; sub nom. *Ayloffe v. Scrimshire*, Carth. 63; sub nom. *Anon.*, Comb. 123; 12 Digest (Repl.) 564, 4279.

Thimbleby v. Baron (1838), 3 M. & W. 210; 1 Horn. & H. 61; 7 L.J.Ex. 128; 150 E.R. 1119; 12 Digest (Repl.) 564, 4281.

Trott v. Smith (1844), 12 M. & W. 688; 13 L.J.Ex. 178; 2 L.T.O.S. 402; 152 E.R. 1375, Ex. Ch.; 35 Digest (Repl.) 602, 2763.

Demurrers in an action upon a covenant in a deed, dated Aug. 26, 1854, by which the plaintiff and Sir F. E. Scott assigned to the defendants certain build-

A ings, lands, mines and hereditaments, to undivided moieties in which they were respectively entitled.

The declaration, after alleging that the plaintiff and Sir F. E. Scott had agreed with the defendants for the sale to them of the buildings, lands, mines and hereditaments, with the colliery, engines and plant thereon, free from encumbrances, at the sum of £99,000, and should be conveyed to William Hatton and William **B** Matthews, upon and for the trusts, intents and purposes, and subject to the powers, provisos, agreements and declarations therein contained, stated that it was by the indenture witnessed that in pursuance of and part performance of the recited agreement, and in consideration of the sum of £6,770 upon the execution of the indenture paid to the plaintiff and the said Sir F. E. Scott, in moieties, in part of the said purchase sum, and of the further sum of £92,230, the residue of the purchase sum to be paid to the plaintiff and the said Sir F. E. Scott, their respective **C** executors, etc., in moieties by the several instalments and at the several times thereafter expressed, the said Sir F. E. Scott and the plaintiff did grant, etc., the said buildings, etc., to the defendants William Hatton and William Matthews, their heirs and assigns for ever, upon and for certain trusts, intents and purposes in the indenture declared concerning the same.

D The declaration then stated that the defendants did by the same indenture covenant with the plaintiff in the following manner: that they or one of them, or one of their heirs, etc., should pay to the plaintiff, her executors, etc., the sum of £46,115, being the equal half part of the said sum of £92,230, the unpaid residue of the said purchase sum of £99,000, in and by the several instalments and proportions at the several times, and subject to the provisos and agreements and otherwise in the manner thereafter expressed (the declaration stated that there was a like covenant for payment of Sir E. Fletcher's moiety), that is to say, the sum of £768 11s. 8d. on every June 24 and Dec. 24 in every year after 1854, until and inclusive of Dec. 24, 1884, the first half-yearly instalment to commence and to be paid on June 24, 1855, and subject nevertheless to such eventual acceleration or variation of the time or respective times of payment as was thereafter

F mentioned and thereafter described. Further, that in case either of the last-mentioned instalments or sums of £768 11s. 8d. lastly thereinbefore covenanted to be paid should not be accordingly and fully paid by the defendants, one of them, or their or one of their heirs, etc., to the plaintiff and her heirs, etc., upon the day or time thereinbefore appointed for the payment thereof, or within one calendar month next after the same day, and should not have been previously

G satisfied pursuant to any of the provisos in the said indenture contained, then they the said defendants, or one of them, or their or one of their heirs, executors, or administrators, should and would upon demand, or in default of such demand, then by equal half-yearly payments in each year, well and truly pay unto the plaintiff, her executors, administrators or assigns, interest at the rate of £4 for every £100 by the year upon the instalment or upon each instalment which for

H the time being should be in arrear and unpaid, or upon such part thereof respectively as should be so in arrear; and such interest should be computed from June 24 or Dec. 24 as the case might be, upon which the instalment should have become payable, or (as the case might require) should be computed from the then last preceding day for payment of interest upon the instalment so in arrear; and that every payment thereinbefore covenanted to be made should be so made without

I any deduction or abatement, except in respect of any property or income tax, which ought by law to be deducted from such interest. The declaration then averred that the times of payment had not been accelerated or varied, and alleged that six instalments of £768 were in arrears and unpaid to the plaintiff, and that divers half-yearly days of payment, according to the indenture, of interest on the said instalments, except the last, elapsed before the suit, yet the defendants had not paid, etc.

The defendants, by their second plea, pleaded, as to so much of the declaration as related to the instalment which became due on Dec. 24, 1857, that by the said

indenture it was provided and agreed that no instalment or other principal sum for the time being payable under or pursuant to the covenant or provisions therein contained, should be recoverable or capable of being enforced, nor should any proceedings for that purpose be commenced until after the expiration of one calendar month from the day upon which the same instalment or sum should have become payable under or pursuant to the covenants and provisions therein contained, nor should any interest accrue or become payable in respect thereof until the expiration of such calendar month. The defendants further said that one calendar month from the day upon which the said last-mentioned instalment or sum became payable under or pursuant to the covenants and provisions contained in the said indenture had not expired before the commencement of this suit. The defendants also pleaded, by their fourth plea, as to the sum of £236 7s. 8d., parcel of the instalments claimed, that in making payment of the said instalments respectively, the defendants deducted and retained out of the said instalments respectively divers sums of money, amounting in the whole to the said sum of £236 7s. 8d., being the amount of the rate of duty which at the times when the said instalments respectively became due, was payable under the Income Tax Act, 1853, and that by such deduction they were acquitted and discharged of the said sum of £236 7s. 8d., under and by virtue of such statute.

The plaintiff demurred to both pleas, and the defendants joined in demurrer.

By the Income Tax Act, 1842 :

"Section 1. There shall be charged, raised, levied, collected, and paid, unto and for the use of Her Majesty, Her Heirs and Successors, during the term hereinafter limited, the several rates and duties mentioned in the several Schedules contained in this Act, and marked respectively A, B, C, D, and E; (that is to say) . . .

SCHEDULE D

Upon the annual profits or gains arising or accruing to any person residing in Great Britain from any kind of property whatever, whether situate in Great Britain or elsewhere, there shall be charged yearly, for every twenty shillings of the amount of such profits or gains, the sum of seven-pence; and upon the annual profits or gains arising or accruing to any person residing in Great Britain, from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in Great Britain or elsewhere, there shall be charged yearly, for every twenty shillings of the amount of such profits or gains, the sum of seven-pence :

And upon the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within Great Britain, from any property whatever in Great Britain, or any profession, trade, employment, or vocation exercised within Great Britain, there shall be charged yearly, for every twenty shillings of the amount of such profits or gains, the sum of seven-pence."

"Section 102. Upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half-yearly or at any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of seven-pence, without deduction, according to and under and subject to the provisions by which the duty in the Third Case of Schedule D may be charged; provided that in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing

A such annual payment, and the person so liable to make such annual payment, whether out of the profits or gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorised to deduct out of such annual payment at the rate of sevenpence for every twenty shillings of the amount thereof, and the person to whom such payment liable to deduction is to be made shall allow such deduction,

B tion, at the full rate of duty hereby directed to be charged, upon the receipt of the residue of such money, and under the penalty hereinafter contained, and the person charged to the said duties having made such deduction shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; but in every case where any

C annual payment as aforesaid shall, by reason of the same being charged on any property or security in Ireland, or in the British plantations, or in any other of Her Majesty's Dominions, or on any foreign property or foreign security, or otherwise, be received or receivable without any such deduction as aforesaid, and in every case where any such payment shall be made from profits or gains not charged by this Act, or where any interest of money shall not be reserved or charged or payable for the period of one year, then and in every

D such case there shall be charged upon such interest, annuity, or other annual payment as aforesaid the duty before mentioned, according to and under and subject to the several and respective provisions by which the duty in the Third Case of Schedule D may be charged: Provided always, that where any creditor on any rates or assessments not chargeable by this Act as profits shall be entitled to such interest, it shall be lawful to charge the proper officer having

E the management of the accounts with the duty payable on such interest, and every such officer shall be answerable for doing all acts, matters, and things necessary to a due assessment of the said duties, and payment thereof, as if such rates or assessments were profits chargeable under this Act, and such officer shall be in like manner indemnified for all such acts, as if the said rates and assessments were chargeable."

F

By s. 40 of the Income Tax Act, 1853:

"Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any

G contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorised, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable under this Act, that is to say, sevenpence, sixpence, or fivepence, as the case may be, for every twenty shillings of such payment; and the person

H liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; and the person to whom such payment as aforesaid is to be made shall allow such deduction, upon the receipt of the residue of such money, under pain of forfeiting the sum of fifty pounds for any refusal so to do: Provided always, that no tenant or occupier of any property chargeable under

I Schedule A of this Act shall be entitled to deduct or retain out of the rent thereof any greater sum than the amount of the duty which shall have been assessed and charged upon or in respect of such property, and actually paid by such tenant or occupier."

Atherton, Q.C., and Gray for the plaintiff.

Phipson for the defendants.

POLLOCK, C.B.—I am of opinion that on the demurrer to the second plea,

the judgment of the court ought to be for the defendants; but for the plaintiff on the fourth plea. A

The demurrer to the second plea raises a question as to what is the effect of a covenant for payment of a sum of money on a day certain, with a proviso that no action shall be brought for its recovery until the expiration of a month from the day of payment; whether the proviso ought to be read with the covenant, so as to make an action premature which is brought after the day of payment but before the expiration of the month. The covenant is mixed up with the proviso in the deed itself. The defendants covenant that they will pay, or cause to be paid, to the plaintiff £46,115, being a moiety of the purchase-money "in and by the several instalments and proportions, at the several times and subject to the provisos and agreements and otherwise in the manner hereinafter expressed." The covenant, therefore, by the express words of the deed, must be taken with the proviso, construed with, and qualified by, the proviso. The result of so reading the whole together is, that there is an extension of the time for one month beyond the nominated day of payment. The provision for interest, making the payment free of interest when made within the month, renders this more clear, because by its effect interest is to become due only after default has been made in paying within the month after the days named; and the stipulation that where interest has become due it shall be calculated from the original day on which the money was payable was probably resorted to with a view to establish a species of penalty; and it furnishes a very good reason for the making of a separate covenant and proviso, as a means of accomplishing that purpose. The result is, that the payment is sufficient, provided it be made within the month, and no action can be brought until the expiration of that month. Therefore, our judgment on that plea must be for the defendants. B C D E

But our judgment on the fourth plea ought to be for the plaintiff. That question is whether the periodical payment of instalments, provided for by the deed mentioned in the declaration, constituted an annuity or annual payment liable to assessment to the income tax by virtue of any of the Acts imposing that duty. I am of opinion that it is not. The statutes referred to in the argument have both of them substantially the same title, namely, "An Act for granting to Her Majesty duties on profits arising from property, professions, trades and offices." The first Act, the Income Tax Act, 1842, has five schedules, in which are specified the income which shall be liable to the duty. Schedules A and B provide for the annual value of lands, tenements, hereditaments or heritages; C for profits arising from annuities, dividends and shares of annuities, payable out of any public revenue; D for annual profits or gains arising or accruing to any person residing in Great Britain from any kind of property whatever, and annual profits or gains accruing to any person, although not resident within Great Britain, from any property whatever in Great Britain; E for every office or employment of profit, and every annuity, pension or stipend, payable by Her Majesty or out of the public revenue of the United Kingdom, except annuities before charged to the duty under Sched. C. These are all matters liable to the tax. F G H

The question now is whether, when upon the sale of an estate for £99,000, it is stipulated that the purchase-money shall be paid £6,000 or £7,000 of it down, and the rest by annual payments extending over a considerable number of years, such payments are annual profits, and therefore liable to the duty? It has been contended that it is an annual profit because the effect of the protracted period of payment, when taken in connection with the value of money, shows that the real value of the estate was some £23,000 or £30,000, and that the difference between that amount and the £99,000 is the profit which that real value, if paid over to the seller, would have produced during the period over which the payments have extended; and, therefore, to that extent, the payments are profit, and are payments of an annuity; and inasmuch as it is the fault of the plaintiff that she has so mixed up profit with capital that the one cannot be distinguished from the other, the consequence must fall upon herself; like the case of a person who has mixed I

A his corn with the corn of another. Therefore, as the plaintiff claims part as profit, the court must say all is assessable as profit, because we cannot distinguish how much of it is capital.

B There are several answers to this. First, there is nothing on the record to justify the assertion that the property was not worth a great deal more than £99,000. There is nothing to show that protracting the time for payment was not a matter of mere indulgence to the purchaser. Then, even if we could speculate and should come to the conclusion that a great part of the annual payment was in respect of the time of payment of all being postponed, still we should have no authority to say that they were payments substantially within the Act, merely because some profit may be mixed up with it. No doubt the annual payment is to the amount of one-half a payment of money properly due as capital, and not profit or interest.

C Then it was said, admitting that, still so much of the annual payment as is interest—that is, the surplus beyond what is strictly purchase-money—is assessable. But there is no provision in the statute to that effect. I cannot say that capital is liable to the duty, because it is in the company of profit. The section principally relied on is 102 of the Income Tax Act, 1842. That section imposes the duty upon all

E “annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same by virtue of any deed or will, or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, and whether the same shall be received half-yearly, or at any shorter or more distant period.”

F If these terms are to be applied to this case merely because we find the words “annual payments,” payable “as a personal debt or obligation by virtue of any contract,” they would apply to every case where a sum of money was payable for two or more years under a contract of what kind or nature soever the obligation might be, such as an ordinary debt payable by instalments; and now by virtue of s. 40 of the Income Tax Act, 1853, they would apply not only to annual, but to any periodical payments. I think that these words, “or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property, etc.,” must be read as applicable only to annual payments ejusdem generis with those specified, namely, annuities and yearly interests of money. It is not an annual payment, although payable by virtue of a contract within the meaning of the section, if it is made in payment of a debt; and, although it may be mixed up with some profit, that does not make the debt subject to duty.

G Section 40 of the 1853 Act provides that

H “every person who shall be liable to the payment of any rent or any yearly interest of money, or any annuity, or other annual payment, either as a charge on any property, or as a personal debt or obligation, by virtue of any contract, whether the same shall be received or payable half-yearly, or at any shorter or more distant periods, shall be entitled, and is hereby authorised on making such payments, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable under this Act.”

I The same observation applies to this section as to that cited from the earlier Act. The words “other annual payment” must be read as applicable to annual payments ejusdem generis with those specifically mentioned, i.e., rent, interest and annuities. If it turns out that an annual payment is the payment of a debt by instalments, it is not profit, or within the Act. The title of the Act and all the provisions declare the imposition of a tax on profits, not on the return of capital. If the payment is of an annuity, then it is chargeable because it is an annuity,

and is expressly made subject to the duty. It was said that the provision that the annual payments shall be chargeable, "whether the same shall be received or paid half-yearly, or at any shorter or more distant period," carries the matter further than the earlier statute, but, if the argument founded on this were valid, then these words would include every promissory note, and, in fact, every payment. If s. 40 stood alone, there might be some colour for the argument; but, looking at the schedule to see what is charged, we find Sched. D says:

"for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act"

—that is, every person who shall be liable to an annual payment which is itself subject to the duty, shall be entitled to deduct, but not otherwise. Here the parties have stipulated for the payment of a sum of money by instalments; and we have no power, where they have contracted for one thing, to make them liable for another.

BRAMWELL, B.—I am also of opinion that the defendants are entitled to judgment on the second plea.

On the other question I think that our judgment must be for the plaintiff. In *Re Micklethwait* (1), **PARKE, B.**, says (11 Exch. at p. 456):

"It is a well-established rule that the subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament is to be read according to the natural construction of its words."

The latter is the main rule, the other subordinate. The natural course of things is, that the heir takes on the death of the person last seised; whoever seeks to disturb that rule must make out his right to do so. So, whoever seeks to impose a tax or penalty must establish the right; whoever seeks to punish must establish the guilt. The rule, properly understood, is, that the burden of proof is on the assertor. I cannot help referring to Mr. SEDGWICK'S books on STATUTORY AND CONSTITUTIONAL LAW, p. 334, where it is said:

"These decisions, as I have said, naturally modify the old rule that penal statutes are to be construed strictly. The more correct version of the doctrine appears to be that the statutes of this class are to be fairly construed and faithfully applied, according to the intent of the legislature, without unwarrantable severity on the one hand, or equally unjustifiable lenity on the other, in cases of the court's inclining to mercy."

And afterwards, at p. 336, he says:

"These decisions show the gradual tendency of the judicial mind to disavow and renounce any right to construe statutes according to considerations of policy or hardship, and to recognise the duty of conforming on all occasions to the will of the law-making body."

And in a note at p. 335, he asks:

"Whether all laws must not be supposed intended to effect a public good, and whether the effort to accomplish the intention of the legislature should be more earnest in this case than in all others?"

These are the principles and considerations which I think ought to prevail in considering this case.

I think, consistently with these, the plaintiff is entitled to judgment on the fourth plea. But I have had considerable doubt upon the matter. The instalments are the payments for an estate deferred for thirty years, the total amount of which is, probably, about double the sum which would have been paid if paid down at once. It may be that the sellers have been content to forgo interest; but the presumption is that the amount consists partly of principal and partly of interest. If we were at liberty to consider the case independently of express enactment,

- A I should say that it would be reasonable to ascertain how much is the payment of principal and how much interest. But all speculation is at an end if the words and the meaning of the statute are plain. Inasmuch as the statute imposes a duty on the whole of an annuity, without discriminating between that part of it which is repayment of principal and that which is interest, I should say that, if there was no injustice in that, there could be no injustice in imposing the duty on a sum
- B analogous to an annuity; if these payments were called an annuity, income-tax would doubtless be payable upon them. It was said that persons will now mix up interest and principal to escape the payment of duty. But by "An Act for granting to Her Majesty duties on profits arising from property, professions, trade and offices," it cannot be taken that the legislature meant to impose a duty on that which is not profit derived from property, but the price of it. On looking at
- C Sched. D. of the Income Tax Act, 1842, it seems to be susceptible of this interpretation, that everything is to be referred to the title and prior part of the Act; and then this expression "the last-mentioned duties extend to every description of property or profit not in the Schedules A., B. and C." will refer to property or profits of the same description as in those schedules; and then when we find in s. 102, "all annuities, yearly interest of money, or other annual payments," it seems
- D not an unreasonable construction to say (leaving out the word annuities), that the intention is to charge yearly interest of money and other annual payments ejusdem generis, that is within the description of profits; and then substantially all annuities. Acting on the principle that the affirmation of the proposition must be made out by those who seek to impose the tax, I cannot say in this case that has been established. But, assuming it has been, and that duty is payable on the instalments, it is
- E admitted the plaintiff herself might have been assessed. If the plaintiff may be compelled to make a return and herself pay in respect of the instalments, it cannot be that the defendants can deduct the income tax before making the payments.

Reading the words of s. 40 alone, nothing seems plainer, and as this is an annual payment, why does it not apply? The expression "liable to payment" is peculiar.

- F Though feeling the greatest doubt on the subject, I think the plaintiff is entitled to judgment, as this is not an annual payment liable to income tax; and even if it is, the defendants can have no right to deduct income tax in respect of the whole of each payment. I own I feel the greatest doubt, because my decision is founded on a construction of the Act which does violence to the words of it.

- G **WATSON, B.**—I think the defendants are entitled to judgment upon the second plea, for the reasons given by the Lord Chief Baron, and that the plaintiff is entitled to judgment on the fourth plea. It is a startling proposition that income tax attaches upon debts payable by instalments. It is a tax upon income, the title of the Act shows it; and reading Schedules A., B., C., D. and E. of the Income Tax Act, 1842, it is obviously a yearly tax on what is called throughout income, and
- H profits and gains. The Income Tax Act, 1853, contains similar heads of taxable matters, all of them treating that on which the tax is to attach as profit or income. Section 102 of the Act of 1842 is relied on by the defendants, and this payment is said to fall within the description of an annuity. But an annuity means an income purchased with money, the capital ceasing to exist, having been converted into an annuity. Annuities are made chargeable by express words. The words "other
- I annual payments" in the section mean payments ejusdem generis, viz., as profits. Suppose the case of a will giving to a legatee money payable by instalments, as for instance £10,000, £5,000 payable at the end of the first, £5,000 at the end of the second year after the testator's death; the sums so bequeathed would not be an annuity, and would be chargeable, not as income, but under the Legacy or Succession Duty Acts. If a person covenanted to pay an annual sum, not being the payment of a debt, by instalments, as to pay £10 a year to a particular person, such payment would be chargeable with income tax. But there is not a word in the Act that leads to the inference that a debt payable by instalments is chargeable with income tax; and a tax

cannot be imposed by implication. Or suppose this payment to the plaintiff made by two instalments, would income tax attach in such a case? It has been said that these payments are compounded of principal and interest. Profit may be obtained by the postponement of the payment, but how can we say that any part of this was interest? As to the other point: by the Act of 1853, the several sections of the first Act are re-enacted, and s. 40 of that Act provides, that a person liable to the payment of "any annuity or other annual payment, either as a charge on any property or as a personal debt by virtue of any contract," shall be entitled "on making such payment to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable under the Act." The true meaning of that is, that where the party has been assessed to the income tax he may deduct it, though he has not actually paid the money. I do not see how a person covenanting to pay the purchase-money of an estate by instalments can be charged with income tax in respect of such payment. It does not appear as a fact that the defendants are in possession of the land, and there are no provisions for assessing the duty on them. The Crown would, therefore, have no remedy, and the defendants would get money which they might keep if we held that they were at liberty to make a deduction on account of income tax.

CHANNELL, B.—I also think our judgment should be for the defendant on the demurrer to the second plea, and for the plaintiff on the demurrer to the fourth plea. The first question is whether the plaintiff commenced this action before she had a right to do so. The defendants rely upon a proviso that no action shall be brought till the expiration of one calendar month from the time when the instalment sued for was made payable; that the proviso amounts to a covenant not to sue, and does not qualify the covenant for payment of the instalments. A covenant not to sue for a definite time, generally speaking, cannot be pleaded as an answer to an action; but here the qualification is contained in the same deed, and to put a proper construction upon that deed, the whole of it must be taken together in order rightly to construe the intention of the parties to it. It is not an absolute covenant to pay, but is subject to a proviso, which makes the proviso part of the covenant itself.

As to the fourth plea, the stipulation is to pay part of the agreed purchase-money at once for the estate, and the remainder by instalments. Are these instalments liable to income tax as "an annuity or yearly interest of money or other annual payment" within the Income Tax Act, 1842, s. 102? I think they are not; as that would be to tax capital, not income; for the purchase-money of this estate, although part of it is payable by instalments, is nevertheless capital, and not income within the meaning of the Act of Parliament. I am, therefore, of opinion, for the reasons which have already been given, that these payments are not liable to be assessed as income.

Judgment for plaintiff on the fourth plea; for defendants on the second plea.

A

ORR & BARBER AND OTHERS v. UNION BANK OF SCOTLAND

[HOUSE OF LORDS (Lord Cranworth, L.C., and Lord Brougham), May 12, 15, 16, August 7, 1854]

[Reported 1 Macq. 513; 24 L.T.O.S. 1; 2 C.L.R. 1566]

Bank—*Letter of credit*—*Grant to debtor requesting second bank to honour drafts of creditor*—*Forgery of draft by servant of creditor*—*Refusal by bank to honour creditor's draft*—*Right of debtor and creditor to recover from bank granting letter.*

If the grantee of a letter of credit has paid or deposited money in respect thereof, and, the letter having fallen into the wrong hands, money is obtained in fraud of the grantee by means of a forged cheque, the grantee will be entitled to recover the amount against the bank granting the letter of credit.

A debtor, who owed the first appellant £460, paid that sum into the respondent bank and received from the respondent bank a letter of credit addressed to the L. bank requesting that bank to honour the drafts of the first appellant to the extent of £460 and to charge the respondent bank with that sum. The debtor enclosed this letter of credit in a letter to the first appellant, which arrived at the latter's office in his absence. The only clerk in the office, who had no authority to manage money transactions, took the letter of credit to the L. bank, forged a cheque in the first appellant's name for the amount, received payment, and absconded. On the first appellant's return he drew on the L. bank for the £460, but the bank refused payment. In an action by the first appellant and the debtor against the respondent bank,

Held: when the respondent bank received the money from the debtor they impliedly undertook that the L. bank would honour the drafts of the first appellant for £460; payment on a forged draft was no payment as between the payer and the person whose name was forged; and, therefore, the respondents could not set up against the claims made in the action the payment made by the L. bank on the forged draft, and the action succeeded.

Notes. Considered: *Conflans Quarry Co. v. Parker* (1867), L.R. 3 C.P. 1. Referred to: *British Linen Co. v. Wilson* (1861), 4 L.T. 162.

As to letters of credit, see 2 HALSBURY'S LAWS (3rd Edn.) 213 et seq.; and for cases see 3 DIGEST (Repl.) 253 et seq.

Case referred to:

(1) *Young v. Grote* (1827), 4 Bing. 253; 12 Moore, C.P. 484; 5 L.J.O.S.C.P. 165; 130 E.R. 764; 3 Digest (Repl.) 255, 714.

Also referred to in argument:

Williams v. Everett (1811), 14 East, 582; 104 E.R. 725; 3 Digest (Repl.) 278, 831.

Scott v. Porcher (1817), 3 Mer. 652; 36 E.R. 250; 5 Digest (Repl.) 1174, 9471.

Baron v. Husband (1833), 4 B. & Ad. 611; 110 E.R. 586; 1 Digest (Repl.) 777, 3069.

Mackersy v. Ramsays Bonars & Co. (1843), 9 Cl. & Fin. 818; 8 E.R. 628, H.L.; 3 Digest (Repl.) 185, 336.

Robarts v. Tucker (1851), 16 Q.B. 560; 20 L.J.Q.B. 270; 15 Jur. 987; 117 E.R. 994, Ex. Ch.; 3 Digest (Repl.) 257, 724.

Hall v. Fuller (1826), 5 B. & C. 750; 8 Dow. & Ry. K.B. 464; 4 L.J.O.S.K.B. 297; 108 E.R. 279; 3 Digest (Repl.) 256, 719.

Johnson v. Windle (1836), 3 Bing.N.C. 225; 2 Hodg. 202; 3 Scott, 608; 6 L.J.C.P. 5; 132 E.R. 396; 6 Digest (Repl.) 97, 761.

Hansard v. Robinson (1827), 7 B. & C. 90; 9 Dow. & Ry.K.B. 860; 5 L.J.O.S.K.B. 242; 108 E.R. 659; 6 Digest (Repl.) 325, 2368.

- Ramus v. Crowe* (1847), 1 Exch. 167; 16 L.J.Ex. 280; 11 Jur. 715; 154 E.R. 70; 6 Digest (Repl.) 393, 2807.
- Wain v. Bailey* (1839), 10 Ad. & El. 616; 2 Per. & Dav. 507; 113 E.R. 234; 6 Digest (Repl.) 325, 2369.
- James v. Williams* (1845), 13 M. & W. 828; affirmed sub nom. *Williams v. James* (1848), 2 Exch. 798.
- Bowes v. Howe* (1813), 5 Taunt. 30; 128 E.R. 596, Ex. Ch.; 6 Digest (Repl.) 230, 1623.
- Campbell v. French* (1795), 6 Term Rep. 200; 101 E.R. 510, Ex. Ch.; 6 Digest (Repl.) 51, 441.
- Evans v. Kymer* (1830), 1 B. & Ad. 528; 9 L.J.O.S.K.B. 92; 109 E.R. 883; 6 Digest (Repl.) 74, 628.
- Truettel (Treuttel) v. Barandon* (1817), 1 Moore, C.P. 543; 8 Taunt. 100; 129 E.R. 320; 1 Digest (Repl.) 399, 591.
- Peters v. Heyward* (1623), Cro. Jac. 682; 79 E.R. 591; 43 Digest 530, 656.
- Phillips v. Jones* (1850), 15 Q.B. 859; 19 L.J.Q.B. 374; 16 L.T.O.S. 4; 14 Jur. 1065; 117 E.R. 683, Ex. Ch.; 43 Digest 530, 657.
- Ellison v. Collingridge* (1850), 9 C.B. 570; 15 L.T.O.S. 67; 137 E.R. 1014; sub nom. *Eddison v. Collingridge*, 19 L.J.C.P. 268; 14 Jur. 869; 6 Digest (Repl.) 22, 139.
- Rothschild v. Hennings* (1829), 9 B. & C. 470; Dan. & Ll. 290; 4 Man. & Ry. K.B. 411; 7 L.J.O.S.K.B. 230; 109 E.R. 175; 12 Digest (Repl.) 252, 1962.
- Taylor v. Hare* (1805), 1 Bos. & P.N.R. 260; 127 E.R. 461; 12 Digest (Repl.) 255, 1975.
- Prescott v. Flinn* (1832), 9 Bing. 19; 2 Moo. & S. 18; 1 L.J.C.P. 145; 131 E.R. 521; 1 Digest (Repl.) 364, 377.
- Hern v. Nichols* (1701), Holt, K.B. 462; 1 Salk. 289; 90 E.R. 1154; 1 Digest (Repl.) 682, 2427.

John Gordon Campbell, merchant, in Glasgow was in the habit of dealing with Orr & Barber, commission agents in Liverpool, and in 1844 was indebted to them in the sum of £460 9s. With a view to paying this debt, Campbell deposited that amount in the Union Bank of Scotland at Glasgow, filling up the following slip of paper, according to the usual practice:

“Union Bank of Scotland, Oct. 22, 1844.

“Wanted credit on Liverpool for £460 9s., payable to Messrs. Orr & Barber.”

In return for his money Campbell received from the bank the following letter of credit:

“Union Bank of Scotland, Glasgow,
 “No. 15,583 A.A. “Oct. 22, 1844.
 “Please to honour the drafts of Messrs. Orr & Barber to the extent of £460 9s., which charge to the bank. “I am your obedient servant,
 “£460 9s. (Signed) JAMES WATSON,
 “Entd. M.G.H. Cashier.

“To the Manchester and Liverpool District Bank, Liverpool.

“Not transferable.

On the same day Campbell put the letter of credit into the Post Office at Glasgow, under cover, addressed to Orr & Barber at Liverpool; but they never received or saw it. At the time it should have arrived both partners were absent; Orr, who conducted the business of the firm at Liverpool, being then in Ireland, where he remained for a fortnight, from Oct. 18 to 31, 1844; Barber, who conducted the business at Buenos Ayres, being long resident abroad. On Orr's return to Liverpool on Oct. 3 he found in his counting-house the letter from Campbell advising the remittance but the letter of credit referred to was gone. He went to the Liverpool and Manchester District Bank to make inquiries and to get payment. He was there informed that the money had been paid on a draft or order previously presented.

A He, Orr, had given no authority to any one to draw on the bank in his name. The fact, however, was that at the time the letter reached Liverpool, the only clerk in Orr & Barber's counting-house was one Smith who was merely a messenger or office-keeper, and had no authority to manage their business or money transactions. He, however, opened the letter, wrote to Campbell acknowledging the receipt of the same, then forged the name of Orr & Barber to a draft, received payment, and absconded before Orr's return. The Manchester and Liverpool Bank refused to give Orr any information, and declined to honour his draft for the money. Having consulted counsel as to his remedy, Orr was advised that, as there was no evidence of the Liverpool bank having ever consented to hold any money for Orr & Barber, and as there was no privity of contract between them and Orr & Barber, no action could be brought by them against that bank.

C In these circumstances Orr & Barber applied to the Union Bank at Glasgow for payment; but they also declined to pay. Orr & Barber then, along with Campbell, the grantee of the letter of credit, as co-plaintiff, brought an action against the Union Bank. After setting out the above facts, their declaration concluded as follows :

D "The defendants (the Union Bank) have failed to perform what they undertook to do in consideration of the said sum of £460 9s.; they did not effectually establish a credit with the Manchester and Liverpool District Bank in favour of Orr & Barber; they did not take the requisite steps for establishing such a credit in terms of their undertaking; and their mandatories, the Manchester and Liverpool District Bank, did not accept or fulfil the mandate contained in the letter of credit, and did not honour the drafts of Orr & Barber to the extent therein mentioned, or to any extent. Further, the defendants themselves refused to give credit to the Manchester & Liverpool District Bank for the sum of £460 9s. as being paid on their account; and they have still in their hands unaccounted for, the sum paid to them by John Gordon Campbell. In these circumstances the plaintiff Campbell requires the defendants either to pay back the said sum to him, or otherwise to implement their undertaking by yet honouring the drafts of Orr & Barber, or making payment to them of the said sum of £460 9s."

G The defendants relied on the following grounds : that, the letter of credit having been transmitted by Campbell in the regular course of post and having been duly delivered at the counting-house or place of business of Orr & Barber and taken and accepted by them as equivalent to a payment of the sum therein mentioned they had no further claim against Campbell or the defendants for payment of the sum, unless they could show that the letter of credit was not an available order or obligation for the said sum. That, the letter of credit granted by the defendants in favour of the plaintiffs Orr & Barber on the Manchester and Liverpool district bank having been honoured when presented for payment, the defendants were not responsible for the loss alleged to have been sustained by the plaintiffs or either of them. That the obligation undertaken by the defendants was only to give Campbell a good and available letter of credit on the Manchester and Liverpool Bank; and, that bank being solvent, no recourse could be against the defendants, unless the plaintiffs produced the letter of credit dishonoured or unpaid, especially as it was not alleged that the Manchester and Liverpool District Bank ever refused to pay the contents of the said letter of credit to any one presenting the same.

I The full court, by a majority of twelve to one, the minority being SIR ALEXANDER COCKBURN, decided that the declaration disclosed no cause of action against the defendant bank. The plaintiffs appealed.

Hugh Hill, Q.C., for the appellants.

Bliss, Q.C., and *Forsyth* for the respondents.

Their Lordships took time for consideration.

Aug. 7, 1854. The following opinions were delivered.

LORD CRANWORTH, L.C.—The question here is whether, in these circumstances, the Union Bank of Scotland, the respondents, are responsible for the money either to Orr & Barber, or to Campbell, from whom they received it. The Lord Ordinary considered the claim of the appellants to be relevant, and admitted it to proof. But a great majority of the judges of the Court of Session held that they were not so responsible. A

With all deference to that high authority, I confess I have arrived at the conclusion that the Lord Ordinary was right. What the respondents undertook when they received the money from Campbell was that the Liverpool bank would honour the draft of Orr & Barber for £460 9s. Campbell complains that this engagement of the respondents has never been performed, so that he has never received any benefit from the payment which he made to the respondents. That the Liverpool bank has refused to honour the draft of Orr & Barber is not disputed, and most unquestionably *prima facie* this gives to Campbell a right of action against the respondents, for he paid his money to them upon their undertaking that the Liverpool bank should do what in fact they have never done, and on the contrary refuse to do, namely, honour the draft of Orr & Barber for £460 9s. B C

The question is whether this *prima facie* case against the respondents is effectually displaced by the defence set up by them. The substance of that defence is that they, the respondents, put the Liverpool bank in funds so as to enable them to meet the draft of Orr & Barber, and that the Liverpool bank was imposed upon by a forged cheque, which they paid supposing it to be genuine, and now decline to make any further payment upon the letter of credit. But this, without more, clearly affords no valid defence. The respondents must show either that the Liverpool bank actually paid the draft of Orr & Barber when called on to do so, pursuant to the letter of credit, or else that they did something which as between them and Orr & Barber they are entitled to treat as equivalent to payment. It is certain that they did not pay the draft of Orr & Barber, and the only question, therefore, is, on the other alternative, whether the payment which they made on the forged cheque is a payment which they are entitled to consider as valid between themselves and Orr & Barber. If it is, then Campbell would be entitled to treat Orr & Barber as having received the £460 9s., and so would be entitled in account with them to have credit for that amount. The Liverpool bank would rightfully debit the respondents for that sum as paid on their account, and neither Campbell nor Orr & Barber could have any claim on the respondents. If, however, the payment on the forged cheque was not a valid payment as between the Liverpool bank and Orr & Barber, then Orr & Barber have not received anything from Campbell. He is still liable to them. The Liverpool bank has no right to debit the respondents for money paid on their account, no such payment having been made, and the money paid by Campbell into the respondent bank still remains in their hands. It is plain from this short statement that the respondents are answerable to Campbell unless they can make out that the payment on the forged cheque was a valid discharge to the Liverpool bank as between themselves and Orr & Barber. D E F G H

The learned judges of the Court of Session seem to have supposed that on this subject there is some peculiarity in the law of England—some difference at all events between the law of England and that of Scotland. But I do not think that any such difference exists. Payment on a forged cheque or order is not of itself any payment at all as between the party paying and the person whose name is forged. This is, I apprehend, the law both of England and Scotland. Cases may perhaps exist in which such a payment may be made valid by reason of collateral matters. Where, for instance, a forgery has been successfully accomplished by reason of the want of due caution on the part of the person whose name is forged. It was on this ground that the Court of Common Pleas decided *Young v. Grote* (1). There the customer of a bank signed a cheque in blank, to be filled up by his wife with whom he left it, and she filled it up with a sum of fifty pounds written so inartificially that a servant was able to insert the words “three hundred and” before the word “fifty,” so as to deceive the bankers without blame on their part. The court held I

A that the bankers, having paid £350 on this cheque, were entitled to credit with their customer for that amount. The decision went on the ground that it was by the fault of the customer the bank had been deceived. Whether the conclusion in point of fact was in that case well warranted, is not important to consider. The principle is a sound one, that where the customer's neglect of due caution has caused his bankers to make a payment on a forged order, he shall not set up against B them the invalidity of a document which he has induced them to act on as genuine.

How does this doctrine apply to the present case? How can it be said that the Liverpool bank was induced to pay the forged cheque in consequence of any negligence or misconduct of Orr & Barber? It can hardly be attributed as blame to them that their clerk purloined the letter of credit. Besides, a letter of credit is not a negotiable instrument. The letter of credit merely gave authority to the bank C to honour the cheque of Orr & Barber. The circumstance that the letter of credit was in the hands of the clerk did not necessarily or naturally import that he was the person entitled to draw for the amount mentioned in it. The bank ought to have made inquiry as to who were the drawers of the cheque, and they ought to have satisfied themselves as to the genuineness of the signature. The fact that it was presented by a person who held and gave up the letter of credit raised a presumption D that it had been drawn by the proper party. But it was only a presumption; and if the bank chose to act on such a presumption without further inquiry, they must abide the consequence. If, then, the Liverpool bank cannot set up the payment which they made on the forged cheque, it follows of necessity that the present claim of the appellants is well founded; for they can have no possible remedy against the Liverpool bank, between whom and them there is no privity whatever. E The respondents have given to Orr & Barber a credit on the Liverpool bank, but that bank will not honour their draft, so that the parties are necessarily thrown back on those with whom the money was originally lodged, and whose contract has not been performed. The respondents will have their remedy against the Liverpool bank by disallowing in account any sum alleged to have been paid on the letter of credit; but with that the appellants have no concern.

F It remains only to notice a point raised in argument, but not much insisted on: I allude to the joinder of Orr & Barber with Campbell as co-pursuers. This was, however, as I conceive, quite right. We are not dealing with an English action at law where such a union would have been bad. But when Campbell paid the money to the respondents, both he and Orr & Barber became interested in the due fulfilment of the obligation into which the respondents had entered, and both, G therefore, properly joined in the action. The course which I now advise your Lordships to take is to reverse the decision, and to remit the case back to the Court of Session, in order that the parties may go to proof, unless the respondents should consider that it would be useless to them to go into such proof.

LORD BROUGHAM.—I entirely agree with the Lord Chancellor; and I am H sorry to be under the necessity, in agreeing with him, of disagreeing with the great majority of the learned judges in the court below. I hope and trust that the suggestion made by the Lord Chancellor at the close of his statement will not be thrown away on the parties, but that, however they should be advised, they will not proceed further; for I should consider that this litigation, in consequence of what has passed here, may be said to have reached its natural conclusion. I apprehend I that the facts of the case are really not in dispute. The facts, from the nature of the case, which depends almost entirely upon documentary evidence, have been before us, and I confidently hope that the parties below will rest satisfied with what has been done here, and that they will not pursue further the litigation.

Appeal allowed.

WILKINSON v. HAYGARTH

[COURT OF QUEEN'S BENCH (Lord Denman, C.J., Coleridge and Wightman, JJ.),
November 30, January 14, 1847]

[Reported 12 Q.B. 887; 16 L.J.Q.B. 103; 8 L.T.O.S. 465;
11 Jur. 104; 116 E.R. 1085]

Tenancy in Common—Trespass by one tenant—Damage to subject-matter of tenancy—Action in trespass by other tenant in common—Competency.

One of several tenants in common is not entitled to damage or destroy the land the subject of the tenancy, e.g., by cutting and carrying away turves, and he cannot lawfully license another person to do that which he cannot himself do. If he does damage or destroy the land he will be liable in trespass at the suit of one of his co-tenants.

Notes. There were further proceedings in this case reported only in 12 Q.B. 851, but do not affect the point decided here.

Referred to: *Job v. Potton* (1875), L.R. 20 Eq. 84.

As to actions of trespass between co-owners, see 38 HALSBURY'S LAWS (3rd Edn.) 746; and for cases see 43 DIGEST 390, 391.

Cases referred to:

- (1) *Clayton v. Corby* (1843), 5 Q.B. 415; Dav. & Mer. 449; 14 L.J.Q.B. 364; 8 Jur. 212, 114 E.R. 1306; sub nom. *Doe d. Clayton v. Corby*, 2 L.T.O.S. 207; 19 Digest (Repl.) 220, 1623.
- (2) *Goodwyn v. Spray* (1786), 2 Dick. 667; 21 E.R. 431; 2 Digest (Repl.) 113, 822.

Also referred to in argument:

- Smallman v. Onions* (1792), 3 Bro.C.C. 621; 29 E.R. 733; 2 Digest (Repl.) 113, 823.
Hole v. Thomas (1802), 7 Ves. 589; 32 E.R. 237; 2 Digest (Repl.) 113, 825.
Twort v. Twort (1809), 16 Ves. 128; 33 E.R. 932; 2 Digest (Repl.) 113, 826.
Rosse's Case (1583), 3 Leon. 83, 94.

Smales v. Dale (1614), Hob. 120; Moore, K.B. 868; 80 E.R. 269; 38 Digest (Repl.) 832, 439.

Fairclaim d. Empson v. Shackleton (1770), 2 Wm. Bl. 690; 5 Burr. 2604; 96 E.R. 406; 32 Digest (Repl.) 531, 1290.

Doe d. Fishar and Taylor v. Prosser (1774), 1 Cowp. 217; 98 E.R. 1052; sub. nom. *Taylor v. Fisher*, Lofft, 768; 32 Digest (Repl.) 531, 1291.

Addison v. Overend (1796), 6 Term Rep. 766; 101 E.R. 816; 41 Digest 207, 462.

Johnson v. Evans (1844), 7 Man. & G. 240; 7 Scott, N.R. 1035; 13 L.J.C.P. 117; 2 L.T.O.S. 459; 8 Jur. 341; 135 E.R. 102; 5 Digest (Repl.) 875, 7314.

Cubitt v. Porter (1828), 8 B. & C. 257; 2 Man. & Ry.K.B. 267; 6 L.J.O.S.K.B. 306; 108 E.R. 1039; 43 Digest 391, 145.

Nelthorpe and Farrington v. Dorrington (1674), 2 Lev. 113; 83 E.R. 475; 43 Digest 504, 447.

Bloxam v. Hubbard (1804), 5 East, 407; 1 Smith, K.B. 487; 102 E.R. 1126; 41 Digest 168, 89a.

Cabell v. Vaughan (1669), 1 Wms. Saund. 288; 2 Keb. 525; 1 Vent. 34; 85 E.R. 386; sub nom. *Chappel v. Vaughan*, 1 Sid. 420; 12 Digest (Repl.) 39, 158.

Wilbraham v. Snow (1670), 2 Keb. 588; 1 Lev. 282; 1 Mod. Rep. 30; 1 Sid. 438; 1 Wms. Saund. 47; 84 E.R. 370; 41 Digest 121, 767.

Purnell v. Young (1838), 6 Dowl. 347; 3 M. & W. 288; 1 Horn & H. 22; 150 E.R. 1153; sub nom. *Parnell v. Young*, 7 L.J.Ex. 80; 43 Digest 408, 312.

Harrison v. Dixon (1843), 12 M. & W. 142; 1 Dow. & L. 454; 13 L.J.Ex. 247; 2 L.T.O.S. 151; 152 E.R. 1145; 43 Digest 428, 525.

Whittington v. Boxall (1843), 5 Q.B. 139; Dav. & Mer. 184; 12 L.J.Q.B. 318; 7 Jur. 722; 114 E.R. 1201; 43 Digest 408, 313.

Brown v. Hedges (1708), 1 Salk. 290; 91 E.R. 257; 43 Digest 503, 426.

A **Rules Nisi**, one obtained by the plaintiff, the other by the defendant, in an action in trespass for entering the plaintiff's close and digging and carrying away peat, soil and turves therefrom.

The defendant pleaded *inter alia*.

B The plaintiff was one of several tenants in common of the close in question, and the defendant pleaded that the peat, soil, and turves were not so his property as to enable him to maintain the action. The defendant also said that he acted as he did under a licence granted him by one Wearing, another of the tenants in common. At the trial, before CRESSWELL, J., the jury gave a verdict for the defendant on some issues in the case and for the plaintiff on the other issues. A rule nisi was obtained for entering judgment for the plaintiff, with damages 1s. non obstante veredicto, for a new trial, and a cross-rule was obtained by the defendant.

C *Pashley* for the defendant, showed cause against the rule for entering judgment for the plaintiff.

Martin, Q.C., and *Manisty*, for the plaintiff, supported the rule.

D **LORD DENMAN, C.J.**—In my opinion, the fourth plea to the original declaration and the second plea to the new assignments are bad. The turf is composed of the grass and soil on which it grows, as peat is the vegetable and the soil of which it has become a part. The turf does not grow as to become part of the accruing profits which are the subject of enjoyment by the tenants in common. It is admitted that, if there has been an ouster, the present action will lie; that taking a chattel away constitutes an ouster; and that in all cases the destruction of the property is also an ouster. In *Clayton v. Corby* (1) a prescription in a plea to take in alieno solo as much clay for making bricks at the defendant's brick-kiln as he required was held bad. The principle of that case was that such a taking destroyed the subject-matter. I consider this, therefore, an ouster effected by means of the destruction of the property. No authority contradicts this view. We cannot act upon what LORD THURLOW said in *Goodwyn v. Spray* (2) without knowing the circumstances of that case more fully.

F **COLERIDGE, J.**—The plaintiff now confines his claim to the new assignment. We must, therefore, see what the facts pleaded amount to. It must be admitted on the part of the plaintiff that the tenant might license the doing of whatever he might do himself, and, on the other hand, the defendant must admit that this does not include acts of destruction. Taking turf is not like taking the vestura terræ or other growing profits. Were we to hold that a tenant in common could take away the turf, we must say also that one tenant in common could carry all the brick earth from the surface, and it is impossible to say where we could stop.

G **WIGHTMAN, J.**—The plaintiff complains that the defendant has made holes in his close, and has dug up, carried away and converted turf. The defendant says he did this in exercise of a right of common of turbary. The plaintiff, as to that, new assigns, stating that he brought his action for trespasses committed for other purposes than the exercise of the right of common. To this the only justification pleaded and affirmed by the verdict is leave and licence by a tenant in common. The case, therefore, is as if the only plea to the declaration had been leave and licence by the tenant in common. Can, then, one tenant in common license the taking away the soil? It is as if the action had been brought against the tenant in common himself, for he could not authorise another to do that which he himself could not do. That, if the action had been against the tenant in common, the plaintiff must have succeeded, appears sufficiently from *Co. Litt.* 200, a.

Rule absolute for judgment on the new assignments.

Martin, Q.C., and *Manisty* then showed cause against the rule for entering a verdict for the defendant on one of the issues.

Pashley supported the rule.

Cur. adv. vult.

Jan. 14, 1847. **LORD DENMAN, C.J.**, delivered the following judgment of the court. —In this action of trespass for cutting turf, all the points were disposed of on the argument, except the question on the plea of not possessed. The evidence showed the plaintiff to be but a tenant in common of the locus in quo, and indeed, further, that the defendant had been authorised to commit the trespass by another of the tenants in common. This latter fact is immaterial for the purpose of the present question, except that it furnishes an example of the necessity for holding here that the plaintiff was possessed for the purpose of bringing trespass. For, if possession in such case imported exclusive possession, one tenant in common might destroy the subject-matter for his own benefit, and his co-tenant be without this remedy. If the plaintiff had joined the co-tenant in bringing the action, that co-tenant would, of course, have released the defendant whose act of trespass was committed under his orders. The plaintiff can recover such damages only as are proportionate to his interest in the property, but the wrongdoer has no right to put him to the proof of more than is necessary to show him injured by the wrong done. If the defendant thinks he can have any advantage from the joint interest of another, he must plead it in abatement.

Rule discharged.

EGERTON v. EARL BROWNLOW AND OTHERS

[HOUSE OF LORDS (Lord Cranworth, L.C., Lord Lyndhurst, Lord Brougham and Lord St. Leonards), June 23, 24, 27, 28, 30, August 1, 12, 19, 1853]

[Reported 4 H.L.Cas. 1; 8 State Tr.N.S. 193; 23 L.J.Ch. 348;
21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359]

Will—Condition or limitation—Operation of condition eo instante when interest would otherwise fall into possession—Whether condition subsequent or precedent.

Will—Condition—Legality—Public policy—Interest to depend on obtaining title of duke or marquis.

A. by will devised his freehold estates to trustees in trust to convey them to the use of C., his great-nephew and heir-apparent to the earldom of D., for ninety-nine years, if he should so long live, remainder to trustees and their heirs during the life of C., in trust to preserve contingent remainders, remainder to the use of the heirs male of the body of C., with divers remainders over, "subject nevertheless, as to the uses and estates so to be limited to C., &c., to the several provisos for the determination thereof hereinafter contained." In a subsequent part of the will was this proviso: "Provided always, if C. shall die without having acquired the title and dignity of Duke of B. to him and the heirs male of his body then and in such case the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void, and my said real estates shall thereupon go over and be enjoyed according to the subsequent uses and limitations declared by my will, as if the said C. were actually dead without issue male." There were similar provisos directed to other events. C. died leaving a son, but without having acquired the title of Duke of B.

Held (disregarding the opinions of the majority of the judges, and reversing the decree of the Court of Chancery, LORD CRANWORTH, L.C., dissentiente) (i) the proviso operated as a condition subsequent (although, per LORD ST.

A LEONARDS, it was in fact a contingent limitation) and was not a condition precedent; (ii) as such conditions tended to fetter the free agency of the party in the performance of his duty as a peer, to embarrass the responsible advisers of the Crown in the distribution of titles, and were an insult to the Crown itself, they were at variance with the public good and general welfare, and, therefore, illegal and void.

B Per LORD TRURO and LORD ST. LEONARDS: A contingent gift or interest has an existence capable, as well as a vested interest or estate, of being made to cease; a chance may exist, and a chance may be made to cease; and there is no authority for saying that a condition subsequent cannot operate to defeat a use or estate before it can vest as well as an estate subsequently to its vesting.

C **Notes.** Considered: *Wilson v. Carnley*, [1908-10] All E.R.Rep. 120; *Montefiore v. Munday Motor Components Co.*, [1918-19] All E.R.Rep. 1188; *Re Wallace, Champion v. Wallace*, [1920] 2 Ch. 274; *Re Hanlon, Heads v. Hanlon*, [1932] All E.R.Rep. 851. Followed: *Re Borwick, Borwick v. Borwick*, [1933] All E.R.Rep. 737. Considered: *Fender v. Mildmay*, [1937] 3 All E.R. 402; *Re Piper, Dodd v. Piper*, [1946] 2 All E.R. 503. Referred to: *Hilton v. Eckersley* (1855), 6 E. & B. 47; *Bean v. Griffiths* (1855), 1 Jur.N.S. 1045; *Kiallmark v. Kiallmark* (1856), 26 L.J.Ch. 1; *Scott v. Avery* (1856), ante p. 1; *H. v. IV.* (1857), 3 K. & J. 382; *Clavery v. Ellison* (1859), 7 H.L.Cas. 707; *Shrewsbury v. Scott* (1859), 6 C.B.N.S. 1; *Christie v. Gosling* (1866), L.R. 1 H.L. 279; *Sackville West v. Holmesdale* (1870), L.R. 4 H.L. 543; *Re Harrison's Estate* (1870), 5 Ch. App. 408; *Re Viscount Exmouth, Viscount Exmouth v. Praed*, [1881-5] All E.R.Rep. 647; *Lound v. Grimwade* (1888), 39 Ch.D. 605; *Windhill Local Board of Health v. Vint* (1890), 45 Ch.D. 351; *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630; *Savill v. Langman* (1898), 79 L.T. 44; *Re Kelcey, Tyson v. Kelcey*, [1899] 2 Ch. 530; *Jeffreys v. Jeffreys* (1901), 84 L.T. 417; *Janson v. Driefontein Consolidated Mines, Ltd.*, [1900-3] All E.R.Rep. 426; *Re Hope Johnstone, Hope Johnstone v. Hope Johnstone*, [1904] 1 Ch. 470; *Prince v. Haworth*, [1905] 2 K.B. 768; *R. v. Local Government Board, Ex parte Arlidge*, [1913] 1 K.B. 463; *Rodriguez v. Speyer Bros.*, [1918-19] All E.R.Rep. 884; *Kemp v. Glasgow City Corpn.*, [1920] A.C. 836; *James v. British General Insurance Co.* [1927] All E.R.Rep. 442; *Beresford v. Royal Insurance Co.*, [1936] 2 All E.R. 1052; *Howard v. Odhams Press, Ltd.*, [1937] 2 All E.R. 509; *Monkland v. Jack Barclay, Ltd.*, [1951] 1 All E.R. 714; *Bank Voor Handel en Scheepvaart v. Slatford*, [1951] 2 All E.R. 779; *Re Howard's Will Trusts*, [1961] 2 All E.R. 413.

G As to the nature and validity of conditions attached to gifts, see 39 HALSBURY'S LAWS (3rd Edn.) 914 et seq.; and for cases see 44 DIGEST 440 et seq.

Cases referred to:

- H**
- (1) *Earl of Chesterfield v. Janssen* (1751), 1 Atk. 301; 2 Ves. Sen. 125; 26 E.R. 191, L.C.; 12 Digest (Repl.) 269, 2071.
 - (2) *Lawton v. Lawton* (1743), 3 Atk. 13; 26 E.R. 811, L.C.; 40 Digest (Repl.) 705, 2004.
 - (3) *Chudleigh's Case, Dillon v. Freine* (1594), 1 Co. Rep. 113 b; Poph. 70; 1 And. 309; 76 E.R. 261, Ex. Ch.; 38 Digest (Repl.) 849, 643.
 - (4) *Earl of Kingston v. Pierepont* (1681), 1 Vern. 5; 23 E.R. 264; 44 Digest 459, 2805.
 - (5) *Jones v. Randall* (1774), 1 Cowp. 37; Lofft, 383; 98 E.R. 954; 12 Digest (Repl.) 294, 2263.
 - (6) *Gilbert v. Sykes* (1812), 16 East, 150; 104 E.R. 1045; 25 Digest (Repl.) 419, 28.
 - (7) *Cole v. Gower* (1805), 6 East, 110; 2 Smith, K.B. 246; 102 E.R. 1229; 6 Digest (Repl.) 306, 2228.
 - (8) *Earl of Scarborough v. Doe d. Savile* (1836), 3 Ad. & El. 897; 6 Nev. & M.K.B. 884; 6 L.J.Ex. 270; 111 E.R. 653, Ex. Ch.; 44 Digest 543, 3608.

- (9) *Cooke v. Turner* (1846), 15 M. & W. 727; 14 Sim. 493; 17 L.J.Ex. 106; 53 E.R. 1044; 44 Digest 461, 2820. A
- (10) *Hotham v. East India Co.* (1787), 1 Temp. Rep. 638; 99 E.R. 1295; 12 Digest (Repl.) 489, 3672.
- (11) *Porter v. Shephard* (1796), 6 Term Rep. 665; 101 E.R. 761; 12 Digest (Repl.) 484, 3605.
- (12) *Robinson v. Comyns* (1736), Cas. temp. Talb. 164; 25 E.R. 718, L.C.; 44 Digest 434, 2608. B
- (13) *Jervoise v. Duke of Northumberland* (1820), 1 Jac. & W. 559; 37 E.R. 481, L.C.; 40 Digest (Repl.) 519, 301.
- (14) *Duke of Newcastle v. Countess of Lincoln* (1797), 3 Ves. 387; on appeal sub nom. *Countess of Lincoln v. Duke of Newcastle* (1806), 12 Ves. 218; 33 E.R. 84, H.L.; 40 Digest (Repl.) 523, 342. C
- (15) *Blachford v. Preston* (1799), 8 Term Rep. 89; 101 E.R. 1282; 12 Digest (Repl.) 275, 2115.
- (16) *Harrington v. Du-Chatel* (1783), 1 Bro.C.C. 124; 2 Swan. 159, n.; 28 E.R. 1028; sub nom. *Harrington v. Chastel*, Dick. 581; 7 Digest (Repl.) 179, 124.
- (17) *Carwardine v. Carwardine* (1758), 1 Eden, 27; 28 E.R. 594; 40 Digest (Repl.) 691, 1865. D
- (18) *Plunket v. Holmes* (1661), 1 Lev. 11; 1 Sid. 47; T.Raym. 28; 83 E.R. 15, 271; sub nom. *Blunket v. Holmes*, 1 Keb. 29, 119; 44 Digest 938, 7940.
- (19) *Page v. Hayward* (1705), 11 Mod. Rep. 61; 2 Eq. Cas. Abr. 362; Holt, K.B. 618; 2 Salk. 570; 91 E.R. 481; 44 Digest 436, 2632.
- (20) *Bromfield v. Crowder* (1805), 1 Bos. & P.N.R. 313; 127 E.R. 483; affirmed (1811), cited in 14 East, at p. 604, H.L.; 44 Digest 1043, 8986. E
- (21) *Doe d. Hunt v. Moore* (1811), 14 East, 601; 104 E.R. 732; 44 Digest 1043, 8988.
- (22) *Phipps v. Akers* (1842), 4 Man. & G. 1107; 9 Cl. & Fin. 583; 5 Scott, N.R. 955; 6 Jur. 745; 134 E.R. 453, H.L.; 44 Digest 1044, 8993.
- (23) *Aislabie v. Rice* (1818), 3 Madd. 256; 2 Moore, C.P. 358; 8 Taunt. 459; 56 E.R. 503; 44 Digest 490, 3100. F
- (24) *Gulliver d. Corrie v. Ashby* (1766), 4 Burr. 1929; 1 Wm. Bl. 607; 98 E.R. 4; 35 Digest (Repl.) 792, 75.
- (25) *Dimes v. Grand Junction Canal (Proprietors)* (1852), 3 H.L.Cas. 759; 8 State Tr.N.S. 85; 19 L.T.O.S. 317; 17 Jur. 73; 10 E.R. 301; H.L.; 16 Digest (Repl.) 426, 2273.
- (26) *Townley v. Bedwell* (1801), 6 Ves. 194; 31 E.R. 1008, L.C.; 8 Digest (Repl.) 371, 570. G
- (27) *Duke of Norfolk's Case, Howard v. Duke of Norfolk* (1683), 3 Cas. in Ch. 1; 2 Swan 454; Freem. Ch. 72, 80; Poll. 223; 2 Rep. Ch. 229; 22 E.R. 931, L.C.; reversed sub nom. *Duke of Norfolk v. Howard*, 1 Vern. 163; restored sub nom. *Howard v. Duke of Norfolk* (1685), 14 Lords Journals, 49, H.L.; 37 Digest (Repl.) 78, 187. H
- (28) *Thellusson v. Woodford, Woodford v. Thellusson* (1799), 4 Ves. 227; 31 E.R. 117; affirmed (1805), 11 Ves. 112, H.L.; 37 Digest (Repl.) 139, 642.

Appeal from a decree of LORD CRANWORTH, V.-C., acting for KINDERSLEY, V.-C., dated Feb. 26, 1852.

John William, seventh Earl of Bridgewater, by his will dated Mar. 31, 1823, after charging his estates in Shropshire and Cheshire with an annuity of £12,000 to his wife, Charlotte Catherine Anne Countess of Bridgewater, and with annuities of £4,000 to Sir Charles and Lady Long his niece, gave all his real estates, except his copyhold and leasehold estates thereafter devised, and the estates of which he was either a trustee or a mortgagee, and subject, as to his estates in the counties of Salop and Chester, to the before-mentioned annuities, and to the powers for the recovery thereof,

“unto and to the use of John Earl Brownlow, Edward Herbert Lord Viscount

A Clive, and the said Sir Charles Long, their heirs and assigns for ever, upon
trust, by such conveyances or assurances as shall be deemed expedient, or
counsel shall advise, to convey and assure, settle and limit, all my said hereditaments and real estates hereinbefore devised, with their appurtenances, to the several uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisoes, limitations, and declarations, hereinafter by this my will declared and directed concerning the same: And in the meantime to permit and suffer my said hereditaments and real estates to be held and enjoyed by, or to pay, apply, and dispose of the rents, issues, and profits thereof unto and for the benefit of, such person or persons, or for such intents and purposes as the same would go, or belong to, or be applicable, if such settlement had been actually made pursuant to this my will: And I will and direct, that such conveyance and settlement shall be to the use of the heirs of my body: remainder to the use of the said John Earl Brownlow, Edward Herbert Lord Viscount Clive, and Sir Charles Long, their executors, administrators, and assigns, for and during the term of ninety years, computed from the day next before the day of my death, without impeachment of waste, upon the trusts and for the intents and purposes, and subject to the provisoes and declarations, hereinafter declared and directed concerning the said term, and from and after the expiration or sooner determination of the said term and in the meantime, subject thereto and to the trusts thereof, to the use of James Walter Earl of Verulam, and John Thomas Viscount Sidney, and their heirs, during the natural life of my brother the Hon. and Rev. Francis Henry Egerton, in trust to preserve contingent remainders [with divers remainders over] with remainder to the use of the said Charlotte Catherine Anne Countess of Bridgewater, my wife, and her assigns, for and during the term of her natural life, without impeachment of waste: and from and after her decease, to the use of the said Dame Amelia Long for the term of ninety-nine years, if she shall so long live: remainder to the said John Earl Brownlow and Edward Herbert Lord Viscount Clive and their heirs during her life, in trust to preserve contingent remainders: remainder to the use of the heirs male of the body of the said Dame Amelia Long: remainder to the use of John Hume Cust, commonly called Lord Viscount Alford, the eldest son of the said John Earl Brownlow by my niece Sophia Lady Brownlow, his late wife, deceased, for and during the term of ninety-nine years, computed as aforesaid, if the said John Hume Lord Viscount Alford shall so long live: remainder to the use of the said Edward Herbert Lord Viscount Clive and Sir Charles Long and their heirs, during the life of the said John Hume Lord Viscount Alford, in trust to preserve contingent remainders: remainder to the use of the heirs male of his body; with remainder in default of such issue to the use of the Hon. Charles Henry Cust, second and only younger son of the said John Earl Brownlow by the said Sophia Lady Brownlow his late wife, for the term of ninety-nine years computed as aforesaid, if he the said Charles Henry Cust shall so long live: remainder to the use of the said Edward Herbert Lord Viscount Clive and Sir Charles Long and their heirs, during the life of the said Charles Henry Cust, upon trust to preserve contingent remainders: remainder to the use of the heirs male of the body of the said Charles Henry Cust; subject nevertheless as to the several uses and estates so to be limited to the said John Hume Lord Viscount Alford and Charles Henry Cust, and to the trustees during their respective lives and to the heirs male of their respective bodies, to the several provisoes for the determination thereof hereinafter contained: with remainder to the use of Wilbraham Egerton, of Tatton, in the county of Chester, Esq., and his assigns, for and during the term of his natural life, without impeachment of waste: and from and after the determination of that estate by any means in his lifetime, to the use of the said Edward Herbert Lord Viscount Clive and Sir Charles Long and their heirs, during the life of the said Wilbraham Egerton, in trust to support and preserve the contingent uses and estates hereinafter declared and directed.

nevertheless to permit and suffer the said Wilbraham Egerton or his assigns, during his life, to receive and take the rents and profits of the premises for his or their own use: with remainder, from and after the decease of the said Wilbraham Egerton, to the use of William Tatton Egerton, eldest son of the said Wilbraham Egerton, during his life, without impeachment of waste: remainder to the said Edward Herbert Lord Viscount Clive and Sir Charles Long and their heirs, during his life, in trust to preserve contingent remainders, and to permit him to take the rents and profits as aforesaid: remainder to the first and other sons of the said William Tatton Egerton severally and successively according to seniority, and the heirs male of their respective bodies, every elder son and his issue male to be preferred to the younger and his issue male."

with divers remainders over: and with the ultimate remainder to the testator's own right heirs. The testator further declared that

"in the settlement to be made pursuant to this my will, my said estates are not to be limited successively to the use of the first and other sons of my said brother, or of the said Dame Amelia Long, or of the said Lord Viscount Alford, or of the said Charles Henry Cust, in tail male, but to the heirs male of their respective bodies in the words of this my will; it being my intention, that the vesting of my estates in the heirs male of their respective bodies shall be suspended during the lives of my said brother, the said Dame Amelia Long, the said Lord Viscount Alford, and the said Charles Henry Cust respectively."

After a name and arms clause and a proviso relating to the term limited to Dame Amelia Long, the will continued:

"Provided always, and I declare my will to be (1) that if the said John Hume Lord Viscount Alford shall die without having acquired the title and dignity of Duke or Marquis of Bridgewater, to him and the heirs male of his body, then and in such case the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void; and (2) that if the earldom of Brownlow shall descend and come to him, and he shall not have acquired, or shall not acquire, the title and dignity of Duke or Marquis of Bridgewater, to him and the heirs male of his body, before the end of five years next after he shall become Earl Brownlow, then and in such case the several uses and estates hereinbefore directed to be limited to the said John Hume Lord Viscount Alford, and to trustees during his life for preserving contingent remainders, and to the heirs male of his body, shall thenceforth cease and be absolutely void, and that my said hereditaments and real estates hereinbefore devised shall, in either of the said cases, thereupon go over and be enjoyed according to the subsequent uses and limitations declared and directed by this my will, as if the said John Hume Lord Viscount Alford were actually dead without issue male:

Provided also, and I declare my will to be, (3) that if it shall happen that the said John Hume Lord Viscount Alford shall not acquire the title and dignity of Duke or Marquis of Bridgewater, to him and the heirs male of his body, with the immediate limitation over of such title and dignity to the said Charles Henry Cust and the heirs male of his body, or to the heirs male of his body if he shall be dead leaving issue male, and also that the said Charles Henry Cust shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, then and in such case the use and estate hereinbefore directed to be limited to the heirs male of the body of the said Charles Henry Cust shall cease and be absolutely void; and (4) that if the earldom of Brownlow shall descend and come to him the said Charles Henry Cust, and he shall not have acquired or shall not acquire the title and dignity of Duke or Marquis of Bridgewater, to him and the heirs male of his body, before the end of five years next after he shall become Earl Brownlow, then and in such case the several uses and estates hereinbefore directed to be limited to the said Charles Henry Cust, and to trustees during his life for preserving

A contingent remainders, and to the heirs male of his body, shall thenceforth cease and be void, and that in either of such cases my said hereditaments and real estates hereinbefore devised shall thereupon go over and be enjoyed according to the subsequent uses and limitations of this my will, as if the said Charles Henry Cust were actually dead without issue male :

B Provided also, and I declare my will to be, (5) that if my brother, the said Francis Henry Egerton, shall be created Duke or Marquis of Bridgewater, with such limitations over of the said title and dignity as that the same may, immediately after the failure of issue male of my said brother, come to the said John Hume Lord Viscount Alford and the heirs male of his body, and after them to the said Charles Henry Cust and the heirs male of his body; then and in such case my said hereditaments and real estates hereinbefore devised shall be settled, limited, and enjoyed in such manner, as if the several provisos hereinbefore expressed for the determination of the uses or estates directed to be limited to the said John Hume Lord Viscount Alford and Charles Henry Cust, and to trustees during their lives for preserving contingent remainders, and to the heirs male of their bodies respectively, subsequent to the proviso for taking and using the name and arms of Egerton only, had not been contained in this my will : Provided also, and I declare my will to be, (6) that if the said John Earl Brownlow shall, in case of the death and failure of issue male of my said brother, in his lifetime be created Duke or Marquis of Bridgewater, the said title and dignity being limited to him and the heirs male of his body by the said Sophia Lady Brownlow his late wife only, and not being inheritable by or limited to any other issue male of the said John Earl Brownlow, the same shall be thenceforth equivalent to the acquisition of such title and dignity by the said John Hume Lord Viscount Alford to him and the heirs male of his body, with limitation over to the said Charles Henry Cust and the heirs male of his body; and my said hereditaments and real estates shall be settled and limited, so as to go and be enjoyed, thenceforth and for the future, as if the several provisos hereinbefore expressed for the determination of the several uses or estates directed to be limited to the said John Hume Lord Viscount Alford and to the said Charles Henry Cust, and to trustees during their lives for preserving contingent remainders, and to the heirs male of their bodies respectively, subsequent to the proviso for taking and using the name and arms of Egerton only, had not been contained in this my will, notwithstanding the previous determination, if it shall happen, of the uses or estates directed to be limited to the heirs male of the bodies of the said John Hume Lord Viscount Alford and Charles Henry Cust, under any of such several provisos :

G Provided always, and I declare my will to be (7) that, if the said John Earl Brownlow shall hereafter take any other title than Duke or Marquis of Bridgewater so as to be inheritable by, or limited to, the issue male of his body by the said Sophia Lady Brownlow his late wife, or any of them, then and in such case the uses and estates hereinbefore declared and directed to be limited to the said John Hume Lord Viscount Alford and Charles Henry Cust, and to trustees during their lives for preserving contingent remainders, and to the heirs male of their bodies respectively, shall thenceforth cease and be void; and that thereupon my said hereditaments and real estate shall go over, and be limited and enjoyed, according to this my will, as if the said John Hume Lord Viscount Alford and Charles Henry Cust were actually dead without issue male : Provided also, and I declare my will and intention to be (8), that my said hereditaments and real estates shall not be enjoyed by the said John Hume Lord Viscount Alford, or the heirs male of his body, if he shall by any means whatsoever succeed to or take any title other than Duke of Bridgewater, to which the Marquis of Bridgewater (sic) shall not, if then, or would not, if thereafter to be created, be superior in rank, or have precedence being of the same rank, nor by the said Charles Henry Cust, or the heirs male of his body, if he

shall take any title, either by immediate creation, limitation over, or otherwise, other than Duke of Bridgewater, to which the Marquis of Bridgewater (sic) shall not, if then, or would not, if thereafter to be created, be superior in rank, or take precedence if of the same rank; and that the uses and estates hereinbefore directed to be limited to such of them the said John Hume Lord Viscount Alford and Charles Henry Cust, as shall take any such title contrary to this my will, and to trustees for his life to preserve contingent remainders, and to the heirs male of his body, shall thenceforth cease and be void; and thereupon my said hereditaments and real estates shall go over and be enjoyed, according to the subsequent uses or limitations of this my will, as if he or they taking such other title contrary to this my will were actually dead without issue male."

The testator died without issue on Oct. 21, 1823, and thereupon his brother, Francis Henry Egerton, became Earl of Bridgewater. He died a bachelor on Feb. 11, 1829, without having been created either Duke or Marquis of Bridgewater, and on his death the earldom became extinct. Lady Long, who became Lady Farnborough in consequence of her husband having been created Lord Farnborough, died without having issue on June 16, 1837. She, and Sophia Lady Brownlow, deceased, the mother of Lord Alford and Charles Henry Cust, were the only children of Lady Amelia Hume, the testator's only sister; and, on Lady Farnborough's death, Lord Alford became the testator's heir-at-law. Lord Farnborough died on Jan. 18, 1838, and in June, 1840, Wilbraham Egerton, the elder, was appointed a trustee of the will in his place. The testator's widow died on Feb. 11, 1849. Lord Alford complied with the direction in the will as to taking the name and arms of Egerton, and exercised the power of jointuring contained in the will, by an indenture of April 5, 1849, charging certain hereditaments with £5,000 a year to his wife, Lady Marianne Margaret Egerton. He died on Jan. 3, 1851, leaving the plaintiff, who was an infant, his eldest son, and the heir male of his body. The plaintiff and Charles Henry Cust also complied with the direction as to taking the name and arms of Egerton.

The bill, which was filed in February, 1854, against the trustees, Lord Alford's widow (in whose favour his Lordship had exercised the power of jointuring contained in the will), Charles Henry Egerton, and his son William Tatton Egerton, and his son, after stating the will and codicils, and the facts above detailed, alleged that there was not at the time of the date of the will, or of the testator's death, a dukedom or marquise of Bridgewater either in existence or abeyance; and that it had not, since the decease of the testator, been the pleasure of the Crown to create any such dukedom or marquise, or any such title as Duke or Marquis of Bridgewater; that the plaintiff's father did not, after the date of the will, succeed to, acquire, or take any title whatever; and that John Earl Brownlow had not, since the date of the will, taken any title whatever; that the plaintiff was advised that, notwithstanding the provisoes and declarations in the will having reference to the title and dignity of Duke or Marquis of Bridgewater, he was equitable tenant in tail in possession under or by virtue of the will of the estates, subject to the trusts thereof: that Charles Henry Egerton, Wilbraham Egerton the elder, William Tatton Egerton, and Wilbraham Egerton, the son of William Tatton Egerton, contended, that by reason of the plaintiff's father having died without acquiring the title and dignity of Duke or Marquis of Bridgewater, to him and the heirs male of his body, the use and estate by the will directed to be limited to the heirs male of the plaintiff's father had ceased and become absolutely void, and that the testator's estates had gone over to Charles Henry Egerton, and that Charles Henry Egerton was then entitled to the receipt of the rents and profits of all the estates; and that his son also claimed an interest in the matters in question in the suit: that the plaintiff's title being disputed as aforesaid, the trustees of the will were unable to act without the direction of the court. The bill prayed that it might be declared by the court that the plaintiff was, under and by virtue of the will, equitable tenant

A in tail male in possession of the estates, subject to the trusts of the will; and that the trustees might be decreed to account with him for such, if any, of the rents and profits of the estates from the death of his father as might have been received by them: and that some person might be appointed to manage the estates, and receive the rents and profits thereof in the meantime, and until it should have been ascertained whether the plaintiff or Charles Henry Egerton was the party entitled to the possession and receipt of the rents and profits of the estates. All the defendants, except Lady Alford, demurred to the bill for want of equity.

The demurrers were argued before LORD CRANWORTH, V.-C., and overruled by him on Aug. 20, 1851. All the defendants thereafter put in answers to the bill; and after replication and evidence gone into, the cause came on to be heard on Feb. 26, 1852, before LORD CRANWORTH, V.-C., acting for KINDERSLEY, V.-C. In his

C decree of that date, LORD CRANWORTH decreed that the bill so far as it prayed that it might be declared that the appellant was equitable tenant in tail male in possession of the estates, other than leaseholds for years, subject to the trusts of the will, and absolutely entitled to the estate held on leases for years and the personal chattels respectively, subject to the trusts of such will, but, as to such leaseholds for years and personal chattels, subject to the gift over in such will contained in

D the event of a tenant in tail male by purchase dying under twenty-one years without leaving issue male of his body then living, and that the trustees might be decreed to account with the appellant for the rents from the death of his father, should stand dismissed. In the event which had happened, his Lordship declared, that in the settlement directed in the decree to be made, no present use or estate in possession ought to be limited to the heirs male of Lord Alford in the freehold

E hereditaments; and that on the decease of Lord Alford, the respondent, C. H. Egerton, became entitled to the said hereditaments, and also to the leasehold hereditaments and personal chattels for the term of ninety-nine years, computed from the day next before testator's death, if C. H. Egerton should so long live, discharged from the jointure and term of years for securing the same respectively, expressed to be limited by the indenture of April 5, 1849, but subject to the proviso in the will

F for the determination of the estates of C. H. Egerton; and that the said C. H. Egerton was then entitled to the receipt of the rents of the freehold, copyhold, and leasehold hereditaments, and real estate, and to the possession and enjoyment of the personal chattels; and with the above declaration his Lordship ordered that it be referred to the Master to approve of a settlement accordingly. The decree then provided for the costs. Against that decree, except so far as it provided for pay-

G ment of the costs, the plaintiff now appealed. The case was argued in June, 1853, before LORD CRANWORTH, L.C., assisted by the common law judges, who had been summoned to attend.

The Solicitor-General (Sir Richard Bethell), and Sir Fitzroy Kelly (with them C. Hall), for the appellant.

H *Russell, Q.C. (with him Giffard), for Charles Henry Egerton, the respondent.*

Rolt, Q.C. (with Malins, Q.C., Elmsley, Q.C., and Rendall), for Wilbraham Egerton the elder, William Tatton Egerton, and Wilbraham Egerton the younger, respondents.

A. Hobhouse for the trustees of the will.

I At the conclusion of the arguments the following questions were submitted by the House to the judges:

Taking the facts from the printed cases, but reading the will as if it were a devise to the uses therein mentioned, and not a devise to trustees to convey to those uses. 1. On decease of Lord Alford, did his eldest son, the appellant, become entitled to any and what estate in the lands devised in remainder immediately expectant on the ninety-nine years' term? 2. If he did, is such estate liable to be defeated on any and what event or events, and may it or not come in esse, or revive again on any and what event or events? 3. On decease of Lord Alford, did his brother Charles Henry Egerton, the respondent, become entitled to any and what

estate in remainder immediately expectant on the said term? 4. If he did, then is such estate liable to be defeated on the happening of any and what event or events? 5. Are all, or any, and which, of the several provisoes void? 6. Are the provisoes, or any, and which of them, to be treated as being conditions precedent? 7. In the events which have happened, has the jointure appointed in favour of Lady Marianne Alford ceased? A

On Aug. 12, 1853, the judges delivered their opinions, the majority taking the view that the condition on which the estate of Lord Alford depended was a condition precedent, and since that condition had never been satisfied, no estate arose in Lord Alford; the condition was not void. The seven questions were answered in accordance with this view. B

The House took time for consideration. The following opinions were delivered. Aug. 19, 1853. C

LORD LYNTHURST.—I have read and considered with attention the opinions of the learned judges in this case; and, after weighing the reasons on which they are founded, I am constrained to say, though with deference, that I differ from the conclusions of the majority of those learned persons. It is to be regretted that several of the opinions, as stated on a former day, were prepared during the pressure of the circuit, and without sufficient opportunity of consulting the authorities bearing on the different, and, in some respects, intricate points which the subject involves. But though I regret this circumstance, it was, I have reason to believe, unavoidable. D

Two questions have been raised. First, whether the proviso respecting the title of Marquis or Duke of Bridgewater is a condition precedent or subsequent; and secondly, whether the proviso is valid, or is to be regarded as against public policy, and, therefore, void. As to the first and more technical question, it is, I think, admitted, and cannot indeed be disputed, that the will has been drawn with much care and attention, by a person obviously well acquainted with the force and effect of the terms he employed, and not likely, therefore, to have misapplied them. The testator declares his will to be, that, if Lord Alford shall die without having acquired the title of Duke or Marquis of Bridgewater, to him and the heirs male of his body, then and in such case the use and estate thereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void. These are admitted to be, in point of construction, and according to the constant usage of conveyancers, words importing a condition subsequent. The same words are uniformly used in different parts of the will, as denoting conditions subsequent, and in cases where no other interpretation can be put on them. In no instance are they used to express a condition precedent. In the previous passage of the will, the limitation of the uses and estates to Lord Alford and Henry Cust, and to the trustees during their respective lives, and to the heirs male of their respective bodies is declared to be "subject to the provisoes for the determination thereof hereinafter contained"; and the use of the distinct word "determination," as to all these uses and estates indiscriminately, manifestly shows that the testator intended the conditions contained in those provisoes to be, as to all of them, conditions subsequent. In like manner, in the proviso respecting the testator's brother being created Duke or Marquis of Bridgewater, the testator speaks of the proviso for the determination of the use or estate directed to be limited to the heirs male of the body of Lord Alford, and so also in the proviso immediately following relative to Earl Brownlow. E
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It is further to be observed, that in the very clause in question the condition is admitted to be a condition subsequent as to one part of it, although it is contended to be a condition precedent as to the other part. In a case of necessity, indeed, such a difference of interpretation in the same clause might be adopted; but a very strong case must be made out to justify such a departure from the ordinary rules of construction. The testator declares that the use or estate limited to the heirs male of the body of Lord Alford shall in a certain event cease and be absolutely

A void—words which, even in their ordinary acceptation, and without reference to any technical rule, denote exclusively a condition subsequent. The proviso has nothing of the character of a condition precedent. It is not said that on the occurrence of such an event a use or estate shall arise, but that, if such an event shall not have occurred, a use or estate previously limited shall be defeated. It does not create—it determines and destroys. The will, in fact, consists of a series of limitations in favour of different persons and sets of persons; and the obvious meaning as to the point in question is, that if Lord Alford shall die without having acquired either of the suggested titles, the particular limitation in the series created in favour of the heirs male of his body shall cease and be void—the limitation is in effect to be struck out of the series, and the next limitation, in favour of Henry Cust, is to be advanced—but then on a condition which, if invalid, can have no operation.

C But, my Lords, it is said, and not improperly said, that whether a condition is to be construed as precedent or subsequent must depend on the intention of the testator, to be collected from the whole instrument; that no particular form of words is absolutely necessary to express the one condition or the other; and that the most strict technical words or form may bend to the clear and manifest intention of the testator. But, far from the intention of the testator, to which I shall presently advert, being at variance with the terms used according to their natural and legal construction, it appears to me that the case is just the reverse. The fallacy, if I may so speak, which has led to the forcible conversion of the words importing a condition subsequent in this case into a condition precedent, seems to be this—namely, that a condition subsequent is not properly applicable to the limitation of a contingent use or estate. But such use or estate is an interest recognised by the law, and not unfrequently of great value; and there is no more inconsistency in making it subject to a condition subsequent, by declaring that, if a certain event shall not have occurred, the limitation shall determine or cease and be void, than if it were an interest vested or in possession. If the law allows such a limitation to be made, such an interest to be created, it follows, as of course, that it may be vacated or determined. It is clear that the framer of the will considered it as no objection to the effect of a condition subsequent, that the use or estate limited was contingent, since he expressly provided that the use or estate in this instance, which he must have known to be contingent, should on the failure of a certain event cease and determine. It is also to be observed that in the clause respecting the name and arms the testator declares that if the person entitled, etc., shall refuse to take, or shall discontinue to use, the name and arms of Egerton, etc., all such estates directed to be limited to the sons of such person in tail male, as for the time being shall be in contingency or suspense, as the case may happen, shall cease, determine, and be void—thereby expressly stating that a use or estate which is described in terms as being in contingency shall cease and be void. Here I may remind your Lordships that one of the learned judges (ALDERSON, B.) though his opinion in the result is unfavourable to the appellant, after adverting to the words “shall cease and be absolutely void,” observes

H “that they must be allowed to be very strong words, indicative of an intention on the part of the testator that the heirs male of the body of Lord Alford should in some way or other first take the estate, and, on the contingency occurring, lose that which they had before taken. And in such a case the words would be to be treated as a condition subsequent.”

I Then with respect to the intention of the testator, as it is to be collected from the whole of the will, did he intend that the condition should not operate as a condition subsequent according to the plain and obvious meaning of the words (for this is what is contended), but on the contrary, as a condition precedent? He was not inops consilii, and we cannot assume that he did not know the effect of the terms that he used. Then how would they operate? If the testator considered, as I think it reasonable to conclude he did, that the proviso was legal and binding, his

intention would be equally effectual whether the condition were precedent or subsequent; and it would, therefore, not be necessary, on this supposition, and in order to effect that intention, to do the violence which is attempted to the language and form of the condition. If he were mistaken in this respect, that is no reason for altering the plain words which he has used, and to introduce other terms, in order to give effect to what may be conjectured as to the disposition he might have made of his property had he been aware of the legal obstruction to the execution of his wishes. If we are to indulge in what I must consider as misplaced conjecture, I should think it not reasonable to suppose that he would, if the object he had in view could not be legally accomplished, and by no failure or default of those whom he intended to benefit in the first instance, desire that the estate should go over and be enjoyed by those who were the most remote objects of his bounty. For the same reason, if the testator entertained a doubt as to the legality of the proviso, it is not unreasonable to suppose that he would, as the safer course, have made the condition a condition subsequent rather than a condition precedent. There appears to me then to be no sufficient reason, founded on any supposed intention of the testator, to do violence to the words that have been used—and that they should, therefore, be interpreted according to their plain technical as well as ordinary sense; that is, denoting a condition subsequent.

The second point to be considered is whether the proviso is at variance with public policy; for if so, and the condition be a condition subsequent, then the result will be the same as if no such proviso had been contained in the will; but otherwise, if the condition be a condition precedent. This is not a technical question, but must be considered on general principles, with reference to the practical effect of the condition; and we must bring our observation and experience to bear in determining it.

It is a well established rule of law, that a condition against the public good or public policy, as it is usually called, is illegal and void. SHEPPARD'S TOUCHSTONE and LORD COKE are direct authorities on this point. In more modern times, we find LORD HARDWICKE, in *Earl of Chesterfield v. Janssen* (1) already cited by POLLOCK, C.B., stating (1 Atk. at p. 352):

"Political arguments in the fullest sense of the word, as they concern the government of a nation, must be, and always have been, of great weight in the consideration of the court; and though there may be no *dolus malus* in contracts as to other persons, yet if the rest of mankind are concerned as well as the parties, it may properly be said that it regards the public utility."

In *Lawton v. Lawton* (2) the same eminent judge says (3 Atk. at p. 16):

"These reasons of public benefit and utility weigh greatly with me, and are a principal ingredient in my present opinion."

It is unnecessary to cite other authorities in support of this well-established rule of law. What cases come within the rule must be decided as they successively occur. Each case must be determined according to its own circumstances. When the case of a trustee dealing with his *cestui que trust* was first considered, it must, in the absence of precedent, have been determined on weighing the public mischief that would arise from giving a sanction to such dealing. So as to transactions between attorneys and their clients; also as to seamen insuring their wages, and other similar cases referred to in the course of the argument. The inquiry must, in each instance where no former precedent occurred, have been into the tendency of the act to interfere with the general interest. The rule then is clear. Whether the particular case comes within the rule is the province of the court in each instance, acting with due caution, to determine.

My Lords, the duties incident to the peerage (and Lord Alford might at any moment, by the death of Lord Brownlow, have become a peer) are of the gravest and highest character, and in the proper discharge of which the interests of the Crown and the public are deeply concerned. These duties are both legislative and judicial; in addition to which, a peer of the realm has a right, when he deems it

A necessary, to demand an audience of the Sovereign, and to tender his advice respecting public affairs. In the framing of laws, it is his duty to act according to the deliberate result of his judgment and conscience, uninfluenced, as far as possible, by other considerations, and least of all by those of a pecuniary nature. He acts judicially, not merely in the appellate jurisdiction of the House, but also in the various matters usually referred to committees, in which the strictest independence

B is to be observed, and all foreign influence of every description to be carefully avoided. Such is the position, and such the duties, of a peer of the realm; and it follows that any application or disposition of property, that has a tendency to interfere with the proper and faithful discharge of these duties, must be at variance with the public good, and consequently illegal and void. It is true that creations of peers and promotions in the peerage emanate from the Crown; and the respect we

C entertain for the Sovereign will not allow us to suppose that, in the exercise of this or any other prerogative, he can act otherwise than according to the best and purest motives. But we all know that, practically, this power is exercised according to the advice of the minister—that the Crown rarely exercises it except at his suggestion, and on his recommendation; and, further, that these honours are usually granted, except in cases of extraordinary merit or distinguished public services, to the partisans and supporters of the administration for the time being, and seldom to its opponents. This is obvious to all, and confirmed by everyday experience. What, then, would be the practical result of this state of things with reference to the proviso now under consideration? If an estate, in this case of great extent and value, is made to depend on a creation or promotion in the peerage, is it reasonable to suppose—speaking generally (for we must so consider the subject), and without

E reference to particular individuals—that such a state of things would not have at least a tendency to lead the party thus interested to act, and without much inquiry, in accordance with those who could insure the permanence of the estate to his descendants, to induce him to support their views and measures, without any very scrutinising regard as to their effect or propriety, and thus to affect that free agency which it is a duty, as far as possible, to keep unimpaired? That there may be

F exceptions—honourable exceptions—to such an influence I do not mean to doubt. There may also be individuals who, from the dread of being supposed to be swayed by such motives, might adopt the opposite course, which would also be liable to objection. But, taking mankind as we find them, we could not, without wilfully closing our eyes and discarding all the results of our observation and experience, come to the conclusion that such a position would not have a tendency, and, in

G some cases at least, a strong tendency, to produce the result which I have stated, viz.: to fetter the free agency of the party in the performance of the important duties incident to his position as a member of the peerage; and it follows, I think, that a proviso or condition which has a tendency to produce such results must be at variance with the public good and general welfare.

H It is admitted that any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void. The character of the judge, however upright and pure, does not vary the case. No less strong must be the principle where applied to the important duties of legislation and to those judicial duties of the peerage, on which so many and vast interests depend. In the decision already adverted to, as to the insurance of the wages of a seaman, the only principle on which it proceeded was that such a practice, if permitted, would tend

I to relax his exertions for the safety of the ship, and thus affect the proper performance of his duty, in the faithful and active discharge of which the public interest is concerned; and so in other instances which have been mentioned, and to which it is not necessary more particularly to refer. Each case must, as I have already mentioned, be decided on its own circumstances, as applied to the established rule of law regarding the public interest and welfare; or, to use the words already quoted of LORD HARDWICKE, “upon political arguments in the fullest sense of the word, as they concern the government of a nation.” It is true, and cannot be disguised, that other motives, such as love of power, eagerness for office, etc.,

may, and undoubtedly do, more or less influence the conduct of men in the performance of these various and important duties. But if cases exist which are beyond the reach of the law, they afford no reason why, when a further influence is attempted to be created by an unusual disposition of property, and courts of justice are called on to give effect to such disposition, they should not refuse to give it their sanction. The question then is, whether a proviso, such as we are considering, would have, if acted on, a tendency to influence improperly the performance of those duties to which I have referred. I think it would have such an influence, and I consider it, therefore, to be against the public good, and consequently illegal and void.

Other objections, some of them of a more refined nature, may be urged against this proviso; but I am not disposed to enter into further detail, as there are several noble Lords present, of great learning and experience, who have given much of their attention to this case, and are prepared to state their opinions upon it.

For the reasons then which I have thus given, I think, but not without some hesitation, considering the respect due to those learned persons from whom I have the misfortune to differ, that the judgment in this case cannot be sustained.

LORD BROUGHAM.—The conclusion at which I have arrived, but not without some hesitation, considering the respect which I entertain for the opinions of the learned judges from whom I have the misfortune to differ, is that the judgment in this case cannot be sustained.

The decision of this case must depend upon two points—the effect of the proviso respecting the dignity, and the legality of that proviso. If the proviso makes the acquiring of the dignity a condition precedent to the estate tail in remainder, that remainder never existed, and the legality of the proviso is immaterial. If the proviso only avoids or makes to cease the estate tail in any way created, then this estate is only destroyed if the proviso is legal. It appears quite impossible to doubt what the frame of this proviso is, what were the intentions of the testator, and what were the pains taken by the well-skilled conveyancer who drew the will to give those intentions expression and effect. The remainder is to the use of the heirs male of Lord Alford's body—not if he shall, or provided that he shall, acquire the dignity, but without any such condition or contingency. Then follows a general declaration or provision, subjecting the uses and estates so limited to Lord Alford and the heirs male of his body to “the several provisoes for the determination thereof hereinafter contained.” So that the remainder, having first been given without any conditions, is subjected to a proviso for its determination, that proviso being afterwards inserted. I observe some unwillingness to regard this proviso as properly a condition, whether precedent or subsequent: and it is said to be only in popular language a condition. It appears, however, to come distinctly within the description of a condition. It is a condition imposed on Lord Alford—he is to acquire the dignity; and the impossibility of his doing so, were it admitted to the fullest extent, would not make it the less a condition. A gift to A. for life, remainder to B., if A. shall go to Rome in three hours, would prevent the remainder from ever vesting or even existing, and would so operate as a condition precedent. This is of no consequence to the present argument, the point I am now dealing with, whether we take it as a condition, or as a circumstance or event, or generally as a contingency. It may be of more importance as to the other question, that of legality.

The use or estate then, which had been limited without any words of condition or any words importing contingency at all, is declared to be subject to the proviso, not for annexing a condition or contingency to the use or estate coming into existence, but for working “a determination” of that use or estate; and then we have the proviso thus referred to, on the decease of Lord Alford without having acquired the dignity:

“the use and estate hereinbefore directed to be limited to the heirs male of his body” (and, as I am now dealing with it not as executory, but as at common

A law, I will leave out the executory words), "the use and estate hereinbefore limited shall cease and be absolutely void."

The proviso thus answers, and most exactly answers, the description given of it in the preceding clause, in which it is referred to the clause which subjects the uses and estates before limited to the after-mentioned proviso. It is most truly a "proviso for the determination thereof." So when, in the jointuring clause, the proviso is respectively referred to, the same expression is used—the uses are said to have been "determined and made void by virtue or according to the provisos."

B If it be contended that the words, although denoting cesser, avoidance, destruction, may possibly mean also prevention, preclusion, causing non-existence as well as destroying existence, we may then look to the other provisos, if any can be found in which the same expressions are used, where there is only one possible sense imputable to them; and accordingly we find this occurs twice over—if Lord Alford shall become Earl Brownlow, and shall not within five years acquire the dukedom or marquissate, all uses limited to him, to trustees to preserve contingent remainders, and to the heirs male of his body, "shall thereafter" (that is, at the end of five years) cease and be absolutely void, and the real estates go over as if he were actually dead without issue male." This is clearly, and without any possibility of question, a cesser, a defeasance of a particular estate vested in possession, and of a remainder expectant on its determination; and no doubt whatever can arise that here the words import a condition subsequent. So the power of jointuring is given; and if Lord Alford at any time during his life shall execute it, the jointure so made and covenanted to be made by him shall cease and "be void," "if the uses and estates shall be determined and made void by the aforesaid proviso"; and the jointure is "thenceforth to cease and be void"—that is, from and after the determination and avoidance of the uses and estates limited to Lord Alford, and of the estate tail to his issue. It is quite undeniable, therefore, that in these two provisos condition precedent is out of the question; there is a condition subsequent only. The estate to Lord Alford and the remainder to the heirs male of his body in the one, the jointure given to his widow in the other, are to cease by his not having acquired the dignity—to cease after his own estate had become vested in possession, and after he had executed the jointuring power.

E It is said, indeed, that the condition may be subsequent as regards the one limitation, and precedent as regards the other; and for this somewhat violent construction the reason is alleged that the proviso was so framed as to meet either of two contingencies—the death of Lord Alford without acquiring the title, and his becoming Lord Bridgewater and not obtaining it in five years; and this, it is said, explains and justifies the use of the words—that is, their use in both cases. But really this is not so; for the part of the proviso which relates to Lord Alford's decease might have been framed in words importing a condition precedent—as that no such uses or estate should be limited to heirs male of his body, instead of a direction that it should cease and be absolutely void; and then the use and estate, both to himself and his issue male, would have been directed to cease and be void from and after the five years. Indeed, it is quite plain that the two provisos are separate and independent: they refer to different estates; the one to the estate tail; the other, both to the estate of Lord Alford and the estate tail. They relate to different periods: the one to the death of Lord Alford; the other, to the expiration of five years from his succeeding his father; and the word "thenceforth," which only refers to the last antecedent, "end of five years," has no application to the former part of the proviso, which is complete in itself. The concluding part, as to the estates going over, applies to both; and, accordingly, it says, "in either of the said cases," so as to leave no doubt of the deliberate intention.

I Then must it be said, that there is no estate existing to which the words of cesser can apply? The limitation to Lord Alford, with remainder to his issue male as purchasers, may possibly be regarded as an entire limitation and taking effect in Lord Alford's life, so that the conditions subsequent could operate on it. Without

denying that this is a possible view of the matter, it may be said that we are not driven to it in order to give the proviso the effect which it plainly was framed to have, as contemplating a contingency determining an existing estate. For there would, independent of Lord Alford's estate, be an existing remainder, contingent indeed—and in two ways contingent—both contingent during the particular estate, and subject to the further contingency of the dignity not being acquired: a contingency which, if operating by way of condition precedent, prevents the remainder from arising; if operating by way of condition subsequent, destroys that remainder or causes it to cease.

The difficulty arises from the negative nature of the condition. If it had been a remainder expectant on the determination of the estate, and to cease and be void if Lord Alford obtained a certain dignity, there could have been no doubt or difficulty. But even the consideration that the estate should cease the instant of its coming into existence does not appear to import anything absurd or self-repugnant. It is not nearly so refined as the possibility of a seisin supposed in the well-known case of *Dillon v. Freine* (3), in order to serve contingent and non-existing uses, and the supposition made in some other cases in order to avoid greater absurdities or contradictions. The momentary nature or duration of the estate may possibly be the result, the consequence, of regarding the condition as subsequent. On the other hand, it must be admitted that, if we are not to treat this as such a condition, no expression of the testator's intentions could have been sufficient to make it so considered. The same objection might have been urged, even if he had said in terms, "I direct this to be taken as a condition subsequent, and not as a condition precedent," in the same manner as he has superfluously intimated his will respecting the suspension of estates in the heirs male during the existence of the life estates.

So we are driven to admit this must be a condition subsequent, unless there is a rule of law to prevent it so being, which will hardly be contended. I have been treating this as a limitation to uses (and not a devise to trustees to convey to such uses), as the learned judges have been directed, of course, to regard it. But, having clearly ascertained the intention, I apprehend we are so to deal with the settlement, so to direct its being made, as will give that ascertained intention effect. This can only be done by giving some estate on which the condition subsequent can operate, as, indeed, certain of the judges appear to have thought—one more doubtfully, another plainly and explicitly. Nor do I find that any of these learned persons has a doubt on the plain import of the words employed by the testator. None of them appears to doubt that he intended a condition subsequent, although most of them consider that, from such estate not existing, his words must be construed differently from his meaning. My Lords, it is quite unnecessary to speculate upon the grounds of the testator's intention. It has been suggested that he may have said: "If I have a right to stimulate Lord Alford, and thereby obtain the junction of dignity with the property, I do so; if I have no such right, then I shall not desire to exclude my nearest relations." But it is not safe to indulge in such suppositions, and it seems by no means called for in this case; and they are open to objections derived from the frame of the will. I also pass over the somewhat extraordinary results which might follow from the proviso in case it were deemed legal and effectual. Thus, the possession of the estate might have been vested in one branch of the family for many years, in case Lord Alford had died leaving a son five or six years after the testator's decease, so that the devises over might have taken effect; but after twenty or thirty years, Lord Brownlow obtaining the dignity, they would have reverted to the issue of Lord Alford. Such consequences might follow whatever view we took of the condition, though more likely to follow from that condition regarded as precedent. No such consequence can follow, if it be considered as both subsequent and illegal.

We are, therefore, brought to consider the second question, which only becomes material on our deciding the first in favour of the condition being subsequent. The proviso is that, if Lord Alford shall not acquire the dignity in his lifetime, the

A estate shall pass from the heirs male of his body immediately on his decease, and that if he, having acceded to the earldom of Brownlow, shall not acquire the dignity within five years, the estates shall pass from himself as well as from his heirs. The creation of Lord Brownlow, the father, a duke or marquis, with limitations to the heirs male of his marriage with the testator's niece, is declared to be equivalent to the acquiring the dignity by Lord Alford. It is very possible that, if the expression had been, not "acquire," but "be created," in the main proviso, the same consideration would have been applicable, knowing as we do the manner in which dignities may be conferred—in which they sometimes have been, and always may be, conferred. But we are to regard the precise expression used, and by it plainly is intended, "Lord Alford's obtaining it by his own exertions." If the testator had been asked, whether he did not contemplate Lord Alford becoming a duke or marquis, either through the public service of his father, thereby exalted, or through his own services in after life, he would in all likelihood have thought the question designed to turn him into ridicule. He would probably have so regarded the suggestion, that, by leading an exemplary life, by strictly performing all the duties of his station, the father or son might find himself raised in the peerage without further or more active efforts to aid his ascent. No one can seriously believe that the testator contemplated such a rise—that he had in his view anything but a strenuous exertion to reach the desired height—that he attached the forfeiture of the estate to anything but the want of exertion or the want of success, and rather to the former than to the latter kind of failure. Here, my Lords, I lay out of view the arguments urged—powerfully and not inappropriately urged—on the tendency of such conditions and family arrangements to interfere with the free exercise of the prerogative. My view is pointed in another direction. I look towards their manifest tendency to cause corrupt proceedings, to encourage attempts on the virtue of one class of public servants, to lay snares for the integrity of another class.

That the Crown is the fountain of honour, and the Sovereign must be presumed incapable of giving a wrong direction to its streams, is an undeniable principle of the constitution—an undoubted position of law. But there is another quite as irrefragable, which supersedes it, and precludes its application to the present question. The Sovereign can only act by advisers, and through the instrumentality of those who are neither infallible nor impeccable—answerable, indeed, for all that the irresponsible Sovereign may do, but liable to err through undue influence, and to be swayed by improper motives. The proviso gives Lord Alford the strongest inducement to use the means of unduly influencing the dispensation of royal favour; and the will places these means at his disposal in an ample measure. A revenue of £50,000 a year and upwards depends on his obtaining the dignity; and that large income may be employed, with the influence of his rank and station to boot, in furthering the attainment of this end. In these times, no one will pretend that the coarse form of naked bribery would probably be resorted to. But suppose the will had borne the date of 1678, instead of 1823, will any one pretend that the same improbability would have existed? Will any one affirm, that the very persons from whom some illustrious members of this house descend would have withheld their influence over, I will not say the Sovereign, but the ministers of the day, towards raising the devisee to the rank which their own progeny had attained; or would have spurned a gift of much less than £50,000 to propitiate that influence? If I go back half a century more than is necessary, it is because of a decided case. I might have stopped at 1723, and suggested that the possibility would even then have been anything rather than remote of a skilful application of great resources obtaining a considerable advancement in the peerage, through certain favourites better known than respected. In those days—possibly of George I, certainly of Charles II. this would have been considered as within the bounds of possibility. But surely it can hardly be maintained that the condition, which would on this ground have been held illegal then, has become lawful now, in consequence of a change in the degree of probability that it might lead to corruption. The tendency is alone to be considered; and unless the possibility is so remote as to justify us in

affirming that there is no tendency at all, the point is conceded—gifts, bequests, conditions, contracts, are illegal from their tendency to promote unlawful acts, without regard to the amount of the inducements held out or interest created, the position of the parties, or any other circumstances which go to affect the probability of the unlawful act being done. A

As I cannot regard the argument on improbability in this case, so neither can I the suggestion that such conditions may have respect either to lawful or unlawful proceedings, and that we are to presume that lawful only are intended. Suppose even that it were said, Acquire the dignity by all lawful means, as was *Earl of Kingston v. Pierepont* (4)—but there are no such words here—still, suppose there had been, this would make no difference so long as unlawful means might be resorted to on lawful means failing; for the encouragement to wrongdoing would still be held out, and it might be effectual notwithstanding the qualification adjoined by way of guard. In that case it was very far from clear, that the dukedom might not have been sought and even obtained without corruption, by “best becoming and lawful means”—the expression used in the will. The sum of £10,000, a sum at that time equal in force and effect to twice as much at the present day, might have been judiciously employed to increase, and (the Statute 49 Geo. 3, c. 118 [repealed], against selling seats, not having passed) by lawful means to increase, the court's minority on the Exclusion Bill; and no service could have been more gratefully acknowledged by the King or the heir-presumptive—none more liberally rewarded. Yet the possibility of another use being made of the money determined that great judge—renowned alike for sagacity and incorruptible integrity in *facie populi*—to allow the demurrer and dismiss the bill, B C D

“for that it is against the law that such titles and honours, which are properly the rewards of virtue and merit, should be purchased by money.” E

Can we doubt that if he had seen an estate of a hundred times the value made to depend on obtaining a dukedom, he would have rejected the suggestion that this title and honour might have been sought after by “best becoming and lawful means,” and that the use of none other was to be presumed? Enough that other means might have also been employed; and that, even if the terms of the condition did not suggest, nay, though they excluded such a course, it yet easily came within these terms. F

In later times the same disregard of the comparative probability of the two courses being taken has been evinced by the language of the courts, the tendency towards the undue proceeding being held sufficient. In *Jones v. Randall* (5), which was the case of a wager on the event of an appeal to this House, and held to be merely an innocent wager, LORD MANSFIELD said that had it been with a Lord of Parliament it would have clearly been unlawful and void—and why? “On account of its mischievous tendency,” says LORD ELLENBOROUGH in *Gilbert v. Sykes* (6) (16 East, at p. 158); and yet, as was stated by his Lordship: G

“The danger of these illustrious persons being influenced was infinitely remote; but that, notwithstanding the improbability of any mischief, in fact it was void, on account of its tendency on general rules of law.” H

His Lordship, in *Gilbert v. Sykes* (6) and also LE BLANC and BAYLEY, JJ., applied the same general rule on the same grounds, refusing to take into account the remoteness of the risk that assassination would be committed or the policy of the state be interfered with. So in *Cole v. Gower* (7), when the court was pressed with the argument that the security in question never could have induced the parish officers intentionally to let the pauper child perish, the court said that on principles of public policy it could not allow them to acquire such an interest, whether they were likely to abuse their trust in consequence or not. I

The case has been put of a gift conditioned on the party offering a living; and the possible tendency of this to encourage simoniacal traffic has been supposed no impeachment of the gift. It is easy to put such cases, in which a very trifling variation would entirely make the condition illegal on that very ground, from the some-

A what anomalous state of our law respecting simony. But what shall be said of a bequest to all the adult males of a parish where sectarian feelings ran high combined with political violence, ten per cent. to be paid down, the remainder when A. B., ministering to a small minority of the parish, should cease to be the rector? There are parts of the United Kingdom in which A. B.'s life would not be insurable: though without doubt the parishioners might entitle themselves to the residue of their legacies innocently, by investing the ten per cent. in the purchase of another living, or in obtaining from the incumbent the resignation of his cure. But the possibility of a crime being committed would make the condition at once be deemed illegal which had a tendency in that direction.

Thus far touching the tendency of this condition to produce and facilitate attempts at obtaining the dignity by corrupt means—attempts, it is admitted, unlikely to be made at the present day, and still more unlikely to succeed. But there are other means of a far less guilty cast, and which are not to be rejected from our consideration; for they are neither so unlikely to be employed, nor are they without great injury to the public weal. As the stern voice of prerogative has been said to be replaced by the gentler accents of influence on the part of the Sovereign, so on that of the subject the ruder forms of corruption have assumed the less repulsive features of intrigue. But, as regards the duties and the functions of the legislature, the law and constitution are inflexible—its members, whether by hereditary or elective right, are there only to consult *circa ardua regni*; and though, in their corporate character, they can, like the Sovereign, do no wrong, individually they may be seduced or deterred from the due discharge of their office. Dignities are, in contemplation of law, to be bestowed for services, or other merits; but they may likewise be sought by submitting to the personal views of a minister, by exerting the influence of property so as to affect elections, and by using that property in a way that the law discountenances; or by guiding the conduct of the persons returned to Parliament, or by directing the course of those filling hereditary seats away from consultation for the interests of the realm, and towards the attainment of the desired advancement. In point of fact, it is as certain as the existence of Parliament that the views of men are occasionally thus pointed, and their conduct guided by these motives. For examples of this we need not go back to the body which existed less than a quarter of a century before the date of this will, sitting in a house which a bystander, a dignitary of the Church, described to be as ‘half a bowshot from the college;’ and where contracts were notwithstanding made for time—that is, political support hired out for a few important months, or even weeks, when some crisis gave every vote a high value, and when it was remarked by the same authority that the attitude of climbing and crawling is the same. In purer times and places the conduct of higher men in both Houses of Parliament has been notwithstanding all but avowedly shaped by the desire of obtaining title, or a step in the peerage. It is, therefore, idle to represent the condition, which makes acquiring a dukedom necessary to preserving a vast estate, as only contemplating a bare possibility—as not addressed to the Parliamentary conduct of the party invested with the precarious possession—as not likely practically and in fact to sway that conduct. But the law reprobates the yielding to such sinister motives; reprobates both the direction of that conduct in order to obtaining the dignity, and the grant of the dignity in consideration of that conduct; and not only reprobates, but discourages, forbidding, not only the wrongful course, but whatever has a tendency towards making it to be pursued. We are not, therefore, allowed to say that the party should not be presumed to seek the honour by undue means, or the dispensers of royal favour to grant it for reasons other than his merits. It is very possible that neither the one nor the other may be incorrect—that neither the individual nor the minister may swerve from the line of their duty; it is even far from probable that either will: but the law regards possible events not more unlikely than these; and, taking security against the infirmity of human nature, regards the tendency as well as the act, and removes the motives to offending, that it may not have to punish the offence. Truly when we find such remote probability

of abuse as amounts to a bare possibility made the ground of decision—the bare possibility of a peer being influenced by a £5 wager to decide a cause on which it was next to impossible he should ever sit in judgment—we may well take into our consideration the possibility of his political conduct, his voice on questions of public policy being biased by the desire of obtaining the dignity which should protect himself or his family from ruin. Yet it is undeniable that his yielding to this bias is a plain breach of duty, especially in a peer, inasmuch as it is contrary to the exigency of the writ whereby he is summoned to attend and to deliberate. That the minister who, to reward such an adherent, prostituted the honours of the peerage, would be culpable, is not denied; but it is a guilt very far from unprecedented. In the present case it would be all the more grave, because of the injury that it must work to the devisees over; and, accordingly, titles have been refused, even leave to change a name withheld, in order to avoid all preference of parties minded to act *ad captum legati*. But all this does not in anywise weaken—it greatly strengthens—the argument; for it illustrates the tendency of such conditions to undermine the virtue of the complying minister, as well as of his unscrupulous partisan.

My Lords, upon these grounds, I entirely agree with the proposition of my learned and noble friend, namely, to reverse the decree now under appeal.

LORD TRURO.—Having arrived at the same conclusion, and for the same reasons mainly as those which have been addressed to your Lordships by my noble and learned friend who first addressed you, I shall have to repeat very much in effect that which he has already uttered. But in so doing I shall only state to your Lordships the course that I have taken, and which has led to the conclusion at which I have arrived; not having been previously aware of the contents of that judgment (beyond its general result) which your Lordships have just heard read.

In this case the will devises the estate to trustees, with a direction that a settlement shall be made embodying the limitations and uses mentioned in the will, but making them subject to the provisos in the will for the determination thereof; and, in a subsequent and distant part of the will, the proviso in question is inserted, being one of those referred to in the limitations. The question which arises on that proviso is whether it should be construed to have the effect of a condition precedent, or the effect of a condition subsequent. The distinction becomes extremely important in the present case, in reference to the second question which your Lordships will have to decide; that is, whether the proviso which for convenience has been called a condition, but which correctly speaking it is not, that the limitations in favour of the Brownlow family should only take effect in the event of the title of Marquis or Duke of Bridgewater being acquired, is a proviso which the law will allow to bind the estate. It is possible that the legality of the proviso may affect its construction; and for the purpose of considering the construction of it, I shall in the outset assume that it is illegal, and shall reserve any observations upon that point until after my remarks upon the construction of the clause upon that footing. The following is the proviso to be construed: [His LORDSHIP here read the proviso.]

It may be convenient to notice that there are certain rules or principles of construction connected with the right decision of this case. Thus, the intention of the testator is the governing principle in the construction of wills; and this intention is to be collected from the whole will, and not from particular expressions or detached passages alone. But, on the other hand, in the case of trusts executed, such intention of the testator must be collected, not conjecturally, but from the language of the will itself; and words and forms of expression having a known legal import must be understood in their technical sense, unless it is to be collected from express words, or by plain implication, that they are to be understood in some other sense. Although in the case of executory trusts the courts have in certain cases properly assumed a greater freedom in effectuating what appears to be the general intention of the author of the trusts, than in the case of trusts executed, yet, even in the case

A of trusts executory, an intention must not be imputed by mere uncertain conjecture in contradiction to the express words; and especially where it is manifest that the will was drawn, not by a person who used technical expressions without knowing the meaning of them, but by a person well skilled in the practice of conveyancing. Again, although the courts will frequently alter the position of words and clauses, and put other meanings on them than those which they prima facie import, yet
B this is never to be done to give effect to an unlawful intent, or in any case where such alteration or interpretation is not really necessary: moreover, where a gift is good in itself, but is followed by an unlawful or repugnant condition or qualification in a distinct clause, the gift is upheld, and the condition or qualification, which alone is obnoxious, is rejected.

The first part of the proviso, which in terms purports to cause the cesser
C of the use and estate directed to be limited to the heirs male of Lord Alford, in case of his dying without having acquired the title of Duke or Marquis of Bridgewater, is in the nature of a condition subsequent, and not of a condition precedent. The proviso, when taken as a whole, is not in the nature of a condition precedent. No estate is to arise on its fulfilment; nor is it a conditional limitation properly so called, because, although it purposes to defeat a use or estate, it does not create
D a new estate or interest in the room of the use or estate so defeated. Nor is it simply in the nature of a condition subsequent, because it not only defeats one estate or interest, but it proceeds to provide that the property shall go over to the objects of the ulterior limitations. In truth, as a whole, it is what the testator himself designates it, a proviso for the determination of the use directed to be limited to the heirs male of Lord Alford; and it is also a proviso which thereby,
E and by express provision, accelerates the subsequent estates or interests. It is similar in this respect to the proviso in *Earl of Scarborough v. Doe d. Savile* (8), except that in that case the cesser was of a vested interest, whereas in the present case it is a cesser of a contingent interest. But the first part of the proviso in question is in the precise form of a condition subsequent, penned in the regular technical way, for it is annexed to an estate or interest created by a previous clause
F or previous part of the instrument, and, in the failure of the condition, the use or estate is "to cease"; whereas, if it had been of the nature of a condition precedent, framed in the ordinary technical way, it would have formed a part, and usually and more properly the introductory part, of the clause whereby the estate to which it is annexed would be created; and, on the fulfilment of it, an estate would arise: see per ROLFE, B., in *Cooke v. Turner* (9), 14 Sim. at p. 503.

G It is also an important circumstance that this proviso is in the precise form of conditions in the same will, which are beyond all dispute conditions subsequent. It is true that no precise technical form or position is essential to render a condition precedent or subsequent. If it can be collected from the will itself, that the testator's intention was that the condition should be a condition precedent, or that it should be a condition subsequent, it is to be so construed, however expressed.
H I refer to the remarks of ASHURST, J., in *Hotham v. East India Co.* (10), 1 Term Rep. at p. 645, and of LORD KENYON in *Porter v. Shephard* (11), 6 Term Rep. at p. 668; and the remarks of LORD TALBOT in *Robinson v. Comyns* (12), Cas. temp. Talb. at p. 166, properly considered, are not inconsistent with this statement. As the condition in question is in the regular form of a condition subsequent, and as it is in the very same form as the other conditions in the same will, which are unquestionably conditions subsequent, the onus of showing that it was intended to be the very opposite of that which on its face it would appear to be—that is, the onus of showing it to be a condition precedent—lies upon those who would put that construction upon it.

I As the use or estate was only to cease or be void in the given event on the death of Lord Alford, before which time it could not vest—as it was to cease and be void before it had ever vested—it has been contended, and the majority of the learned judges have adopted the position, that, by reason of the contingency, the words "cease and be void" can have no correct and appropriate application to the use and

estate referred to. It is said that, the use and estate not being vested, it cannot cease and be void, consequently the proviso cannot operate as a cesser or determination; and that, to have any effect, the proviso must be construed as a declaration that the acquisition of the prescribed dignity should operate as a condition precedent to any use or estate arising or vesting, in which case the legality or illegality of such condition precedent is immaterial. It has been assumed to be so clear that the proviso can have no operation as a cesser or determination of the contingent use or estate, that neither from the Bar nor by the judges has any reason, principle, or authority, been mentioned or adduced in support of the point. It appears to me that the learned judges (owing, perhaps, to the little time and opportunity afforded them for research) have mistaken the common and ordinary examples of a rule for an exact and perfect definition of it. I do not deny that the examples, on which those learned persons would seem to have relied, may be in the nature of conditions precedent or subsequent; but I cannot assent to the assumption that they form the limits of the rules by which provisions of such a nature are to be ascertained.

This will, my Lords, is evidently drawn by a skilful draftsman. Numerous contingencies, which might interfere to thwart or disappoint the testator's intentions or wishes, are anticipated and provided for with a degree of ability and professional skill which, if correctly estimated, must induce great caution and mistrust in entertaining an impression or opinion that the draftsman had adopted words which, although of known established technical meaning, were yet senseless and inappropriate in relation to the use and estate of which he was speaking, and were incompetent to produce the legal effect for which he used them; and, in fact, rendered the proviso, as he framed it, incapable of any sensible or legal construction. It seems to me that the expression here used is perfectly correct as applied to the gift or the interest made or created by the limitation. For a contingent gift or interest has an existence, capable, as well as a vested interest or estate, of being made to cease and become void. The vesting has nothing whatever to do with the question; it is perfectly immaterial. In the one case, a contingent gift or interest exists; in the other case, an actual estate exists. The two things are very different; but each exists, and each may properly be made to cease and become void. Indeed, a use, *eo nomine*, though it be only inceptive, inchoate, or potential, may be properly said to exist, and to cease and become void, as well as a use clothed with the actual seisin, or in other words an actual estate. Who can deny that even a chance may exist, and a chance may be made to cease?

My Lords, it may be admitted it was the object of the proviso, and the intention of the testator, that the use of the estate to the heirs male of Lord Alford should not vest at his death, otherwise than in the event of his having acquired the title of Duke or Marquis of Bridgewater. But, it should be observed, that that object and intention would be equally accomplished by construing the condition, if valid, a condition subsequent. But it seems to be further contended, not only that such was the intention of the testator, but that the effect of the proviso was that, from the very necessity of the case, the use or estate to the heirs male of Lord Alford could not vest at his death otherwise than in the event of his having acquired the title of Duke or Marquis of Bridgewater; and that, therefore, the proviso, coupled with the limitations to which that proviso relates, virtually amounts to two conditions precedent, such as these: "If Lord Alford should acquire the title of Duke or Marquis of Bridgewater, then to his heirs male; but if he should not have acquired that title, then over," which is what is commonly called a contingency with a double aspect—and that, consequently, the proviso, as regards the use to the heirs male of Lord Alford, is in fact a condition precedent, and attended with the incidents of a condition precedent. This reasoning, however, appears to me to be fallacious, and little short of confounding things which are essentially different. For, as the very learned editor of GILBERT ON USES, p. 177, observes:

"The distinction is very refined; but it is certainly well established, that if an

- A estate be limited to A. until B. return from Rome, and after B.'s return to C., the limitation to C. is a good contingent remainder; whereas if the estate is limited to A. for life, with a proviso that if B. return from Rome the estate shall go to C., in this case the limitation to C., although precisely the same as the former in effect, is not a remainder, but what is generally termed a conditional limitation."
- B The very affirmative words which have been constructively supplied in the present case, viz., "if Lord Alford should acquire," etc., are wanting. We have only the negative words, "if he should die without having acquired," etc., which constitute a condition precedent in regard to the acceleration of the posterior uses, but a condition subsequent as regards the prior use to the heirs male of Lord Alford. Take the words as they stand, and then according to their *prima facie* and technical
- C import, what the testator says is this—not that an estate to the heirs male is to arise on a given contingency, which would be a condition precedent; but that an estate previously directed to be limited to the heirs male should cease on a given contingency, which is a condition subsequent. As little are we authorised, I conceive, to supply the affirmative words above mentioned, as we should be authorised to supply the collateral limitation "until B. shall return from Rome," in the
- D example just given of a conditional limitation by the learned editor of GILBERT ON USES. To do so would be to translate the testator's language into words of a different legal import, and thereby, as I shall presently endeavour to show, defeat instead of effectuating his intention. The mere fact that, if the condition determines the use at all, it must determine it before ever it could vest even in interest, does not show that it was a condition precedent. It may virtually have the effect
- E of a condition precedent in this respect, without being a condition precedent in its form, or of the nature of a condition precedent, and without being attended with the incidents of a condition precedent.
- My Lords, it appears to have been assumed, that, according to the definition, and indeed according to the import of the very term itself, a condition, to be a condition
- F subsequent, must necessarily be a condition to defeat a use or estate subsequently to its having become actually vested, that is, vested in interest at least. It is true, indeed, that ordinarily the use or estate which is defeated by a condition subsequent has become vested before the time when the condition defeats it; and it may be admitted, at least for the sake of argument, that one reason why a condition subsequent was so called, is, that it is a condition which ordinarily defeats a use or estate subsequently to its vesting. But, although this may be one circumstance
- G from which its name may have been derived, yet its nature is not necessarily restricted to the thing from which its name is derived. Although the condition may have received that name because such an operation is ordinarily incidental to it, yet, even if this were the only reason why the condition was entitled a condition subsequent, that fact would not prove that in all cases the use or estate, to be defeated, must be actually vested before the condition operates. But there is another reason
- H why a condition subsequent may have received that name. A condition may be called precedent, when it precedes, and because it precedes, the words of gift; and a condition may be called subsequent when it follows, and because it follows, the words of gift, whether that gift is vested at the time when the condition (which follows it) is to operate or not. Regularly a condition precedent does in form precede, and a condition subsequent does in form follow, the words of gift, and in all cases a condition precedent does, in substance and by construction at least, precede the gift, and a condition subsequent does, in substance and by construction at least, follow the gift; for if the gift is to arise on a condition, such condition must in substance precede the gift; and if the gift is to be defeated, or the use or estate is to cease or determine by the condition, such condition must in substance follow the gift; the gift in the latter case must have an existence antecedent to the operation of the condition which is to defeat it, or cause it to cease or determine.
- I For these reasons, my Lords, it seems to me that no satisfactory grounds have

been shown for the position that a condition subsequent can operate only on a vested estate or interest, or that a condition subsequent cannot operate to defeat a use or estate before it can vest, as well as an estate subsequently to its vesting. To get rid of the argument arising from the frame of the condition, it is urged that this is not a case of a trust executed, but of a trust executory—that is, of a trust raised by a direction in the will to make a settlement to uses, or upon trusts which are indicated in such will, but left to be formally declared by the settlement so directed; and it is beyond dispute that this is a case of a trust executory in that sense of the word, and that in the case of a trust executory a court of equity is in the habit of directing the property to be settled in such a mode as will best carry out the testator's intentions: see *Jervoise v. Duke of Northumberland* (13); *Duke of Newcastle v. Countess of Lincoln* (14). But admitting all this, the onus still lies on the party contending that this proviso, framed as a regular condition subsequent, is a condition precedent, to show that in reality it was intended to be a condition precedent.

How then is such an intention manifested, or on what grounds is it clearly presumable? I do not perceive any necessary or plain implication, any vehement or strong presumption, any clear or sufficient indication, of such an intention. But I do see what appear to me to be perfectly conclusive grounds, for holding that an intention existed that this should not be a condition precedent. Not only does the testator, or rather the skilful draftsman for him, adopt the frame of a regular condition subsequent, but he designates the provisos embodying that condition, and the other conditions which are unquestionably conditions subsequent, by one general term of "provisoes for the determination of the uses and estates directed to be limited." The true character of those provisos is therefore described in the will itself. But, independently of this, there are very strong grounds for negating the presumption (if any existed from any other circumstances) that this is of the nature of a condition precedent. I conceive that probability, and reasonable and strong, if not vehement, presumption, is all in favour of the construction that this is of the nature of a condition subsequent. The will of the Earl of Bridgewater, although it may not be faultless, is yet admitted evidently to be the production of a gentleman well skilled in the law of property, and in conveyancing practice—and it may, I think, be fairly considered that he knew that the conditions he was instructed to insert were of questionable validity, and that he, therefore, very prudently and properly adopted a course which he knew to be safe with regard to those conditions, by making them conditions subsequent. But whether he knew this or not, one thing is certain, that the insertion of a condition subsequent was safe, whether valid or not while the insertion of a condition precedent would have been most mischievous, and subversive of what we may fairly presume to have been the most important designs of the testator. For, assuming the condition to be bad, it would do no harm if subsequent; whereas, if bad and precedent, it would accomplish the testator's intent as regards the heirs male of Lord Alford; and while the heir male of Lord Alford, though the prior object of the testator's regard, would lose his estate, it would go to those who were only secondary objects of his regard, and be held by them freed and discharged from the condition which in their case is a condition subsequent, and which, therefore, if bad, would be wholly inoperative.

The grounds on which I say that the condition in their case is a condition subsequent are these. The operation of the first branch of the first proviso is made dependent on a single circumstance, viz., the non-acquisition of the title by Lord Alford, during whose life the limitation to the heirs male of his body was necessarily contingent. But as regards the second proviso, relating to the heirs male of C. H. Cust, the operation of that is made dependent on two circumstances, namely, the non-acquisition of the title by C. H. Cust, during whose life the limitation to the heirs male of his body would also be necessarily contingent, and also the non-acquisition of the title, with certain special limitations, by Lord Alford, and which he might have acquired after the death of C. H. Cust, and consequently long after the limitations to his heirs male had become actually vested. The distinction between the first and second provisos in this respect, or at all events the conse-

- A quences of that distinction, as regards the defeating instead of effectuating the general intention of the testator, would seem to have escaped attention. The limitation to the heirs male of C. H. Cust is only contingent on account of the person. It is not contingent by reason of the second proviso relating to the acquisition of the required title. For it is a rule that an interest shall, if it can consistently with other rules of law, be construed to be vested, either in the first instance or as early as may be, rather than contingent; and the second proviso, relating to the acquisition of the required title by Lord Alford or C. H. Cust, does not prevent the application of this rule—for that proviso (as far as regards the words of the cesser) is not only capable of being deemed to be of the nature of a condition subsequent, so as not to interfere with the vesting of the limitation to the heirs male of C. H. Cust on his death; but, so far as regards the words of cesser, it is in the precise technical form and language of a condition subsequent, insomuch that to hold it to be of the nature of a condition precedent would be a gratuitous infringement of the rules of law, both as to the construction of conditions and as to the construing interests to be vested rather than contingent. Hence, if C. H. Cust had died in the lifetime of Lord Alford, the heir male of C. H. Cust would have taken a vested interest under the limitations of uses, and notwithstanding the second proviso. In that case, if Lord Alford had not subsequently acquired the prescribed title, and C. H. Cust had not acquired it before his death in the lifetime of Lord Alford, the second proviso would, as being in the nature of a condition subsequent, defeat such vested interest in the heir male of C. H. Cust, if such second proviso were legal; but if such second proviso were illegal, the property, on the death of Lord Alford, would, by virtue of the first proviso (supposing it to be of the nature of a condition precedent, whether legal or illegal), go over from the heir male of Lord Alford, the primary object of the testator's bounty, and would vest in possession in the heir male of C. H. Cust, the secondary object of the testator's bounty, unaffected by the second proviso, as being of the nature of a condition subsequent and illegal, or by any condition whatever. Thus, if the condition were bad, the only effect of holding it to be a condition precedent would be this—to cause the prior objects of the testator's bounty to lose the estate under an unlawful condition, because the dukedom or marquissate was not acquired by descent, and to give the estate to the secondary objects of the testator's bounty, though they might not possess the title, which it was equally the desire of the testator that they should possess, if they should become the owners of his property. This would be accomplishing a part only of the testator's intention, in such a way as to be utterly subversive of his real intention as a whole. For it can never be supposed that he could wish to take the estate in effect from the prior objects, and give it to the secondary objects of his regard, when the condition would be as unfulfilled by the secondary as by the prior objects.
- I have considered the case as if it had been a question whether the words constituted a condition precedent or a condition subsequent. But I have already intimated that in reality the proviso containing the contingency is neither a condition precedent nor a condition subsequent, but "a proviso of cesser and acceleration." Whatever might be the true decision if this were strictly a question between a condition precedent and a condition subsequent, the case assumes a very clear form when it is considered, as it is in fact, a case of a distinct proviso of cesser and acceleration, even separated (though I need not lay any stress on that circumstance) by an interval of several pages from the limitations of uses.
- I My Lords, the case, thus considered, resolves itself into this short form. First, there are certain limitations of uses; secondly, there is a proviso of cesser and acceleration of some of those uses. The limitations of uses are free from objection. The proviso of cesser and acceleration is alone the subject of objection. If that objection is well founded, if the proviso is invalid, the limitations of the uses remain unaffected by it. The gift being valid in itself, and the proviso which occurs in a subsequent part being alone obnoxious, such proviso must be regarded as struck out of the will. If it be said that the testator would not have inserted those limitations of uses, or would have varied them, if he had known that the proviso of cesser

and acceleration was to have no effect given to it, I answer that is a mere conjecture, on which no judge could act. I may here observe, my Lords, that it appears to have been thought that the inoperativeness of a void condition subsequent, or of a provision of the nature of a condition subsequent, depends on the circumstance of its being annexed to a vested interest. But I apprehend that the reason of that inoperativeness is not the repugnance of the law to defeat vested interests, but the repugnance of the law to illegality, and the rule "that no provision (whatever may be its nature), dependent on an illegal event for its operation, shall have any effect."

In concluding this part of the subject I may here remark that the opinions I have expressed, as to the nature and effect of the first proviso, are the conclusions at which I have arrived, treating, as the learned judges were directed to treat, the dispositions in this will as legal limitations. Considering them, as they in fact are, executory trusts, I think the grounds for those conclusions would be still stronger. If I had not been satisfied that the first proviso, so far as regards the words of cesser, is of the nature of a condition subsequent, and that the words "cease and be void" would be capable of having effect given to them, even if this were a trust executed, I should have taken the course suggested by one of the learned judges, Alderson, B., namely, to have submitted to your Lordships the expediency of considering the question as depending on an executory trust.

My Lords, for the opinions of all the learned judges I entertain a most unfeigned respect, and it is a subject of regret with me that those very learned persons have not had more time and better opportunities to form the opinions for which we have had to thank them. I know from experience too well what the duties of a judge are on circuit, not to feel how fully they are entitled to the indulgence with which several of them have begged your Lordships to receive their opinions. But I cannot forbear adding a hope that this case will not be hereafter cited as a precedent for any judge expressing an opinion, unless he is himself present, when there shall unfortunately be a difference of opinion among those learned judges.

On the grounds I have stated, I have come to the conclusions that the proviso is in the nature of a condition subsequent, and will operate as such if legal; but, if it be illegal, it must be rejected, as if it were not contained in the will, and the gift will remain unaffected by it. I have hitherto assumed that the proviso, by which the limitation to the heirs of the body of Lord Alford is restrained from taking effect otherwise than in the event of Lord Alford, during his life, obtaining the title of Duke or Marquis of Bridgewater, is illegal and void; and I now submit to your Lordships the grounds on which I think the correctness of that assumption is established.

In considering the question of the legality of the proviso, and the inexpediency of unnecessary restrictions on the free disposition of property by will, or by any other means known to the law, it cannot be denied that such dispositions are subject to some limits and restraints, and that the law will not uphold such as have a tendency prejudicial to the public weal. Every man is restricted against using his property to the prejudice of others. The principle embodied in the maxim *sic utere tuo ut alienum non laedas*, applies to the public in at least as full force as to individuals. There are other mixims equally expressive of the principle, *nihil quod est inconveniens est licitum*, and *salus reipublicæ suprema est lex*. The principle I conceive to be universal, as governing as well transfers by deed, as the validity of contracts, and dispositions by will. I know of no textbook or case impugning this principle. Confusion occasionally arises from considering cases as establishing a principle, when they are in truth but instances of its application. It must be superfluous in this House to cite authorities to prove the existence of such a general law. It is to be found enunciated in our law books from the earliest times, and by names of the highest authority in the law—by LORD COKE, 1 INST. 206 b; by BRACTON, bk. iii. fol. 100; and in SHEPPARD'S TOUCHSTONE, chap. 6, 132, which I believe is the work of DODDRIDGE, J.; by LORD HARDWICKE, in *Earl of Chesterfield v. Janssen* (1), 1 Atk. at p. 352; by LORD KENYON and LAWRENCE, J., in *Blachford v. Preston* (15); and it has been acted on in a great variety of cases, marriage brokerage bonds, restric-

A tions upon trade, the disability of sailors to insure their wages, sale of offices not within any statute, as in *Harrington v. Du-Chatel* (16), which was a case of security given as a consideration for having procured an office in the King's household; and LORD THURLOW expressed himself to the effect that it was a matter of public policy, similar to marriage brocade bonds, where, though the parties are private, the practice is publicly detrimental, and in cases of wagers respecting the public revenue and numerous other instances. This law has been expressed in different language, but all to the same import, as applying to matters against the liberty of the law, contrary to law, and against the public good. Some criticism has been wasted in relation to the language in which the principle has been expressed. Exceptions have been made to the expression of "public policy"; and it has been confounded with what may be called "political policy," such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign states, with all which, as applied to the present subject, it has nothing whatever to do. Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.

D I shall, therefore, assume that a disposition of property by will, equally with a disposition in any other form, which has a tendency injurious to the public interest or good, the law will not uphold; and the law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition; and if the law is to be practically applied, it cannot be administered with reference to the character of the individuals to whom the question may relate. E It has been said that this rule is too uncertain and vague to be capable of practical application by judges, on account of the various opinions which may be entertained on the subject of public policy. But I think the remark has no just foundation. There is no uncertainty in the rule that the law will not uphold dispositions of property and contracts which have a tendency prejudicial to the public good. There will be, no doubt, occasionally a difficulty in deciding whether a particular case is F liable to the application of the principle. But there is the same difficulty in regard to the application of many other rules and principles admitted to be established law. The principle itself seems to me to be necessarily incident to every state governed by law. Judges, who are charged with the duty of seeing that dispositions and transactions are not upheld and enforced which are contrary to the spirit of the law, must be presumed to take care not to apply the law to doubtful cases, and G unnecessarily interfere to affect with the transactions which are the subject of judicial investigation. It is true, as I have before said, that remarks have been made on particular cases as calculated to impugn the principle, when the point of doubt has really been whether the circumstances of the particular case brought it within the principle.

H The facts, of which the tendency to affect the public interest is to be determined in this case, are these. A vast estate is given, and the continuance and permanency of the gift is sought to be made to depend on the event of a certain title of peerage being obtained—the object, as declared, being to annex the estate to the title required; and the question is, has the hope of retaining an estate of £80,000 a year, by the acquisition of the title referred to, any tendency to influence the devisee I to a conduct which may be inconsistent with his public duty as a subject, and prejudicial to the public good? This question relates to the tendency of the hope on practical conduct.

My Lords, the materials for arriving at a sound conclusion, on the question must be gathered from a consideration of the political and social state of the country. It will not be necessary to refer to history to ascertain the particular sources of influence by which the grant of peerages may have been obtained, or what change in those sources may happen at any future period—whether those in the year 1668, when *Earl of Kingston v. Pierepont* (4) occurred, in which £10,000 was bequeathed,

to be employed in "all lawful and becoming manner to obtain a dukedom," and which was held to be void, may be identical with those of after-times—because the principle of the constitution is, that the peerage at all times should be conferred with reference only to the character and circumstances of the individual elevated, and that pecuniary or any other influences, apart from those merits, ought not to be exercised or prevail: but the question should be determined by the tendency generally, of the possession of such vast wealth being made dependent on the acquisition of a peerage or elevation to a higher rank in it, to furnish motives calculated to influence the conduct of the devisee, and independently of a sense of duty. The question is not affected by the character, or supposed character, of the individual who may be placed in such circumstances; the general tendency of being placed in such a situation is the point to be considered.

My Lords, in considering the question proposed, I do not think it proper or necessary to introduce the name of the Crown as the fountain of honour, further than to say that, constitutionally, the Crown is under no legal responsibility in relation to the exercise of its prerogatives, and that the Crown is esteemed never to act on its own motion and impulse, but by the advice of those who are held responsible to the public for their due exercise. If the law is to be administered faithfully, the question must be considered with reference to the fact that it is the minister of the day by whom and through whom, in substance, peerages are acquired. Let any one look through the list of creations since the commencement of the reign of George III, and say, if there are not instances (not to say how many) of elevations to the peerage of individuals whose public merits entirely eluded public attention, and whose elevations, whatever those merits might be, could only be ascribed to Parliamentary or political influence. Probably there are few persons with so little regard to their credit as to controvert the fact. With the exception of persons engaged in the public service, and of a very few other persons, has it not been the course for such patents to be conferred on the adherents of the party in power, or Minister of the day? Or have they not frequently resulted from Parliamentary influence? However fortunate each Minister may have been in his turn in the great merits and virtues possessed by his adherents and his party, many not very auspicious persons yet do not doubt that those merits would have gone unrewarded, unless they had been associated with Parliamentary power and influence. The possession of Parliamentary boroughs, and a large expenditure in aiding the election of party associates, have certainly not been unsuccessful in arresting the attention of the Minister of the day to the merits of those adherents who were owners of the boroughs and expenders in elections. Those who affect to doubt on this subject may arrive at satisfaction by ascertaining what proportion of the peerages, within the period I have mentioned, or of the advancement of the old ones, have fallen on individuals not belonging to the party in power at the time of their elevation. Can it be said that, at the present day, no peerages have been acquired by the influence of party and Parliamentary support? Does experience warrant the conclusion, that the devise in question has no tendency to furnish a motive for public conduct independent of duty? My Lords, in considering the effect of the hope of retaining the estate by procuring a higher title, by an existing peer already charged with high duties of a legislative, political, and judicial character, can it be said that it has no tendency to influence him in his public conduct?—or, in case of a commoner, to induce him to create and exercise a Parliamentary influence, and regulate his conduct with views resulting from other considerations than the good of the state? Will it be asserted that motives much less cogent, though equally connected with personal objects, have influenced political conduct on very important occasions. I repeat that what may occur in the particular instance is not the point. It is the general tendency. It has been said that the extent of the fortune should have no influence on the question; which, properly explained, can only mean that the degree or quantum of power to produce the evil referred to is not an ingredient in determining whether the devise has a tendency adverse to the public good. No advantage can result from putting a number of hypothetical cases, which are supposed to have more or

A less analogy to the present. A difference of opinion may prevail in respect of each or of any of the cases, as to their falling within the principle; and to arrive at a correct decision may require as much examination and deliberation as the case in question, and without any advantage to be derived from the result.

The present case must be decided with reference to a general principle, but the particular circumstances of the case are the only safe materials on which to determine whether the case itself is brought within the general principle. I cannot doubt that the testator was too well acquainted with the state of the society of which he was a member, not to know the ordinary means by which individuals of large fortune have been elevated to the peerage, whose situations were very likely to afford the opportunity of performing great public service; and that he never supposed that Lord Alford was in a station likely to have the opportunity of distinguishing himself by the performance of any such public services as would be calculated to ensure the reward of a marquissate or dukedom, however eminent the personal virtues and merits of that individual might be and no doubt were. The means which the testator put within his power would enable him to display a merit quite as probable to procure the desired distinction as public services—that is, the merit of becoming a powerful and influential political and Parliamentary supporter of the minister of the day. Many individuals would hesitate to express a confidence in their political independence and virtue, if such merits were to be followed by a loss of £80,000 a year. My Lords, I entertain the opinion that individuals ought not to be allowed to dispose of their property in any manner which furnishes a motive to conduct in relation to acts of State, independent of a sense of right and duty. I can conceive no good motive to influence such a gift. It is plain that personal regard for the individual is not the only, or even the principal, motive for the gift. I admit the object sought to be attained is not illegal. I also admit that illegal or improper means need not necessarily be used to attain it. But I do not think that the testator could have contemplated any legitimate means by which it could be acquired, and that he could have anticipated the use of no other means than Parliamentary or private influence, obtained through the medium of the means which he should furnish. The views, intentions, or contemplations of the testator in this respect do not, in my opinion, form material ingredients in the question. Giving credit for the purest intentions on the part of the testator, and the highest honour to Lord Alford and his parent peer, I think the tendency of the devise ought to prevent those considerations from influencing the decision; and that that tendency is to induce the individual to apply his wealth to the furtherance of his great object, in a manner which others had found to facilitate the attainment of similar objects, and to political conduct irrespective of the proper motives.

My Lords, *Earl of Kingston v. Pierepont* (4), has a strong bearing on the present case. In that case £10,000 was given to the Marquis of Dorchester and William Pierepont, to be applied by them in all becoming and lawful manner to procure a dukedom. On a bill being filed to set apart that sum to be applied according to the will, the bequest was held to be illegal and void. It will be observed that the testator sought to guard his bequest, from objection, by directing the application of the £10,000 to be in all becoming and lawful manner. But the court held that no lawful and becoming manner could be discovered in which the £10,000 could be applied to enable him to procure that title. In that case the money was given to be applied to procure the title. In this case the estate is to be retained, if the title is acquired; and it is distinguishable from the case cited, by the omission of any direction that the income to be derived from the estate should be applied to acquire the title. But I think the circumstance that the estate would be lost, if the title should not be acquired, has such a tendency to induce the appropriation of the funds derived from the estate in endeavours to obtain the acquisition, and to influence Lord Alford's conduct as a subject, as to bring the case within the principle of the decision cited.

My Lords, my opinion has been founded on what I firmly believe is the just result of my experience of the present state of the political community which must be

subjected to the operation of the proviso in question; and I cannot, when exercising the solemn duty of a judge, deny or reject that experience, in order to adopt a sentimental theory of purity, which, in truth, is not applicable, and as to which I doubt whether it is applicable to any former, or will be applicable to any future, period of the history of this country. In conclusion I have to repeat that I think the dispositions of property being made dependent on matters of state, which furnish motives that have a tendency to affect the conduct of the objects of such dispositions, as subjects, is not a restriction which can be deemed improperly or unnecessarily to interfere with the disposing power which the law has given. The caprice and fancy which may influence individuals, in regard to the disposal of their property, may have abundant scope for exercise, although not allowed to the extent of interfering with the public good. The power to regulate the disposal of property after death ought not to extend to the doing it in a manner tending to the prejudice of the living; and I think that to do it in a manner which furnishes motives for conduct independent of a sense of duty, is a disposal tending to prejudice the living, and is such as the law will not uphold. And, on this ground, I think the proviso by which the limitation to the heirs of the body of Lord Alford is made to depend on the acquisition of the title of Marquis or Duke of Bridgewater, is illegal, and is in the nature of a condition subsequent, and that no effect can by law be given to it; and that, as the will contains a perfect limitation to the heirs of the body of Lord Alford, which character the appellant fills, full effect must be given to such limitation; and, therefore, that the decree which has been made in the cause must be reversed.

LORD ST. LEONARDS.—As it is my fortune to address your Lordships last on this occasion, I shall take care not to go over the same grounds which have been already laid before your Lordships. I may state that I entirely concur in the grounds as stated by my noble and learned friends.

The questions are of great importance in point of law; their importance in that respect exceeds even that which the case derives from the value of this property. The property, I take it, in round numbers may be considered as exceeding in value two millions of money; but the questions of law are not less important. I am sure, in the estimation of your Lordships: and I must say that I for one shall never accede to any representation under any circumstances to hasten, as we have hastened under the peculiar circumstances the decision of this case; for it has led to considerable inconvenience to the learned judges, and has pressed on them in the manner to which they have adverted in their judgment, and which, no doubt, has a tendency to take from the opinions of those learned persons some of the weight to which those opinions are entitled. If I differ in the result at which I arrive from those learned judges, I must be considered to do so with the greatest possible hesitation, and with the greatest deference to opinions of which I know so well the value.

The questions, as has been already stated, are two: one on the nature of the condition itself, whether it be what is called a condition precedent, or a condition subsequent; and the other as to its legality or illegality. I look on it to be of the highest importance to ascertain exactly what is the nature of those limitations, before we consider what the particular provisions of the will are. It seems rather late in the day to refer to first principles; but they lie in a few words, and they appear to me to be essential to the proper understanding of this case. Under the common law, as your Lordships all know, you could not create such estates as are now made, and you could not raise a fee on a fee—you could not have a possibility on a possibility. You were so crippled and confined, that, even if you could only manage to create a determination of an estate by either a conditional limitation or by a condition, the heir-at-law only could take advantage of it—the consequence of which was that you could have no limitations over to a stranger or to other persons, in the way that you now may. When uses were introduced, the law was entirely changed, and you were enabled by means of uses, which were founded originally on trusts, to introduce all those modifications of property which are now

A so well known in the law of this country. It seems, with regard to the opinions of all the learned judges, to be of importance to ascertain what a contingent use is; because they seem to think that that which does not exist cannot be defeated; and that I understand to be the ground of the opinion which they have delivered on this first point.

B In point of fact, a use is a thing simply of confidence. If one man have a legal interest, which of itself is only a creation of the law, the man who has the legal interest may tread with a landlord's tread on the land; he has it only as by force of law. But when you come to the use of a legal estate, which gives a right, the possession of the estate may be in one person, and the use or confidence in another. When, therefore, a man has the use, it is simply that there is a confidence placed in some person, who has the legal estate, to permit the other person to have a usufructuary interest; that is a thing which is simply a creation of the law—it is a thing C which is not tangible—it is a thing simply of confidence. When the Statute of Uses came in and transferred uses into possession, that is, made uses possessions, and gave to the equitable person, to him who had had the benefit, the legal estate, then it was a simple transfer, by force of the statute, of the legal estate, which we call the seisin, to serve those uses. What did the contingent use then become? It D did not alter its character, except in this respect, that the legal estate was carried to it; and so it was made in that sense a possession. Speaking of a vested estate, for example, it was in possession, when before it was a simple use or confidence. But it arises in the same way; although, being coupled with the legal estate, it does not alter its character and quality. It does not alter its character afterwards, because it becomes a legal estate. Instead of the thing being vested simply in E confidence, the legal estate is in another. If you come to a contingent use, there is no variance; the contingency is a thing resting in confidence; and when the time arrives for that contingency to take effect, the statute executes that use or confidence, and gives the legal estate. Why should it not? Before it vests it is a limitation, and it is a limitation of the use. What distinction can there really be in law, as to the operation of defeating a confidence, whether it be a confidence to F allow a person to enjoy an estate for the next ten years, or whether it be a confidence to allow me, if I go to Rome, for example, or if I have a son born within a certain time, to enjoy the estate from that period? In either case it is a confidence. In the one case it is a confidence to be executed at once, and in the other it is a confidence depending on a future event; but equally to be executed, and equally to be served out of the legal estate of the person in whom that estate has G been vested.

On the mere abstract question, can a contingent use be divested or not, before it actually takes place, I should say, why should it not? What is there to prevent you from saying, if a certain event arises, I direct you to stand possessed of that estate on confidence, for A. B. C., and so on? But if a certain other event happen, I then tell you that that confidence is to cease—the trust is to cease, as we call it— H and the use is to cease—the trust ceases and the use ceases. The statute goes with, and operates to give, the seisin to all these uses, and they may all be determined precisely the same as vested estates. That, therefore, is a mere abstract question. I can have no doubt that a contingent use is a confidence—a trust—and therefore is an estate first in equity, and then at law; but which, before the event arises, is just as capable of being defeated by a matter subsequent I as any vested estate in the possession of any person.

The next point, which it will be necessary to ascertain before we come to the discussion of the very point before your Lordships, is, What is the nature of these provisions? I am sorry to differ from my noble and learned friend who spoke second, on that question, because my impression strongly and clearly is, that it is not a case of condition at all. These provisions may properly be called in law conditions, to enable us to judge of these limitations, because contingent limitations—such limitations the law now allows—have been imported into the law from the law of conditions; and, therefore, it is that what might be illegal as a condition may

still be illegal as a secondary or shifting trust; and, therefore, that what might be a precedent condition at law before the operation of the Statute of Uses, may still be a contingent gift since that statute. My Lords, I apprehend that it is perfectly clear, with submission to others, that this is not a case of condition at all; but that it is a case of contingent limitations, with a series of shifting or secondary uses limited on those contingent limitations. That relieves this case very much from all the difficulty that has been imported into it in considering these provisos, as if they were strict conditions at common law; for I am content, and must be content, to take the law of conditions as it stood, as a precedent in this matter. I know, by the authorities which have been referred to, that conditions, which were intended to defeat an estate, have defeated an estate, in contingency just as much as a vested estate—that they are odious in law, as it is said by high authorities. In SHEPPARD'S TOUCHSTONE it is said expressly that they must be submitted to a strict construction; that is, you are not to give any favourable construction to a proviso, the object of which is to defeat an estate already created; but that, if that estate is to be defeated, it must be so by clear and express terms, within the limits of the instrument creating it.

So far then, if this be a mere question of contingent limitations, we have to consider what are the limitations on which this estate is to operate. I think one thing is perfectly clear, that we can only collect the intention of this testator from the words which he has used; and that here, as in all other cases, we are bound, if we can, to give the common meaning to every expression which we find on the face of the will. If you find that the expressions are vague—if you find that they are irrelevant, and that they are, as one of the learned judges said, words, and only words—that will not prevent you from getting the substance; but you must be satisfied, before you discard the ordinary meaning of language,—if you do what the majority of the learned judges propose to do in this case, viz., mould the words of this testator—you must be perfectly satisfied that you are called on to mould those words, by taking them in their common and ordinary import as words of science; and you must be satisfied that they do not convey the meaning which the testator had, and to which you by law may give effect.

My Lords, I would first, before I address myself to that point, call your Lordships' attention to the subject of executory trusts. If this could be deemed as an executory trust, that construction would let in many arguments which would strike fatally at the view taken by the majority of the learned judges. But, as I said on a former occasion, when I stated my opinion to your Lordships, this is not a case of an executory trust—and I took particular care to draw the attention of the learned judges to that question, and to state to them that their opinions were not asked on that question. This House did not require the opinions of the learned judges at common law on what was or was not an executory trust—the House had itself better means of deciding that point than fell within the reach of the learned judges. But one of the learned judges, ALDERSON, B., has, although not asked the question, given his opinion that this is an executory trust. I am sorry to differ from that learned judge; but I am clearly of opinion—and as strongly as a man can be on any point—that this is not an executory trust; and I advise your Lordships not to treat it as an executory trust, but to treat this will in all respects as if it had been a series of limitations of the legal estate.

Now, my Lords, with some knowledge of the framing of these instruments, I will take on myself to state to your Lordships, that no legal instrument ever was prepared with a more perfect knowledge of the subject with which the draftsman was dealing, and of the law bearing on the different points, than this will exhibits in every part and portion of it. If the framer has miscarried with regard to the legality of the subsequent condition, he has miscarried in very great company, and he would have no reason, if he were living, to be ashamed of any failure. He certainly has miscarried with very high authorities, to whom the greatest deference must be given. But there is no colour belonging to it of an executory trust, properly so called; all trusts are in a sense executory, because a trust cannot be

A executed except by conveyance, and, therefore, there is something always to be done. But that is not the sense which a court of equity puts upon the term "executory trust." A court of equity considers an executory trust, as distinguished from a trust executing itself, and distinguishes the two in this manner: Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is, or has he so defined that intention, that you have nothing to do but to take that which he has given to you, and to convert them into legal estates. I defy any real property lawyer living to go through this will, and draw a settlement from it, and to alter a single word. I will say of the whole framing of the limitations, they are right from beginning to end. I do not speak now of the legality of the particular proviso, but I am speaking of the framing of the instrument; and I say that no lawyer sitting down to frame that instrument could do it more legally or more effectually than the framer of this will has. I trace the hand of a master in every part of it. There are provisions with regard to vesting the heirlooms; there are provisions with regard to the vesting of chattels; there is a provision respecting his brother's debts, not giving his creditors a right over the fund. In short, in every page, and every part of this will, I see that the framer knew perfectly well what he was about.

If he did know what he was doing, what has he done? He has introduced one of the most perfect series of limitations that it was possible for the law to enable him to introduce. He has given to the testator's heirs of his body this estate in the first instance. His brother was resident abroad, and there are most elaborate provisions in respect of that residue. He gives him a certain interest, and provides for his heirs male; but how does he provide for his heirs male? In the same way in which he provides for the heirs male of other parties. He then makes a provision for Lady Long, who was afterwards Lady Farnborough; and I beg your Lordships' particular attention to these provisions. The learned judges have begun the will a little later; but I hold the further limitations to be of very great importance, as showing what was the true construction of this will.

F By his will he gives an estate, after his wife, in remainder to Lady Long for ninety-nine years; then to trustees in the usual way, in trust, to preserve contingent remainders; and then to her heirs male. There is a proviso afterwards inserted that, in case she has not issue male living at the time when the estate comes into her possession, then the limitation to her shall cease and be void, and the estate shall go as if she died without issue. At the Bar I remember it was argued as if there was some difference of expression in that proviso, as compared with the other provisos; but that is not so. There may be sometimes "determine" in one proviso; sometimes "cease and be void;" in another—equivalent words; but the expression is always the same, either "determine and be void" or "cease and be void"—there is no variance in the expressions. Now, my Lords, just as we are passing, to try the point on which I am about to enter, namely, what is the true construction of those limitations, and what you are to introduce, take that particular case. The words are: "To Lady Long for ninety-nine years, and her heirs male."

H I may as well try the case on the limitations to her as on those to Lord Alford. A limitation, as we all know, to heirs male, is in its nature and from necessity a contingent limitation, because it only refers to the person who shall be the heir male of that devisee at the death of that devisee; but then it has this singular operation as a limitation, that, although it cannot, in the first instance, operate to the first and other sons, and to them in tail male—but that the first son, the person who is heir male at the death of the devisee, takes it as a purchaser; yet, when he does take it as purchaser, it then has all the qualities of a regular limitation, the ancestor not taking a life estate, and the estate goes from one to another in precisely the same way as it would have done if there had been a regular line of limitation. And, my Lords, the framer of this will was perfectly aware of that; for, in the subsequent clauses, with regard to heirlooms, he speaks of the first and other sons taking. Let us try how we are to remodel it, because what the learned judges

propose is this : The limitation is of itself contingent, without introducing any single word; and they propose in the other limitations, on which the question properly arises, to introduce from the will new contingencies. They look to the subsequent provisos, and they take from those provisos a particular contingency, and they add that contingency to the contingency which is necessarily created and embodied in the very limitation itself. A

I do not know whether I quite make myself understood by your Lordships; but take this for example: The limitation to Lady Long's heirs male is in itself contingent, because it really is, in point of law, to the person who shall, at her death, answer the character of heir male of her body. If the learned judges were to do with that limitation what they propose to do with the subsequent one, finding that in case Lady Long, when she comes into possession of her estate, being in remainder, have not issue male then living, the whole is to be defeated—they would introduce another contingency, and they would say, if Lady Long has issue male living at her death, or, if Lady Long has issue living at the time that her estates come into possession—and why would they introduce that? Because they say, that the contingent limitation or use of the estate to her issue was a thing that had not arisen, and, therefore, could not be defeated; and, although the conditional proviso is that it shall cease and be void, and the estate go over, they say that it is not possible to give that effect to it—they are words and only words—because, the estate never having arisen to heirs male, it cannot be defeated; but the will made it a precedent condition, that she should have issue male living at the time she came into possession. B C D

Your Lordships will be aware that in the way in which the learned judges look at this point, with the opinions which they have expressed on the second point, it is to them wholly immaterial whether this is a condition precedent, as it is called (and which I will call it also, simply for the sake of following the argument, and not because it is correct), or a condition subsequent. What can it signify, whether you shall introduce the contingency before the limitation, which shall prevent the limitation arising, or you let it take place *modo et forma* in which it is given, with a positive, clear, and distinct declaration, that on a given event it shall not take place? Suppose it to vest, where is the magic—where is the harm of it vesting? Suppose it to vest in the person who is heir male, let it vest in the person who is so for the time, and it is then divested, what is that? It is a momentary operation. But, my Lords, the law is so benignant in this country, that the law sometimes contradicts itself, in order to preserve estates. The very doctrine (and I beg your Lordships' attention to that) of conditions subsequent, was introduced in favour of men's dispositions, and to save estates which might be avoided by legal conditions from the destruction which awaited them, if the condition were held to be precedent. Therefore, in that view it is of the greatest importance to distinguish the real nature of that which we are dealing with. Take Lady Long's case, because it is so very simple, and because it was to cease on an event which might happen in her own lifetime, viz., that she might not have issue living at the time the estate came into possession; and if you look at the words of the proviso, you will see that the words of the proviso, or limitation, are clear—it is a contingent limitation; but with no other contingency attached to it,—and if you give effect to the will, therefore, in that respect, you must give effect to it as a contingent limitation to arise at the time of her death. Then there is a proviso which defeats it. That proviso is strictly proper in all respects—it is a shifting or secondary use, because it defeats the previous limitation, and introduces a new estate in lieu of it. Therefore, it is what, on the face of the proviso, it purports to be—it is strictly a secondary or shifting use. E F G H I

Why should you not give effect to it according to the words? You are in this dilemma, which, as I think, my Lords, the learned judges have in no respect relieved themselves from, that in this very simple proviso to which I have referred in Lady Long's case, you would have to give to these words a double meaning—that is to say, that, as regards Lady Long's whole interest, it was a condition subse-

A quent, as it is termed, and in regard to the issue a condition precedent. Whereas, if you let this will operate as the framer intended it to operate, so as to let the limitations, if they can, take place according to the manner in which they are given, and then let the other provisoes operate in the way in which they by law can operate, and in the manner in which the framer of the will meant they should operate, and as I am bound to suppose the testator himself meant they should operate, they will be defeated if the events arise, and if the events do not arise they will not be defeated. In this case there is this most important consideration. If you will let the limitations take effect in their course, and according to their order, in the way in which they are pointed out, in this will there are events, and very probable events, in which every one of those uses will take effect, exactly as they are given, and no one by any subsequent event can be defeated. Are you to introduce contingencies in order to defeat those estates? I think, with the greatest submission, that the learned judges have not met the difficulty—at least, the learned judges have not at all relieved my mind from the difficulty; and they introduce a particular contingency.

Let us see, for example, when we are trying that, what the provisions are, and then see whether the learned judges have or have not solved the difficulty which they have themselves created. After this proviso as regards Lady Long's estate, you come to the proviso as to the dignities. The first proviso provides for the two events, and it has been treated as two provisoes. It is only one proviso, and the latter part of that proviso overrides the whole of it. If Lord Alford do not in his lifetime, or within a certain time, obtain the dignity to himself and his heirs male, or if the title of Lord Brownlow descend to him in his lifetime, and he do not within five years obtain a proper grant of the dignity, then and in either of those cases, etc.—that is the proviso. The latter part of it governs both the preceding provisions, and hence it is only one proviso—the estate to him, and to his heirs male, and to trustees, and so on, shall cease and determine; and the estate shall go over as if Lord Alford had died without issue. Just let us consider that for a moment while I pass on. Then the same provision is introduced as regards his next brother, Charles Henry Cust, now Egerton, and with this additional proviso, that, if Lord Alford shall have obtained a remainder which would extend to Charles Henry Cust, then that would introduce an additional case; but supposing it did not, then, and in either of these three cases, the estates in like manner are to go over in the clearest possible manner. Then come what have been properly called the equivalent clauses—and I will show your Lordships presently the operation of those clauses—that if the brother of the testator obtains the grant of a dignity, and that should extend to Lord Alford, for example, then the gift to him shall operate; or if Lord Brownlow himself, after the death of his brother, obtains a dignity, that then the estates of Lord Alford shall operate. We will see presently how that will bear.

Then come two extraordinary clauses—one, that if Lord Brownlow obtain an estate which descends, and which would interfere with the dukedom or marquise, then the limitations are to be void; secondly, if Lord Alford acquire by himself or otherwise an estate, the precedence of which shall not be greater than the marquise of Bridgewater would be, that then the estate shall be void. These are two actually distinct clauses, repeating clauses. I will not stop now to inquire whether they be legal or not. But observe what the learned judges have done; they have taken out of this series of complicated provisions a particular case, namely, that of Lord Alford dying without acquiring the title, and then they introduce one contingency on a contingency, which is necessarily included in the devise, and then they make it thus. [LORD LYNTHURST.—That is only half the devise.] That is only half the devise, but I will show your Lordships what besides. They take that particular case out, and introduce it without warrant of law in my opinion, speaking with great deference to them, but certainly against the intention of the testator and contrary to the frame of this will; they take a particular contingency out, and read it thus, that if Lord Alford should obtain the title of Duke or Marquis of Bridgewater in his lifetime, then to his heirs male at his death.

My Lords, I pressed it on the learned counsel at the Bar at the time, that, in order to sustain that view of the case, you must be prepared to do this—to show how every part of these very provisos can be introduced by way of contingent event, or precedent condition, if you like to call it so, by a contingency which shall prevent the use from arising unless it happens. But to take out that particular case, because the event has happened, is against every construction of law which ought to bind a court of justice. You are not to look at the case as it stands at the moment when you are deciding it, and pick out that particular case, and say, Because this event has happened, therefore, there is such a construction to be put on it. But the true mode of construing men's wills is this. Take the whole instrument, and ask, What were the probable cases which might arise at the time that will was made? What were the probable events which were contemplated by the testator, and provided for? If we are to do this, no man can introduce contingent limitations that will satisfy your Lordships in the way in which the learned judges intend to construe it; for, in order to do this, they must go on and provide for all. There is no reason why you are to take one contingency—we are now speaking of a contingent limitation—and leave out all the rest.

Therefore, the first contingency is, if Lord Alford shall not acquire the title; but then the next contingency is not with a qualification or rather with another contingency, "or if he shall"—it must be, if he shall for five years be Earl of Brownlow without acquiring that title, that goes to qualify and defeat the will. Are you to introduce anything except where it is introduced in the will? Then we come to the other cases, still keeping to Lord Alford; if Lord Brownlow acquired the title, that is a satisfaction, and that is the qualification. Therefore, suppose Lord Alford, for example, not to have acquired the dignity, why, we know perfectly that still his issue male might take under the will. Then you must come to the conditions afterwards, in order for them to operate. Why not take them, therefore, in their regular course and order? Supposing the brother himself to have acquired the title, there is satisfaction again; and then the limitation will take place. But the contingency proposed to be introduced by the learned judges, in order to effectuate the intention of the testator, according to that view of the subject, would require to be qualified, moulded, and explained in a way that no man ever did or could create such a contingency. What was the consequence? Why, that the framer of this will, who was master of his business, drew the will in a perfectly legal manner, so as to meet that; and, I will venture to say, in exactly the manner in which every conveyancer, who is really worthy of the name of a conveyancer (a name for which I can assure your Lordships I have a very great respect) would have drawn that will. I have read over and over again every syllable of this will. I have bestowed on it the greatest attention in my power, and have felt exceedingly anxious about the determination of it, differing as I do from my noble and learned friend on the Woolsack. I do so with great reluctance when I consider that his opinion is supported by so very great a majority of the learned judges; and it really does require a very strong conviction to enable me to recommend your Lordships not to follow the opinions of those learned judges. There is not a single proviso throughout this will that it is not consistent with itself and with every other part of the will; and if you attempt to dislocate it, and to introduce contingencies from it, you produce all the mischief which I have pointed out, and it leads to inextricable confusion. You may, no doubt, pick out a particular case which has happened, and say that it is a contingency; but you are not warranted in doing so in point of law. Therefore on that point I have nothing further to say. My Lords, in this case there has been a little misunderstanding. One learned judge refers to *Carwardine v. Carwardine* (17) as an authority for importing words into a condition. Your Lordships will find it fully explained in the last edition [3rd Edn.] of GILBERT ON USES, 173, n, that that case does not bear at all on this case:

"A settlement was made to the use of the settler for life—remainder to his

A intended wife for life, except in such cases as should be thereafter excepted for her jointure."

B In a subsequent part of that settlement you find that there was a proviso that, if the settler had issue, that issue should have half the estate, during the life of the wife; and what the Lord Keeper did in that case was this. He introduced that proviso properly where the exception was to her for her lifetime, "except in such cases as should be thereafter excepted." He said: "Very well; I must look to see what is excepted,"—and he took the exception that created a conditional limitation. It was no case of contingency, properly speaking. She had the whole of the estate if there was no issue living; and, if there was issue, then the issue took one half, and she took the other half. That was all that was done in that case.

C My Lords, one of the learned barons (ALDERSON, B.) seems to have imagined that this was a case turning on the difference between a contingent remainder, and an executory devise. I think there is some misapprehension about that. This case involves no consideration of that rule. The very limitation itself is a contingent remainder. We are all aware that it is a contingent remainder, and not an executory devise. The rule is (only we do not want the rule) that a thing is not more or less contingent. The event on which the contingency depends may be more or less probable; but you do not make the contingency more or less contingent. It is contingent; and that is the definition of it. But the event may be much more probable in one case than in another. Is it contingent? It is in point of law. This, therefore, is a contingent remainder; and the only question is whether it is to be defeated by subsequent events, by a proviso which would operate to create a shifting or secondary use. The learned judge introduced that which is under the law a shifting or secondary use, as if it applied primarily to the creation of either a contingent remainder or an executory devise, which it clearly does not.

E One thing I think is quite clear. My noble and learned friend who spoke last stated that, in which I quite agree, that a condition precedent or a condition subsequent can never be fairly varied, or be rendered more or less operative, because a limitation is contingent. It matters not whether the limitation is vested, or whether it is contingent; for the question of condition precedent or condition subsequent, depends on intention; whether the one or the other, whether it be a contingent limitation or whether it be vested, it is wholly indifferent to the operation of that rule. The great question on this will be what I have before stated. If you leave these limitations to operate precisely as they are given, and to be defeated precisely as the testator has provided for their being defeated, every intention which the testator ever had will be carried into effect according to the rules of law, without altering a single word in the will. You will give to the language its natural import; and, moreover, you will give to the language its scientific and legal import; and it would be doing violence to the words to construe them in any other way. I have already, I think, mentioned to your Lordships that it must be wholly indifferent, as to the intention of the testator, whether you prevent the use from arising, or whether you will allow it to vest for a moment, and then to be divested. But I will call your Lordships' attention to the care with which the law provides for the vesting of estates to save estates from being destroyed. There is a remarkable instance in the old books—*Plunket v. Holmes* (18). There there was a devise to the testator's heir-at-law for life, with remainder over in contingency, and the fee simple descended to the heir-at-law, who was then the tenant for life. Your Lordships are aware that the union of a fee simple in reversion with a life estate would exclude and destroy the contingent remainder. What did the court do when that case arose? It decided that, as the descent was immediate to the heir, there should not be that coalition in law between the reversion and the life estate, which would exclude the contingent remainders, although they admitted the law to be, as it still is, that if the descent of that reversion had not been immediate, but it had descended to a third party, and then from him to the tenant for life, the heir-at-law, the contingent remainders would have been excluded. That, therefore, is an

instance in which the law actually entrenches on its own settled rule, in order to save estates from being destroyed. A

My Lords, I have reserved, as regards this question, the authorities by which I want to show your Lordships that, as I apprehend, the opinion delivered by the majority of the learned judges ought not to be the rule of your Lordships' decision; and the cases to which I am about shortly to call your Lordships' attention, you will find to be cases which, if the rule now proposed by the learned judges had been adopted, must have been decided directly in an opposite way. Yet, my Lords, there are no cases better established in law than those to which I shall very shortly call your Lordships' attention. B

My Lords, I will first refer to a case in which the question was whether a proviso should operate, by way of condition, to defeat a legal estate, or whether it should operate so as to form a part of the limitation itself, and so save the estate. It is *Page v. Hayward* (19). C

"Nicholas Searle, by his will, devised to his niece Mary Bryant and the heirs male of her body, upon condition and provided that she intermarry with and have issue male by one surnamed Searle; and, in default of both conditions, he devised to Elizabeth Bryant in the same manner; and, in default thereof, he devised to George Searle for sixty years, if he so long lived; remainder to the heirs male of the body of the said George and their issue male for ever." D

One of the nieces married a person who was not a Searle, and the question was, what the effect of those limitations was.

"And, by HOLT, C.J., and the whole court, it was adjudged, first, that the estate devised to Mary was a good estate tail; and so was the estate to Elizabeth; but it is a special entail; it is an estate to her and the heirs male of her body begotten by a Searle, which is a middle entail, not the highest nor the least; for it might have been to her and the heirs of her body begotten by J. Searle, which had been more particular; yet this is a good estate tail within the statute de donis, for it is within the reason of the statute. Secondly, the words 'upon condition,' etc., though they are express words of condition, shall be taken to be a limitation; so it is held in other cases. And HOLT, C.J., said, he saw no reason why they might not be so construed in a deed, though the law had not been carried so far; and so the sense is, if she has no issue by a Searle upon her death, the estate shall remain over." E F

In that case, therefore, the condition was so moulded as to form part of the limitation, and so to save the estates, which had been intended to be created by the testator; whereas, according to the opinions which have been now given, I should understand that it would be read as an express condition, which would defeat the estate, instead of allowing it to go as a description of part of the limitation of the estate, so as to save, as far as it might be, the limitations provided for. G

My Lords, there are a great number of cases, which have been decided, where, although actual words of contingency are used, and limitations are introduced by actual words of contingency, yet, from the limitations over, you can come to the conclusion that the testator intended that the devisee, before that contingency had arisen, should take the vested estate. Those cases, therefore, go infinitely beyond that now before your Lordships, because you are here asked, from a proviso providing for a subsequent event, to select a contingency, and to insert it where you do not find it. But the cases to which I now call your Lordships' attention are cases in which there was such a contingency expressed in the clearest words, and yet, entirely on the ground of the intention, that contingency was not, as here, interpolated and inserted without warrant, but that contingency was struck out of the will, and it was not considered as a condition precedent, but as a condition subsequent. H I

The first case is the well-known case of *Bromfield v. Crowder* (20). There the testator devised to A. for life, and, after her death to B. for life, and, at the decease of the two, he gave all his real estate to C. if he should live to attain twenty-one;

A but, in case he should die before attaining twenty-one, then he gave it over. The court there held, that that last taker took the estate at once from the death of the testator; though he was under twenty-one, he took a vested estate at once, and the gift over was only to take effect in case he died under twenty-one. The learned Chief Justice, in stating the opinion of the court, says :

B "There is nothing in the will to prove that the testator meant the plaintiff not to take a vested estate, unless he survived twenty-one. Indeed, the true sense of the thing is, that the deviser meant him to take it as an immediate devise in himself; but that it was to go over in the event of his dying under twenty-one. It must be admitted that, according to repeated decisions, no precise words are necessary to constitute a condition precedent in wills. They must be construed according to the intention of the parties; and it would be absurd, considering the various circumstances under which wills are made, to require particular terms to express particular meanings. The apparent intention, as collected from the whole will, must always control particular expressions. Now the fairest construction that can be put upon this will, independent of authority, is that the plaintiff took an immediate vested estate on the death of the preceding devisees, with a condition subsequent."

D That case came to your Lordships' House, and the judgment was affirmed; so that there the very contingency was struck out of the will, and a vested estate taken directly, contrary to the very words of the will itself. That was followed by a case, which was very much doubted at the time, *Doe d. Hunt v. Moore* (21). The only difference between those cases is this—that the former was the case of a gift in remainder, and the latter was a devise at once to J. M. when he attained twenty-one; but, in case he died before twenty-one, then over. And it was held, that there was no distinction in law between the two cases, and that, therefore, the devisee took, although he had not attained twenty-one. The words of contingency are again and again struck out, in order to effectuate the intention of the testator; and that is directly, as it appears to me, opposed to the

F opinions of the majority of the learned judges in this case.

That case being deemed not quite satisfactory, the point was brought before your Lordships' House in *Phipps v. Akers* (22). There the case which was stated to the learned judges was this :

G "The testator, being seised in fee of estates situated in the parish of Wheelock, devised those estates in this manner: he gave those estates to George Holland Akers when and as soon as he should attain the age of twenty-one years; but in case he should die under the age of twenty-one years, without leaving issue, in that case the estates should form part of the residuary estate of the testator, which he gave over to another person; and the question put to the judges was this, what estate George Holland took in the Wheelock estates."

H My noble and learned friend who spoke second doubted whether *Doe d. Hunt v. Moore* (21) had been properly decided, yet he did not oppose the decision of this House, and that decision was in favour of the judgment of the court below, and that really sets this point at rest. [LORD BROUGHAM.—Where did that case come from?] From the King's Bench.

I There was another case, that of *Aislabie v. Rice* (23). There was a devise in that case to the wife and her assigns for life, in case she continued single and unmarried, and, after her decease, to such persons as she should appoint by deed or will, and, for want of appointment, over. But in case she should marry in the lifetime of other persons, with their consent, then she was to enjoy the estate for the whole of her life. Your Lordships will see, therefore, that the limitation was to her for her life, if she should so long continue single and unmarried, but with a subsequent proviso that if she married in the lifetime of those persons referred to, with their consent, she should have the estate for the whole of her life. Those persons died, and she married without consent, and the question was, what was the

nature of the limitation. It was sent to the Court of Common Pleas and the learned judges gave this opinion: A

"We have heard this case argued, and have considered it. We are of opinion that this condition was a condition subsequent, and that, as the compliance with it was by the death of Alice Hatton, and James Fremoy, and Thomas Lilly, become impossible by the act of God, her estate for life is become absolute; and that she may now execute the power of appointment." B

And that was confirmed. If that had been allowed to operate as a part of the limitation, she would of course have lost the estates; but the court held it to be a condition subsequent, and that, that condition having become impossible by the act of God, the estate was not destroyed or affected, but remained; and your Lordships see, therefore, what has been the care of the courts to prevent estates being defeated by those conditions. C

There is one other case, *Gulliver d. Corrie v. Ashby* (24). There there was a devise of estates to uses, and there was a condition that the party should take the name and arms; but in the devise over there was a condition: it was by way of proviso. There was a condition that they should not commit waste, and the particular spot wasted was actually devised over. There was a little argument, therefore, on that point, still the testator knew how to devise the estate over when he made it; and the question was, what was the nature of this proviso. LORD MANSFIELD said: "I am of opinion that this is not a condition precedent, and it cannot be complied with"; and he gives the reason why he is of that opinion. It was argued very much, that that portion of the proviso was to be taken in and form part of the limitation, just as the learned judges have recommended your Lordships to take the contingent proviso, and to insert it before the limitation. LORD MANSFIELD was clearly of opinion that this was not warranted by law; and he makes this observation as to the question whether the condition was broken or not: "In such a case (of so silly a condition as this is)," showing that the courts do not look with very great favour upon such conditions, "the court, perhaps, would incline against the rigour of the forfeiture," though a forfeiture had been incurred. F

YATES, J., says (4 Burr. at p. 1942):

"This is certainly not a condition precedent. The question then is whether it be a conditional limitation? I am clearly of opinion it is not. Doubtless it is not an expressed limitation; and an implication of one can only be made in order to effectuate the testator's intention, and must necessarily be an implication to that purpose." G

He then says:

"The court will not make an implication to support an idle intention beneficial to nobody, nor can such an implication be made upon a limitation after estates tail. It cannot, therefore, be considered as a conditional limitation, nor is it a condition subsequent; for it would be nugatory, as Ambrose Saunders might immediately suffer a common recovery and bar the estate. It can only operate as a commendation or desire." H

ASTON, J., says:

"Whether this be a condition or a recommendation, yet the rules of making implications do not hold in the case now before us. The cases cited in support of making the implication are founded upon reasons which do not exist in the present state. I take it to be a condition subsequent, and, as such, barred by the common recovery." I

My Lords, see what another of the learned judges, HEWITT, J., says (*ibid.* at p. 1943):

"He concluded with saying that this condition, or whatever else it may be called, is not such a limitation as will carry the estate over to the next remainderman, upon breach of the condition enjoined."

- A These cases seem to me clearly to prove what I have stated to your Lordships, that not only is the introduction of the contingency, selected and culled out of the provisoes, not warranted by law, but that the law does, in cases of infinitely more difficulty, actually strike out positive contingency, and give vested estates in order to effect an intention. In like manner, it refuses to take a proviso, the object of which was to impose a condition on the parties, out of its proper place, and to insert
- B it as a part of the limitation, and which would go to defeat the estate. As these cases appear to me quite conclusive on the subject, I have, therefore, come to the conclusion to recommend your Lordships, with my noble and learned friends who have already spoken—and I do so with a perfect conviction in my own mind that such is the law—to hold that this is a condition, if it is to be called a condition, subsequent, and not a condition precedent. I call it so, because it is a short way of
- C expressing it, not because I look on it as conditional.

- My Lords, you must in looking at this part of the case bear in mind the different events that might have arisen. If Lord Bridgewater's brother had obtained the dignity, and it had descended to Lord Alford, everything would have taken place regularly in its course; if Lord Brownlow had obtained the dignity, and it had descended, the same operation would have taken place; and, therefore, in that case they would have taken effect in their natural order, without being in any manner disturbed. The different complications which might take place I have already referred your Lordships to, and I will not repeat them; but looking at the whole of these points, I am bound to say, as a mere real-property lawyer, it is not one on which I can entertain any doubt. I speak with great submission and deference to those who are more competent than myself to give an opinion on it; but I am bound
- E to state my clear and firm conviction and opinion, that there is in no respect any principle of law which authorises your Lordships to treat it as what has been termed a condition precedent.

- That introduces the next question, which has been so largely debated, that I shall be as short as I possibly can on that question. I agree with so much that has fallen from my noble and learned friends, that I shall not attempt to repeat what they
- F have already so ably expressed. But there are some few points to which I wish to draw your Lordships' attention.

- If your Lordships take the case of *Earl of Kingston v. Pierepont* (4) as it is reported, it would seem to be a case in which the testator had intended by lawful means, as he states, to obtain a dignity. I have been furnished with the copy of an extract from the registrar's book of that case, by which it appears that he meant
- G no such thing—he meant any means, however unlawful, as I will show to your Lordships. What does that case prove? Remember that this was a will of an honourable man openly made, a will that must necessarily be brought forward, made by a person of great family, and made with the view of obtaining the highest dignity that could be obtained from the Crown—yet it did unblushingly, as I will show to your Lordships, provide for the purchase by money of the dignity in
- H question. How was that followed up? A bill in equity was filed by the person who would be entitled to have that money laid out in the purchase of the dignity, to have the trust executed, that is, to have the dignity bought. What conclusion do I draw from that? That at that period such was the corruption of the times, that nobody doubted that a peerage might be bought. But observe for 180 years, that attempt being defeated, nobody has ever attempted to raise the question again,
- I till the Earl of Bridgewater raised it in this case. It has often been said by sages of the law, and I think well said, that it is a good rule never to allow that to be done which has never been accomplished. We have had new-fangled schemes quite enough already; and the attempt at this day to introduce some novel limitation would fail, for you may depend on it that it would contain some seeds of vice which would render it illegal. The wit of man has been tried, and the science of lawyers has come to his aid, to endeavour to make limitations of all sorts and kinds to gratify every possible fancy and caprice; but during the whole of that period there are but two instances, one of which I have mentioned to your Lordships, in

which the parties thought they could in a court of justice enforce an actual disposition of money to buy a peerage. And the debate was long, as the registrar's book tells you, before that case was decided; and then this case, for the first time, at the end of upwards of a century and a half, comes before your Lordships. What is the distinction between the cases, in the worst and vilest view of the matter, and looking at the infirmities of human nature? That in the one case it was unblushingly and openly asserted, intended, and expressed; and in the other case, supposing there was any such intention, the means are furnished of accomplishing the very same purpose, and the means furnished with such a pressure on the man to whom these means are given, that it is too much, it is too great a trial of human firmness, or rather I should say of a man's weakness, to expose him to such a temptation; and the law ought to step in to save the man from such a temptation. But what was the object of the Earl of Bridgewater? To annex his estates, as he tells you, to the title of Duke or Marquis of Bridgewater. How did he intend to accomplish it? By giving this immediate vested estate, worth upwards of two millions of money, to a family with influence, possessing already a dignity, and which would only make it necessary, therefore, to obtain a step or two steps in the peerage. And, with such a pressure as that would create, he hoped that it would lead to the acquisition of the dignity. My noble and learned friends have told your Lordships what has been done; and I entirely agree that this case ought to be decided precisely as if it had taken place a century and a half ago. The law moulds itself to the wants and wishes and varying exigencies of mankind, and properly so; but the principles of law do not vary, though they may be modified in their application to new cases as they arise—and the principle of law upon which these cases must be decided is precisely that which ought to have governed your Lordships, if the case had come before you at the time when *Earl of Kingston v. Pierepont* (4) came before the Court of Chancery—that is, that men are not by pecuniary means (for those are illegal means, given to a party, who has himself so deep an interest in obtaining that which it is the wish of the testator shall be obtained, annexed to the enjoyment of the estates, and for which he has provided the illegal means) men are not to be allowed to hold out inducements which may lead to serious and fatal consequences.

My Lords, I think it important, in a few words, to call your Lordships' attention to what was the real nature of *Earl of Kingston v. Pierepont* (4), because it shows how necessary it is for your Lordships to be very careful, in any rule laid down, not to encourage dispositions of this nature. He says he appoints, and

"he appropriates £10,000 to be employed by his brother, the Marquis of Dorchester, and William Pierepont, both or either of them, or the heirs male of their family at the time of his death, by all best becoming and lawful means to procure the title of Duke to the present head, and successive heirs male of their name and family, provided the same were effected within the term of one year after the day of his decease."

He thought that the dignity of a dukedom was to be had very readily, and he only allowed twelve months to obtain it, and £10,000. I beg your Lordships' attention to this part of the will, in order to see what the intention of the testator was.

"But if the said sum of £10,000, or what they, concerned in the title, might and should add, could not avail to that mentioned and appointed end, the obtaining of the title,"

then he gives the £10,000 over. So that he says, If you cannot with that £10,000 obtain the title, my object will not be answered, and I give it over. Then comes this important clause:

"Further declaring, that the said £10,000 or any part of it was not to be nor should not be in the hands of the carriers on account of the designed procurement, but granted and secured to be paid when the wished title was really procured, and satisfactory security given to his executor, and that within a short prefix time it certainly should."

A Your Lordships see, therefore, that he says here that the money is not to be given to the carriers, but it is to be secured well, till the title is actually and positively got. The word "carriers" seems rather to have puzzled some persons; but it admits of a very easy interpretation—it there means the persons who undertake to get the title; and they were not to touch the cash till the ducal coronet descended on the brows of the person there named. A more unblushing and audacious disposition
B never was made by man. That the parties entitled under it should dare to go into a court of equity, and ask for the execution of that trust, does show a state of things sufficient to alarm us; and it ought to operate as a warning not to let in, by the decision of your Lordships now, such dispositions in effect as that which was struck at. There the matter remained up till this moment, and I hope that your Lordships will now, by your judgment, give a final and fatal blow to such highly improper
C dispositions.

My Lords, I cannot help thinking that there is a great deal in the argument addressed at the Bar, as to the embarrassment which such a creation and such a proviso as this would create to the Crown. Constitutionally speaking, I will not on this occasion sever the Crown from its Ministers; but I will consider the Crown acting, in the usual way, by responsible Ministers. Then observe what it is that is
D desired—a particular dignity is pointed out, and particular limitations of that dignity are chalked out; and there is this pressure at least put on the Crown, that a case of compassion is raised. Supposing Lord Alford was an infant when the testator made his will, and he provided for his infancy. Supposing, for example, the estate to have come to the infant Lord Alford, and suppose Lord Brownlow to have died, and the Earldom of Brownlow to have descended to Lord Alford while
E he was an infant, then comes the clause, that if within five years he did not obtain the dignity his estate should go to his heirs male—an estate worth two millions of money. Conceive the pressure that is put on the Crown, the case of compassion which is made out. Will the Crown refuse the dignity to this family? Will it refuse one step more in the peerage (knowing that the consequence of its refusal will be that this vast estate will go from the person for whom it was provided in the
F first instance, and, therefore, the object of the testator's bounty be frustrated. I say, my Lords, that it is an indignity, an insult offered to the Crown, that a man shall point out the particular title which he will have, and the particular limitations to be attached to that title—that he shall prohibit a party from taking any other title which should interfere with his views—that he shall insist on what the Crown itself cannot accomplish, namely, as in one of the clauses, that the dignity to be
G taken shall have a certain precedence. The Crown of itself has not the power to do that which this ambitious testator desired to be accomplished. Is the Crown to be placed in that difficulty? Suppose that I were to imagine that two Sovereigns had already been compelled, from this provision, to refuse a step in the peerage to give effect to this instrument, it would be no great stretch of imagination. Yet what can be more painful when you look at the great pressure on the party. It is a dangerous power to be placed in the hands of any man, with a temptation to use it;
H such a temptation is almost irresistible. God forbid that I should say there are not men who could resist it; but the temptation is more than you are justified in laying before a man, and more than you are justified in exposing him to. You are not justified in raising so fearful an issue.

Look for a moment at the case of the five years—Lord Alford might have died an
I infant, and the Earldom of Brownlow might have descended with the dignity not acquired during that time. It is said that this honour is to be acquired by merit, and this was what the testator looked at. But look at the probable case, that while Lord Alford was an infant, Lord Brownlow might have died, and the earldom descended to Lord Alford. Then Lord Alford, being an infant, would have been incapable, of course, of doing any act—he would not have acquired that dignity of Duke or Marquis of Bridgewater by merit; it would have been impossible for him to do so. Then what would have been the position of the Crown. Here is a young nobleman, an earl, to whom this money has been left, as a child wholly guiltless of

any neglect whatever, belonging to an ancient stock and a noble family; and the Crown has the means, by giving him only one more step in the peerage, to secure to him an estate of £70,000 a year. My Lords, it is a position in which no subject has a right to place the Crown—no subject has a right to play, if I may so say, with the prerogative of the Crown, or to make the prerogative of the Crown the basis of an arrangement as to his own property. No subject has a right to do so. It ought to come from merit, and from merit alone. Look at the case—suppose Lord Brownlow to die, and Lord Alford to be of age, and that just for the time the earldom descends to Lord Alford—Lord Alford in that case, just come of age, for example, or he might be older, would have five years to acquire the title of duke or marquis. How is any man in this country by fair means to acquire the title of marquis or duke, or any particular title which he chooses to chalk out for himself? If the Crown confers the title, the very first act of the Crown is to select the title. The Crown, out of deference and regard to the subject whom it means to ennoble, may desire to be furnished with certain titles; but the Crown selects the title—the subject is never allowed to select it. He may do so by grace and favour, but the Crown selects the title, though it may select that which the man may wish to have conferred upon him. Now, my Lords, observe what Lord Alford would have to do in five years, let his age be what it would, when the earldom came to him. He must procure a dukedom or marquise, and this particular dukedom or marquise with particular limitations, or the estates are to go over. It is said that the testator meant nothing but merit; what merit in five years could enable any man so to ennoble himself? Is it to be the senate—is it to be in diplomacy, in the army, or the navy, or in the law? How is he to determine where his services are to be given, or his talents exercised, in order to entitle him in five years to the most distinguished mark of favour which the Crown has to bestow upon a subject. It appears clearly to me, therefore, that this is not a question turning upon the grace and favour of the Crown; but it is a vast estate given to a person in order to feed the posthumous vanity of the testator, that he might die in the belief that his estates would once more be annexed to a dukedom or marquise of Bridgewater; and he had furnished the means, and given a temptation to exercise those means, in order to obtain that dignity.

My Lords, there are just a few remarks that I wish to make on public policy. I will not add a word to what has been already said by my noble and learned friends; but I will call your Lordships' attention to what fell from one of the learned judges (CRESWELL, J.) as regards the restraint of trade. That learned judge says, that with regard to the restraint of trade, there is a maxim in common law, and he refers to a case in the YEAR BOOK, 2 Hen. 5, pl. 26, to prove it. But the learned judge forgot to tell your Lordships on what that maxim was founded. Nobody supposes that there was any statute in those times—on what was that maxim founded? Why, on public policy for the good of the realm. It was not good for the realm that men should be prevented from exercising their trades. Now let us see what this particular case is—it lies in a few words, and remarkable consequences have resulted from it. It was an obligation with a condition that if a man did not exercise his craft, say, of a dyer, within a certain town, that is, where he carried on his business, in six months, then the obligation was to be void: on which, HULL, J., said, being uncommonly angry at such a violation of all law, according to the book, "Per Dieu, if he were here, to prison he should go—just as if he had committed an offence against the King," because he had dared to restrain the liberty of the subject. STRANGE, J., says, that

"if the defendant had carried on his business for a certain time, say seven days within the time limited by the condition, that would have been enough."

I have referred to this case to draw your Lordships' attention to it. Angry as that learned judge was at that infraction of the law, what has been the result of that very rule, without any statute intervening? That common law, as it is called, has adapted itself on grounds of public policy to a totally different and limited rule, that would guide me at this day, and is just as good a condition as any condition that was

A ever inserted in any arrangement, that was ever the subject of any statute, because a partial restraint created in that way with a particular object is now perfectly legal. Without any exclamation of the judge, and without any danger of prison, any subject of this realm may sue on such a condition as HULL, J., was so very indignant at in that particular case. That shows, therefore, that the rule which the learned judge thought depended on some rule of common law, irrespective of policy, B has been founded on public policy and has been restrained, and limited, and qualified, up to this very hour, and beneficially so, by that very policy which has no bearing at all upon the foundation of the rule.

My Lords, there has been great discussion about distinguishing between wagers and conditions. Certain rules have been laid down by some of the learned judges, and dissented from by other learned judges, which I do not mean to follow. I C mean, particularly in the advice I tender to your Lordships, to guard myself against this. I am acting in that advice on what I consider a great principle of law, and I am advising your Lordships to apply that principle to the particular case before you. I strongly advise your Lordships to follow the example of my predecessors, and not to lay down on this occasion any abstract rules. Let each case be decided on principle. Let each case as it arises be subjected to the consideration of the D judges, and you will find in that case, to take the example of perpetuities, a solid matter of reform will be formed. If you had attempted, at starting, to fix a limit, and to lay down a certain rule which was not to be departed from, you would have done great mischief, and you would never have had the rule of property acted upon which you now enjoy.

One of the learned judges (TALFOURD, J.) refers to, and ALDERSON, B., puts a case E about, the danger of wagers. He puts the case of a wager on the Queen's life; alluding to a wager on the duration of that life being void, he asks whether a lease on the Queen's life would not be good. Why of course it would be good—it has no tendency to mischief—it is rather, generally speaking, meant in honour of the parties whose names are taken. It is only done that the persons who grant leases may, from the dignity of the nominee, know when that life drops; but no mischief F has ever occurred from it. If it had occurred, it would at once have been provided against. But suppose this case. Suppose a devise to one for life, with a proviso that if the Queen was not dead that day six months the estate should cease. Would not that be an illegal proviso? Of course it would be; and your Lordships have shown, by your decision in a case that was decided lately by your Lordships (*Dimes v. Grand Junction Canal (Proprietors)* (25)), that a judge with the smallest interest, G however small it might be, was incapable of trying a cause—not because anybody supposed that he would be influenced (nobody supposed so), but because the principle is, that a man shall not have an interest in a matter which he is to decide. You must take the general principle; but it is said by the learned judges, Yes, that is a principle of law. No doubt it is: but on what was the principle founded? Does any man doubt that it was founded on public policy? That is an expression H which is well understood. Does any man doubt it? One of the learned judges, who denied that there was public policy in the case of the restraint of trade, is contradicted by another learned judge, PARKE, B., who was of opinion that it was founded on public policy. That learned judge's opinion I considered as containing within itself the opinions of the great majority of the judges.

My Lords, a case was put by one of the learned judges of this sort. He could not I distinguish from a case of this sort that a subject went to the Crown and said: "If the Crown will grant a dignity to such and such a member of my family, I will settle a great estate on that person." The learned judge said that was perfectly legal, and he could not see where the distinction was. I see naturally a very broad line to be drawn between that case and this. It may not be a wise thing to do; and clearly it is not legal. Suppose a great family desire, as often has happened, that the second son should be made a peer, in order to found a separate family. Nothing could be more reasonable, in asking on proper grounds for the favour of the Crown, than to tell the Crown that that dignity would be sustained by a sufficiently ample

estate—nothing could be more proper; but there the Crown is not fettered at all. The Crown will accept or reject, just as it thinks the party deserving of its favour or not. That is not the case of a man who has left his property in such a manner that he cannot afterwards remedy or alter it, death having intervened. There is no question of that sort in this case—the man is living, and the Crown does not care how that man shall dispose of his property. The Crown would not grant a dignity merely because an estate was to be attached to it. If it did, every wealthy person in the kingdom would have a dignity conferred on him. That is different from a case of this kind. Here we are dealing with the dispositions of a dead man's property; and we are to consider whether we can or not leave it safely under the rule which he has laid down.

My Lords, one of the learned judges (CROMPTON, J.), in giving his opinion to your Lordships, says: "There is no capricious disposition by which, according to the law of England, a man may not leave his property." I believe, my Lords, that is rather too broadly laid down. It has already been shown in the argument otherwise—that no man can attach any condition to his property which is against the public good. For instance, the case given in the old books, of a man making a condition that his devisee shall not cultivate his arable land. That is void, because it is against the prosperity of the country; and for no other reason. But there are many dispositions that a man may not make of his property: and I will give your Lordships a few instances. A man cannot alter the usual line of descent by a creation of his own. A man cannot give an estate in fee simple to another and the heirs of his body. Why? Because the law has already said how a fee simple estate should descend. There is a case in which he cannot alter it. There is a case in which a capricious disposition is not allowed by law. A man cannot, by law, give an estate to private charity—the law would not execute it—it is so vague. In *Townley v. Bedwell* (26), LORD ELDON decided against the validity of a gift for maintaining a botanical garden, on the ground that it was stated to be intended for the public benefit. He thought that was too large, and not within the Statute of Uses. A man cannot give his property generally to objects of immorality, or to objects of benevolence; and so I might multiply instances. There are many instances in which the rule admits of exception; but a man cannot indulge in any fanciful disposition of his property which he thinks fit. The law of England, however, does this, which no other law in the world accomplishes; and I hope your Lordships will, in another capacity, take care not to break wantonly and without consideration into that law. The law of England enables you at once to put your estate in settlement, for the very purpose that a man desires to provide for those who are to come after him; and, at the same time, it gives all the power in the world, all the rational power of disposition, which any man could wish to have given him, and which, I believe, no other law in the world accomplishes in so perfect a manner, or so well, as the law of England. But, my Lords, the law of England knows where to step in and to stop any improper or any unwise disposition, such as that before your Lordships. This, therefore, is a case in which that power, so large as it is, which is given by the law of England, ought to be properly restrained.

I wish before I sit down only to draw your Lordships' attention to an authority, and an ancient one—one that has had great influence on the law of England—to show that this doctrine of public policy is authorised, by the greatest authority in the law, to be applied to a subject like that before your Lordships—that is, a testamentary disposition of property: putting aside wagers and putting aside contracts, and involving ourselves in nothing which is not germane to the matter; but taking the actual case of a disposition of property, to see whether public policy is in this country not strictly within the rules of the courts, and to continue to be so according to the decided cases. The case to which I invite your attention is the *Duke of Norfolk's Case* (27); and your Lordships will recollect that that was the first time in which, by way of trust there had been an attempt to carry over an estate on a contingency to happen in the lifetime. We should be astonished now to hear it stated; but then the question was whether you could limit your estate over on a contingency

A to happen in the lifetime. The three Chief Justices (MONTAGU, NORTH and PEMBERTON) were unanimously of opinion that it was against the law; LORD NOTTINGHAM was of opinion that it was in accordance with the law; and one of the Chief Justices, NORTH, C.J., who afterwards became Lord Keeper, at the re-hearing reversed the decree of LORD NOTTINGHAM. The case was then brought to your Lordships' House, which reversed the Lord Keeper's decree, and affirmed LORD NOTTINGHAM's decree; and they wisely did so.

B But I would now call your Lordships' attention to what the grounds were on which LORD NOTTINGHAM had a right to disagree with what was, at that time, such great authority—the united opinions of the heads of every court in Westminster Hall—all of them men entitled to very great attention, from their individual learning. In that case the opinion of NORTH, C.J., was against the validity. He says

C (3 Cas. in Ch. at p. 20):

"I conceive the rules of law to prevent perpetuities are the policy of the kingdom, and ought to take place in this court as well as in any other court."

So that the Lord Chief Justice, therefore, thought that the policy of the kingdom which was observed in every other court ought to be observed in the Court of Chancery. LORD NOTTINGHAM made this observation (*ibid.* at p. 33):

D "Pray let us so resolve cases here that they may stand with the reason of mankind, when they are debated abroad. Shall that be reason here that is not reason in any part of the world besides? I would fain know the difference why I may not raise a new springing trust upon the same terms, as well as a new springing term upon the same trust; that is such a chicanery of law as will be

E laughed at all over the Christian world."

Upon a subsequent argument he said (*ibid.* at p. 48):

"If there be a tendency to a perpetuity, or a visible inconvenience, that shall be void for that reason."

He says again (*ibid.* at p. 49):

F "No man can say that it doth break any rule of law, unless there be a tendency to perpetuity, or a palpable inconvenience."

He then says (*ibid.* at p. 51):

G "If, then, this be so, that here is a conveyance made which breaks no rules of law, introduceth no visible inconvenience, savours not of perpetuity, tends to no ill example—why this should be void only because it is a lease for years, there is no sense in that."

Then he was asked what bounds he would put. It was thought he was going to a vast extent in allowing a contingency on a life in being—that must take place on a life in being; and he was asked where he would stop—where were the bounds? and he answered (*ibid.* at p. 49):

H "You may limit, it seems, upon a contingency to happen in a life. What if it be limited if such a one die without issue within twenty-one years or one hundred years, or while Westminster Hall stands? Where will you stop if you do not stop here? I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear; for the just bounds of a fee simple upon a fee simple are not determined; but the first inconvenience that ariseth upon it will regulate that."

I So that your Lordships will see that that question was precisely germane to this. The question was, by law, how far was the limit of the estate? LORD NOTTINGHAM, against the united opinions of the other three judges, went further than ever had been gone before, and he did it on grounds of public policy. He was asked, "Where will you stop?" and he said: "I will stop wherever I find a visible inconvenience." Succeeding judges have gone on; and now the rule is that you may take a life in being, and twenty-one years after that life; and that clearly shows how sound the principle of LORD NOTTINGHAM was, and how wisely it has been extended. But the

judges have had no difficulty in stopping; and why did they stop? Because they found inconvenience. The principle of the law did not allow the tendency to perpetuity; and when a limitation had that tendency, they stopped it. So here. These provisos are the subject of limitation, and you are to construe and mould them, if you can, so as to meet that principle in the law. If you find that they are not capable of being so dealt with, you must strike at the root of them—and on what ground? On the ground of public policy. Why should not grounds of public policy be applied to limitations of this nature, as well as to limitations of another, namely, in perpetuity? The law limits it; it being important that you should not allow vague and vain limitations to be inserted in the will of a testator.

I shall conclude with this one observation. I pray your Lordships to bear in mind, if you permit this mischief now to be introduced, what the bearing of it is, and where it will stop. You might not be able to stop it, because a visible inconvenience came; because, if you permit this when the inconvenience is so visible, you could not stop any other disposition. My Lords, men's minds are prone to embrace precedents, and to invent new-fangled schemes, without the aid of the law. If your Lordships decide this case according to the opinion of the majority of the learned judges, no man is wise enough to know or to say where the mischief will stop, or how far it will go. I ask your Lordships to consider if there were a considerable number, as there might be, and probably would be, of landed proprietors, each attempting to raise a dignity on his own private estate, embarrassing and entangling the Crown, and embarrassing and perhaps leading to mischief the Crown's advisers—how the Crown would deal with the circumstances, and how the law would stand with respect to that which would become a public mischief. Your Lordships ought to strike at this, on the ground—and on the ground alone—that it is necessary for public policy. On these grounds, I have only to advise your Lordships that, on the first point, there is no condition precedent, and that no such words can be imported by law as the learned judges have advised your Lordships to import. On the other point, that the condition subsequent, if it be a condition, is illegal, and therefore void; and consequently the decision of the court below must necessarily be reversed.

LORD CRANWORTH, L.C.—Although I have still the misfortune to retain the opinion which I originally entertained, differing from the opinion which has been expressed by the four noble and learned Lords who have addressed your Lordships, yet I do not feel it inconsistent with my duty or with my respect to your Lordships to state that it is my intention in any detail to give the reasons for that difference, and on these grounds. Four of your Lordships have stated, at very great length, your reasons for thinking that the judgment ought to be reversed. My Lords, without making any distinction such as is made in practice, though not in the theory of the constitution, between those noble Lords who are called Law Lords and other noble Lords, and assuming that all noble Lords might equally give their opinion and vote on this question as on every other, yet I may, I think, assume that no peer would think fit on a question of this sort to give his vote, who has not heard the whole of the arguments. There being only four noble Lords besides myself who have heard the argument, I may assume that your Lordships will only have to decide between the views of those four noble Lords and my own; and, in fact, the four noble and learned Lords who have addressed your Lordships will decide the question. If, however, I had been in the position of either of those noble Lords, I should nevertheless, although differing from them, and though my difference was in some sense useless, have felt myself called on to state in detail the grounds of that difference of opinion. But, inasmuch as this is an appeal from a decree made by myself, and inasmuch as the grounds on which I pronounced that decree are before your Lordships, fully stated in print, being printed from my own manuscript, I do not think it is necessary that I should repeat what is already there stated. Whatever may be the demerits or the errors of that judgment, I am perfectly satisfied that I have not to accuse myself of having come to the conclusion at which I

A have arrived hastily and without the fullest deliberation. I did give to the case my fullest attention, and the result of it is before your Lordships.

I think I know myself well enough to be able to say that, if my opinion had been shaken by the arguments which I have heard, I should have had no hesitation in stating at once that I had changed my opinion; and I should have made that admission the more readily, because the circumstance of the great and I might almost say overwhelming majority of the learned judges who heard the case having concurred in the view which I take, would have relieved me from anything like a sense of false shame, if I had been convinced. It may be that it is difficult to change one's opinion, or it may be from other causes—what the causes are I do not inquire—but I still retain the opinion which I formed at the original hearing of this case, and which is expressed in print as shortly and clearly as I was able to express it.

C Therefore, it is that I do not think it will be either necessary, or, I might almost say, respectful to your Lordships, to read over to you again that which you have already read, or to put in different language that which I have already stated in the best language I could command to convey my meaning; and, therefore, I simply say that I adhere to my original opinion. But there are one or two little points which have fallen partly in the course of the arguments, partly from the opinions

D of the learned judges, and partly from your Lordships in the course of what you have stated today, that do induce me to make one or two observations, and they shall be of a very limited character.

In the first place I certainly felt in the course of the argument, that perhaps I had been wrong in the use of the word "condition." I did not mean to use it in the technical sense of a legal condition. When we speak of common law pleadings, all

E conditions precedent must be averred. It is not strictly a condition, but it expressed my meaning, as I thought, with sufficient accuracy; and I shall continue the use of that expression, though entirely deferring to what has been said, that it is not, strictly speaking, a legal condition. But, call it a contingent limitation, or a contingency, or give it what name you please, I think it is to be governed by the same consideration. Certainly, nothing that I have heard, either in the arguments

F at the Bar or from the four noble Lords who have addressed your Lordships, has at all (I speak with submission and diffidence, because I differ from such high authorities) shaken me in the notion that there is in that sense a condition precedent. It is said that that could not have been the intention of the testator. In my opinion it is not a question of intention at all. Whether a certain course of events operate as a condition precedent or as a condition subsequent is something collateral to the intention, and not dependent upon it at all. My opinion would not have been shaken if

G the will had said, "I mean all this to operate as a condition subsequent." Why? I take it, in deciding whether a condition is subsequent or precedent, what we are to look at is, to see the way in which it is to operate; and if it is something which is to happen one way or the other, before that which is contingent upon it can be decided, that is in the nature of things precedent. Can there be the least doubt in

H the world that the testator meant (I recollect his meaning only from the words of his will) that if, at the death of Lord Alford, he dying in the lifetime of his father, Lord Alford had not obtained a dukedom or marquise, then Lord Alford's son, at his death, should not have the estate. It seems to me, after all that has been said, to be a proposition utterly incontrovertible. To say that it shall operate as a condition subsequent, if it is in the nature of things a condition precedent, seems to me

I confounding that which is the object of the intention, with that which is not the object of the intention.

Let me put this case. Suppose Lord Alford had survived his father and had become Lord Brownlow, and the question of the operation of the contingency, or of the proviso had then come into effect; and suppose in this will the testator had said, after the proviso in that case defeating the estate, "I intend that proviso to operate as a condition precedent," I should have laughed at it—I should have said, "What do you mean by its operating as a condition precedent? It is in its nature a condition subsequent, and, therefore, all the rules that attach upon conditions subsequent

will be applicable, although the testator has chosen to call it a condition precedent." I think exactly the same principle applies. No doubt very ingenious arguments have been adduced to show, from the terms of the will, that the testator meant this to operate as a condition subsequent. I cannot believe that any such thought ever crossed the mind of any testator. The testator does consider how his property is to go; but whether it is to go by one rule of law, or by a condition of one character or another, never crosses the mind of any testator; it is something beside the intention. A B

My noble and learned friend who last addressed your Lordships adverted to *Phipps v. Akers* (22), and many similar cases of that sort. The courts have got over contingencies, and have made violent struggles to get rid of them, and have treated the will as if it were differently worded; and so either they see, or think they see, an intention in the testator which would be defeated by the use of those words in the way he has used them, and they have got over the use of those words in order to carry into effect the intention. But in this case nobody surely can doubt what the intention of the testator was; and if it were a lawful intention, it will be defeated by the course which your Lordships are about to take. Let me ask your Lordships to put the question, whether this is a condition precedent or subsequent, to the test. One of the learned judges (PARKE, B.) in his opinion, adverts to this circumstance, and says that you cannot, in trying this condition, by any suggestion bring it to the test of special pleading, because in actions of ejectment there is no special pleading; but it occurred to me to suggest this case to your Lordships. I will suppose an action of covenant. I do not profess to be a very expert special pleader; but I think this is a matter so much in the substance of the case, that I cannot be wrong in what I am about to suggest. It is a well-known rule that all conditions precedent, using the words in rather a loose sense, must be averred by the plaintiff on his declaration; whereas a condition subsequent, which defeats a previously-acquired right, need not be alluded to by the plaintiff—it must be set forth by the defendant. Let me suppose an action of covenant by A. B. against C. D., and the declaration of the plaintiff to state that C. D., by his deed, under his hand and seal, covenanted with plaintiff that he would pay to J. S. during his life an annuity of £100, and would after decease of J. S. pay to such person as should then be heir male of the body of J. S. a like annuity of £100, by half-yearly payments, the first payment to be made at the end of six calendar months next after the decease of J. S.; provided always, that if J. S. should not in his lifetime acquire the title of Duke of Bridgewater, then the said annuity so payable to the heir male of his body should cease and be void, and that in such case it shall be payable to X. Y. for his life, and after his death to such person as shall be heir male of his body, with a like proviso in case X. Y. shall not acquire the title of Duke of Bridgewater. The declaration, I then assume, shall go on to state that the defendant during the life of J. S. paid him the said amount, as it from time to time became due; that J. S. died on the blank day of blank, leaving J. N., his eldest son and heir male of his body, and though more than three years have elapsed since the death of J. S., and though J. N. is still alive, yet defendant has not paid him the said amount or any part thereof, to the damage, etc. Demurrer by defendant for want of averment that J. S. had, in his lifetime, acquired the title of Duke of Bridgewater. I think it would make no difference if the deed expressly stated that the condition, as to the dukedom, should be taken to be a condition subsequent. Are your Lordships prepared to say that that demurrer would have been a bad demurrer? In a matter of this sort it may be a little dangerous to speak off-hand with very great confidence; but I am strongly of opinion that that would have been a good demurrer. I am not at all inclined to think that it would have been rendered a less good demurrer if the deed had stated that it should operate as a condition subsequent. The question would have been no more affected by the declaration of the intention of the parties, than if they had said "It shall operate as a final recovery," or anything else. The question would have been: "Was it intended that J. N. and the heirs male of his body, at the death of J. S., should take any part of that annuity, unless C D E F G H I

- A J. S. had obtained the dukedom in the lifetime?" In my opinion, it was necessary that that should have been averred. Perhaps it may be said that it is only *idem per idem*. It is exactly this case; and if it does not illustrate my meaning, I must then only fall back on the reasons I have given in the judgment which is now in print, and leave your Lordships to consider this as not adding at all to the weight of the reasons I there gave. If I were right in that—and I fear your Lordships
- B have come to the conclusion that I was wrong in thinking that it was a condition precedent—the other question substantially does not arise. It might arise in certain contingencies; but I do not think it necessary for me to go into that question. I have stated my grounds for thinking that there was nothing in the nature of the proviso which this House or any court of law could deal with as being put upon grounds of public policy. I shall not repeat the reasons which I have stated.
- C As I have said, this subject is always exceedingly difficult to deal with. LORD NOTTINGHAM thought that a life in being and twenty-one years afterwards was good—he thought that a certain limitation was not bad; but it would be a very dangerous thing now to say that we think it contrary to public policy that I should go on as long as it has been heretofore going on. I do not at all rely on that; because those are matters very difficult to be dealt with. I only wish your Lordships had
- D been called in aid to decide the *Thellusson* will [*Thellusson v. Woodford* (28)]; for I protest that, to my mind, whatever inconvenience arises from public policy as applicable to the proviso, I think that public policy was thwarted in a tenfold degree by *Thellusson's* will. The object of that will was to keep mankind out of the enjoyment of an enormous sum of money, which, according to the calculation of actuaries, might have amounted to ten millions or fifteen millions before anybody should
- E enjoy any part of it, or only a small portion of it, and to keep everybody out of the enjoyment of it for a period of some sixty or seventy years. The court said there was nothing in the law to prevent it; but that it was contrary to public policy is proved by the fact that in the very next year the legislature interfered to prevent anything of the sort happening for the future [*Accumulations Act, 1800*].
- F My argument, my Lords, is but an additional argument to those I have already stated, which are in print, and which I shall not trouble your Lordships by referring to again. I must make one observation, that, if I have come to an erroneous conclusion, it is an error which I think I have less reason to regret than perhaps could ever have fallen to the lot of any judge who has committed an error; because it was stated to me fairly, when the case was under argument by the learned counsel, that they averred the matter in order to get a decision; but I believe neither party cared
- G which way the decision went. If I had wished for an excuse for indolence, it was tendered to me almost as if they had said, "If your Lordship will just state your impression upon the subject, and make a decree, that will satisfy us; for all we want is a *locus standi* to go to the House of Lords." I mention this for the purpose of saying that I did not think it consistent with my duty to take that course. I did come, as it turns out from the opinion of the noble and learned Lords, to which I
- H most readily bow, to a wrong conclusion; though I am supported in that conclusion by the great majority of the judges, who also differ from their Lordships' opinion. I can only say that I am extremely glad that the real rights of the parties have now been correctly ascertained: and I shall rejoice in one sense, as much as any of your Lordships can do, that any attempts to make these extraordinary wills will be found not very easy to carry into effect. If I could see what the public policy in such a
- I case was, I should feel as much as any of your Lordships that it is exceedingly to be deprecated, that parties should puzzle mankind, and interfere with the ordinary enjoyment of property, by any contrivances or provisions out of the ordinary course of things.

LORD BROUGHAM.—I entirely agree with my noble and learned friend, and I believe we are all of opinion that the attention he gave to this case was most diligent and entire, and he might very easily have spared himself the trouble of giving that judgment. It was undeniable on all hands, that the case was brought into

court with the view of its being ultimately brought to your Lordships' House, A
whichever way my noble and learned friend decided it.

Decree reversed.

COLYER v. FINCH

[HOUSE OF LORDS (Lord Cranworth, L.C., and other Peers), July 15, 17, 18, 24, 1856]

[Reported 5 H.L.Cas. 905; 26 L.J.Ch. 65; 28 L.T.O.S. 27;
3 Jur.N.S. 25; 10 E.R. 1159]

Mortgage—Priority—Priority of first mortgagee—Postponement—Title deeds left in possession of mortgagor—Fraud or gross negligence by first mortgagee—“Gross negligence”—Prima facie evidence.

A first mortgagee, having the legal title, is not to be postponed to a subsequent purchaser or mortgagee merely because he has not possessed himself of the title deeds of the mortgaged property. To deprive the first mortgagee of his legal priority the person claiming by title subsequent must satisfy the court that the first mortgagee has been guilty of either fraud or gross negligence but for which he would have had the deeds in his possession. What circumstances will amount to, or be evidence of, gross negligence it is difficult to define, but prima facie a mortgagee who, knowing that his mortgagor has title deeds, omits to call for them, or who omits to make any inquiry on the subject, must be considered to be guilty of such negligence as to make him responsible for frauds which he has thus enabled his mortgagor to commit.

Circumstances in which **held** that there was no evidence of gross negligence.

Notes. Applied: *Carter v. Carter* (1857), 3 K. & J. 617. Considered: *Hipkins v. Amery* (1860), 2 Giff. 292. Applied: *Hunt v. Elmes* (1860), 2 De G.F. & J. 578; *Dixon v. Muckleston* (1872), 8 Ch. App. 155. Explained: *Northern Counties of England Fire Insurance Co. v. Whipp*, [1881-5] All E.R.Rep. 941. Considered: *Re Venn and Furze's Contract*, [1894] 2 Ch. 101. Referred to: *Perry Herrick v. Attwood* (1857), 2 De G. & J. 21; *Phillips v. Phillips* (1862), 4 De G.F. & J. 208; *Hooper v. Gumm*, *McLellan v. Gumm* (1865), 13 L.T. 187; *Thrope v. Holdsworth* (1868), L.R. 7 Eq. 139; *Wilkinson v. Castle* (1868), 37 L.J.Ch. 467; *Hunter v. Walters*, *Curling v. Walters*, *Darnell v. Hunter* (1870), L.R. 11 Eq. 292; *Heath v. Crealock* (1873), L.R. 18 Eq. 215; *R. v. Shropshire Union Co.* (1873), L.R. 8 Q.B. 420; *Corser v. Cartwright* (1875), L.R. 7 H.L. 731; *Heath v. Pugh* (1881), 6 Q.B.D. 345; *Re Hawthorne*, *Graham v. Massey* (1883), 23 Ch.D. 743; *Manners v. Mew* (1885), 29 Ch.D. 725; *Taylor v. Russell*, [1891] 1 Ch. 8; *Re Rebbeck*, *Bennett v. Rebbeck* (1894), 63 L.J.Ch. 596; *Re Henson*, *Chester v. Henson*, [1908] 2 Ch. 356; *Parker v. Judkin*, [1931] 1 Ch. 475.

As to loss of priority by mortgagee, see 27 HALSBURY'S LAWS (3rd Edn.) 224-230; and for cases see 35 DIGEST (Repl.) 538 et seq.

Cases referred to:

- (1) *Evans v. Bicknell* (1801), 6 Ves. 174; 31 E.R. 998, L.C.; 35 Digest (Repl.) 542, 2217.
- (2) *Barnett v. Weston* (1806), 12 Ves. 130; 33 E.R. 50; 35 Digest (Repl.) 493, 1787.
- (3) *Farrow v. Rees* (1840), 4 Beav. 18; 4 Jur. 1028; 49 E.R. 243; 35 Digest (Repl.) 539, 2190.

- A (4) *Worthington v. Morgan* (1849), 16 Sim. 547; 18 L.J.Ch. 233; 31 Jur. 316; 60 E.R. 987; 35 Digest (Repl.) 541, 2205.
- (5) *Allen v. Knight* (1846), 5 Hare, 272; 15 L.J.Ch. 430; 10 Jur. 948; on appeal (1847), 16 L.J.Ch. 370; 11 Jur. 527, L.C.; 35 Digest (Repl.) 542, 2219.
- (6) *Hewitt v. Loosemore* (1851), 9 Hare, 449; 21 L.J.Ch. 69; 18 L.T.O.S. 133; 15 Jur. 1097; 68 E.R. 586; 35 Digest (Repl.) 541, 2208.
- B Also referred to in argument:
Kennedy v. Green (1834), 3 My. & K. 699; 40 E.R. 266, L.C.; 35 Digest (Repl.) 535, 2154.
Hiern v. Mill (1806), 13 Ves. 114; 33 E.R. 237; 35 Digest (Repl.) 512, 2000.
Dryden v. Frost (1833), 3 My. & Cr. 670; 8 L.J.Ch. 235; 2 Jur. 1030; 40 E.R. 1084, L.C.; 35 Digest (Repl.) 715, 3824.
- C *Jerrard v. Saunders* (1794), 2 Ves. 454; 30 E.R. 721, L.C.; 20 Digest (Repl.) 275, 200.
- Penny v. Watts* (1849), 1 Mac. & G. 150; 2 De G. & Sm. 523; 1 H. & Tw. 266; 19 L.J.Ch. 212; 14 L.T.O.S. 82; 13 Jur. 459; 41 E.R. 1220, L.C.; 20 Digest (Repl.) 348, 768.
- D *Bowen v. Evans* (1844), 6 I.Eq.R. 569; 1 Jo. & Lat. 178; affirmed (1848), 2 H.L.Cas. 257; 9 E.R. 1090, H.L.; 40 Digest (Repl.) 166, *708.
- A.-G. v. Wilkins* (1853), 17 Beav. 285; 1 Eq. Rep. 514; 22 L.J.Ch. 830; 21 L.T.O.S. 260; 17 Jur. 885; 1 W.R. 472; 51 E.R. 1043; 20 Digest (Repl.) 277, 220.
- Robinson v. Lowater* (1854), 17 Beav. 592; 2 Eq. Rep. 337; 23 L.J.Ch. 641; 23 L.T.O.S. 17; 18 Jur. 321; 2 W.R. 181; 51 E.R. 1165; on appeal, 5 De G.M. & G. 272, L.J.J.; 24 Digest (Repl.) 638, 6287.
- E *Bugden v. Bignold* (1843), 2 Y. & C.Ch. Cas. 377; 63 E.R. 167; 35 Digest (Repl.) 678, 3551.
- Shaw v. Borrer* (1836), 1 Keen, 559; Donnelly, 150; 5 L.J.Ch. 364; 48 E.R. 422; 23 Digest (Repl.) 315, 3809.
- F *Ball v. Harris* (1837), 8 Sim. 485; 1 Jur. 706; on appeal (1839), 4 My. & Cr. 264; 8 L.J.Ch. 114; 3 Jur. 140; 41 E.R. 103, L.C.; 35 Digest (Repl.) 324, 368.
- Gosling v. Carter* (1845), 1 Coll. 644; 14 L.J.Ch. 218; 4 L.T.O.S. 491; 63 E.R. 580; sub nom. *Gostling v. Carter*, 9 Jur. 324; 24 Digest (Repl.) 636, 6272.
- Harper v. Faulder* (1819), 4 Madd. 129; 56 E.R. 656; 35 Digest (Repl.) 540, 2198.
- G *Martinez v. Cooper* (1826), 2 Russ. 198; 38 E.R. 309, L.C.; 35 Digest (Repl.) 543, 2225.
- Stevens v. Stevens* (1845), 2 Coll. 20; 14 L.J.Ch. 252; 4 L.T.O.S. 491; 9 Jur. 894; 63 E.R. 617; 35 Digest (Repl.) 543, 2222.
- Sheldon v. Cox* (1764), 2 Eden, 224; Amb. 624; 28 E.R. 884, L.C.; 35 Digest (Repl.) 516, 2032.

H **Appeal** from an order for foreclosure made by SIR JOHN ROMILLY, M.R., in a suit instituted by the respondent, Edward Finch, against the appellant, Thomas Colyer for the foreclosure of a freehold estate, called "Hook's Place" and "Weavers," and situated at Southfleet, in Kent.

On July 7, 1842, Sir John Kenward Shaw, Bart., being absolutely entitled to the estate in question subject to certain legacies amounting to £6,000 and to an annuity of £200 charged thereon and also upon other property of his and to a term of 100 years for securing such annuity, and being also one of the executors of the will under which he became so entitled, executed a mortgage in fee of the estate to the respondent Finch for securing £3,500 and interest. In that transaction Mr. John Hayward, of Dartford, acted as solicitor both for the mortgagor and the mortgagee. At the same time there were handed over to Finch certain documents which he was led to believe gave to him a complete security, but shortly before the present litigation it transpired that some documents of title which ought to have accompanied the mortgage were not given up to him. On Sept. 23, 1843, the property in

mortgage to Finch, with other estates, was conveyed by Shaw to John Hayward, in trust for securing to the latter certain moneys and interest therein mentioned, and without any notice having been therein taken of Finch's security. Between November, 1845, and July, 1846, Mr. Colyer advanced, through Mr. John Hayward, to Sir John Kenward Shaw, £11,000 upon a deposit of certain title-deeds relating to the same estates, with an agreement giving Thomas Colyer an equitable mortgage for that sum and interest. In this transaction no other solicitor appeared to have been employed than John Hayward, and in like manner no notice was given to Colyer of Finch's prior mortgage. On Oct. 11, 1847, Sir John Kenward Shaw conveyed the same estates, with other property, to John Hayward, for further securing the moneys secured by the deed of Sept. 23, 1843 (but in which Finch's money was again not noticed), and for raising, among other sums, the £11,000 so advanced by Thomas Colyer. This deed was prepared by John Hayward, and executed by Shaw without the knowledge of Colyer. Ultimately Colyer became dissatisfied with his security, and insisted upon repayment through the medium of Mr. Ellis, a new solicitor, whom he had consulted.

By a mortgage of date May 20, 1848, John Hayward, with the concurrence of Shaw, Colyer and others, conveyed to William Webb Hayward the property in question, with all the other premises previously conveyed to him by Shaw, discharged from the trusts of the deeds of conveyance to John Hayward of Sept. 23, 1843, and Oct. 11, 1847, as a security to re-transfer certain stock loans of £20,000 and £4,750, and to pay £6,000 sterling to Mr. Thomas Colyer, and in such deed was contained a power of sale to William Webb Hayward, for the general purposes of the trusts of such mortgage security, and among others for raising and paying the legacies, amounting to £6,000. This deed was prepared in the office of Messrs. Essell and William Webb Hayward, solicitors of Rochester, but no notice was given to William Webb Hayward, at the time of the execution thereof by Sir John Kenward Shaw or John Hayward of Finch's first mortgage claim, and out of the loans made under the deed Colyer was paid off his equitable mortgage of £11,000, and executed such deed, and thereby released that claim. On Feb. 15, 1849, William Webb Hayward put up the estates comprised in Finch's security for sale by public auction, entirely without the knowledge of Finch, and on July 17, 1849, the portion thereof called Hook's-place and Weaver's was conveyed to Thomas Colyer as the purchaser thereof, and the title-deeds were concurrently handed over to him. Mr. Colyer's solicitor in this case also was Mr. Ellis.

Finch's mortgage interest having ceased to be paid by John Hayward, who had been accustomed to pay it as Sir John Kenward Shaw's solicitor, it became necessary for him to enforce his rights of foreclosure under his first mortgage charge. On June 1, 1852, accordingly, he filed his bill in the Court of Chancery (which was afterwards amended) against Sir John Kenward Shaw and Mr. Colyer, praying by such bill that an account might be taken of what was due to him, the respondent, Finch, for principal, interest and costs on his mortgage security, and that Shaw and the appellant, Colyer, might be ordered to pay to the respondent what should be so found due to the respondent by a day to be appointed by the court for that purpose, and in default thereof that the appellant might be absolutely barred from all equity of redemption of and in the mortgaged premises, and might be directed to deliver up to the respondent all deeds, documents, muniments of title and writings relating to the mortgaged premises; or, if the court should not direct possession to be given up to the respondent, then that the appellant might be restrained by the order and injunction of the court from setting up or pleading or giving in evidence in any proceedings to be taken at law by the respondent for obtaining possession of the mortgaged premises the term of 100 years created by the indentures of April 9 and 10, 1822. The appellant duly appeared and put in answers to the original and amended bills. Shaw was at the time of filing the bill, and continued, out of the jurisdiction of the court.

On Sept. 28, 1852, the appellant filed his bill in the Court of Chancery, which he afterwards amended) against the respondent, praying that it might be declared by

A the court either that the respondent's mortgage was invalid, or, if not declared invalid, that he was not entitled to priority over the appellant's purchase; and also that, whether such mortgage should be declared valid or invalid, the respondent might be directed to convey to the appellant and his heirs, or as he or they should direct, all such estate (if any) in the farms and premises as might then be vested in the respondent under his mortgage deed, and that, if the mortgage deed should be

B declared invalid, the same might be ordered to be delivered up to be cancelled, and that the respondent might be restrained by the order and injunction of the court from taking any proceedings at law to obtain possession of the farms and premises. The respondent duly appeared and put in answers to the original and amended bills. Replication having been filed, and evidence gone into on both sides, the two causes came on to be heard before the Master of the Rolls who, by his decree, dated

C July 18, 1854, decreed that the appellant's bill should stand dismissed with costs, to be taxed, and that the appellant should pay to the respondent his costs when so taxed, and that an account should be taken of what was due to the respondent for principal and interest on his mortgage security, and for his costs of the first-mentioned suit, such costs to be taxed by the taxing master, and that upon the appellant paying the respondent what should be found due to him for such principal,

D interest and costs, within six months after the chief clerk of the judge to whose court the cause was attached should have made his certificate at such time and place as should be thereby appointed, the respondent should re-convey the mortgaged premises free and clear of and from all incumbrances done by him, or any claiming by, from or under him, and deliver up all deeds and writings in his custody or power relating to the mortgaged premises, upon oath, to the appellant, or as he should appoint; and that in default of the appellant paying to the respondent what should be found due to him for such principal, interest and costs within the time aforesaid, the appellant from thenceforth should be absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of, in and to the mortgaged premises. Against this order the appellant

E appealed.

F *Rolt, Q.C., C. Hall and Mott* for the appellant.
Roundell Palmer, Q.C., and Osborne for the respondent.
 Their Lordships took time for consideration.

July 24, 1856. **LORD CRANWORTH, L.C.**, delivered the following opinion.—The remaining question* for our decision is whether or not Mr. Finch, the mortgagee, put himself in such a situation as to disqualify him from setting up a prior legal title by reason of having improperly left the title-deeds in the hands of Sir John Kenward Shaw, the mortgagor from whom he derived his title. The rule upon this subject is now well settled. A first mortgagee, having the legal title, is not to be postponed to a subsequent purchaser or mortgagee merely because he has not possessed himself of the title-deeds. To deprive the first mortgagee of his legal

G priority the party claiming by title subsequent must satisfy the court that the first mortgagee has been guilty of either fraud or gross negligence but for which he would have had the deeds in his possession. What are the circumstances which will amount to, or be evidence of, gross negligence it is difficult to define beforehand. But I think that *prima facie* a mortgagee who, knowing that his mortgagor has title-deeds, omits to call for them, or who omits to make any inquiry on the

H subject, must be considered to be guilty of such negligence as to make him responsible for frauds which he has thus enabled his mortgagor to commit.

I

Is that the case here? Finch was a retired tradesman, having a sum of between £3,000 and £4,000 which he was desirous to invest on real security. He was a friend of Mr. Hayward, a solicitor of station and respectability, who was with him an executor of his father's will, a circumstance which no doubt made Hayward

* Two matters which do not now call for report were decided immediately after the conclusion of the arguments.

aware to a certain extent of the nature of Finch's property. Hayward was also the solicitor of Sir John Kenward Shaw, a neighbouring landed proprietor, and in that character he applied to Finch in June, 1842, to know if he would lend his money on a mortgage of Sir John Kenward Shaw's estates, which he represented truly to be of ample value and to be the absolute property of Sir John Kenward Shaw free from all encumbrances. Finch acceded to the application, and directed Hayward to prepare the necessary deed. The progress of the transaction is described in Finch's affidavit thus: He says:

"About the latter end of the month of June or the beginning of July, 1842, the said John Hayward desired me to be ready with the said £3,500 by the then following July 7, and I accordingly applied to Mr. Frederick Charles Chappel, of 15, Angel Court, in the city of London, stockbroker, to sell for me so much of a sum of £4,076 19s. 3d. new three-and-a-quarter per cents. then standing in my name, as would produce the sum of £3,500 clear, but Mr. Chappell informed me that he could not complete such sale until July 8. On July 8 I went, in the first instance, to the Adelaide Hotel, London Bridge, where I was to meet Mr. Hayward by appointment, and I then saw Mr. Hayward and Sir John Kenward Shaw in conference together. Mr. Hayward then informed me that he had arranged everything with Sir John Kenward Shaw and by his (Hayward's) desire. I then went to the office of Mr. Chappell, and sold £3,517 14s. 3d. portion of the sum of £4,076 19s., which produced, after deducting the brokerage, the sum of £3,500 exactly. Mr. Chappell handed me over the proceeds of the sale in notes of the Bank of England. Immediately I received the £3,500 I went from the office of Mr. Chappell to the Adelaide Hotel, London Bridge, where Mr. Hayward had appointed to meet me. I met Mr. Hayward at the hotel, and he then informed me that Sir John Kenward Shaw had just left, but that he, Mr. Hayward, would see him that evening, and I might leave the money with him. I did, accordingly, then pay to Mr. Hayward the £3,500. On July 11 I received from Mr. Hayward a letter, of which the following is a copy: 'Dear Sir, I was too late for Sir John Shaw on Friday, but I remained in London, and concluded the business yesterday afternoon. I have the papers, and will bring them up the first day I am in London. I did not get away yesterday until half-past six, and I could not manage to get to your house.—Yours very truly, JOHN HAYWARD.' A few days afterwards John Hayward called upon me, and delivered to me the indenture marked A [the mortgage-deed from Sir John Kenward Shaw] together with the several documents now produced and shown to me, marked B, C, D, E and F, and the said paper writing marked G, and he also delivered to me at the same time a parchment writing, which for the reasons hereinafter stated I have not now in my possession, and the nature of which I do not accurately know, but I believe that it was dated somewhere about 1678 and that Brasenose College, Oxford, was one of the parties to it. Mr. Hayward then informed me that the document so delivered to me constituted, with the indenture marked A, a perfect security for my advance, and I implicitly believed that statement. I was then, and am now, totally unacquainted with documents of title to landed property and legal forms, and quite incompetent to form an opinion upon the question whether the documents so delivered to me in fact constituted the title-deeds belonging to the mortgaged premises. Under these circumstances, and having no reason whatever to doubt or question the perfect respectability of Mr. John Hayward, I relied upon the representations made to me by him, and entirely believed that the documents delivered to me, were in truth and fact the title-deeds of the said premises. I never knowingly or wilfully left the title-deeds, or any of them, in the hands or custody of the said defendant Sir John Kenward Shaw."

I ought to have stated, that it was an instruction to Mr. Hayward to prepare a proper mortgage, and he did prepare that indenture accordingly.

- A The result of all this is that Finch obtained a valid legal mortgage, together with certain documents which Hayward represented to him as being, and which Finch believed to be, the muniments of title which made him completely secure. I may state that the documents not obtained by Finch were not material. They consisted of a will of the date of 1760, which was merely an indemnity against certain temporary charges which existed, and copies of subsequent wills. But for the circumstance that Finch employed Hayward as his solicitor, there would be no pretence for saying that there was in this transaction anything like culpable negligence on the part of Finch. He did all that a person in his situation could do. He obtained a valid conveyance, together with documents which the solicitor of the mortgagor, a man of credit and respectability, told him made his security perfect. To hold that he was guilty of gross negligence in not making further inquiry and investigation
- C would be to hold that to accept a mortgage security without taking all the precautions which an experienced conveyancer would suggest may subject the person accepting it to the consequences of fraudulent misconduct, or of negligence so gross as to be tantamount to fraud—a conclusion at variance with all the authorities.

- I may refer to a case which was commented on fully, *Evans v. Bicknell* (1), where the deeds had got into the hands of the mortgagor, not having been improperly lent by the trustees under the marriage-settlement, but lent under circumstances which the court held did not involve fraud, though it might have been an imprudent act. In *Barnett v. Weston* (2), a case before SIR WILLIAM GRANT, there was a loan of the deeds in the same way. *Farrow v. Rees* (3), was a case where the deeds related to settlement property, and several other cases were referred to: *Worthington v. Morgan* (4); *Allen v. Knight* (5); and *Hewitt v. Loosemore* (6).
- E If, then, such would have been the result, supposing Finch not to have employed Hayward in the business, does the circumstance of that employment make any difference? I think not. The only employment was an employment to prepare the deed which was a mere ordinary mortgage in fee from Sir John Kenward Shaw, reciting his uncle's will under which he was tenant in fee-simple of the property mortgaged. There was no investigation of title, Finch relying on Hayward's assurance that Sir John Kenward Shaw was, as in fact he was, seised in fee-simple in possession free from incumbrances. If this assurance had been false, if there had existed prior charges on the property, then there would have arisen the question how far Finch, by employing Hayward to prepare his deed, was affected with notice of these charges. But no such question did or could arise, for no prior charges, in fact, existed and in respect of the handing over of the documents, Hayward was in no respect the agent or solicitor of Finch. Finch in that part of the transaction acted for himself. Hayward acted for Sir John Kenward Shaw, and when Finch accepted from Hayward the copies of the will and other documents as being what was necessary to make him secure, the only question is whether he was bound, in order to relieve himself from the imputation of fraud or gross negligence, to inquire further of the mortgagor or of Hayward as his solicitor? I have already said that I think he was not. The consequence is, that the appellant fails in this part of the case as well as in those which were disposed of last week, and I, consequently, move your Lordships to dismiss the appeal with costs.
- H

Appeal dismissed.

FRESHNEY AND OTHERS *v.* WELLS AND OTHERS

[COURT OF EXCHEQUER (Pollock, C.B., and Martin, B.), January 27, 1857]

[Reported 1 H. & N. 653; 26 L.J.Ex. 129; 156 E.R. 1363]

Bankruptcy—Property available for distribution—Property in reputed ownership of bankrupt—Goods mortgaged to secure debt—Bankrupt left in possession—Subsequent adjudication—“True owners” of goods—Right of assignees in bankruptcy to set up jus tertii.

H., a trader, assigned his goods except fixtures worth £10 to W. Subsequently, in January, 1855, he assigned by way of mortgage all his goods including the fixtures to the plaintiffs subject to a condition for redemption on payment on demand and a stipulation that he should remain in possession of the goods until default in payment. On May 10, 1855, at noon, H. was adjudicated bankrupt. At 3 p.m. on the same day the plaintiffs demanded payment. Shortly afterwards the assignees in bankruptcy took possession of the goods and obtained an order of sale. In an action against the assignees for conversion,

Held: (i) under the mortgage of January, 1855, the plaintiffs were the “true owners” within the meaning of s. 125 of the Bankrupt Law Consolidation Act, 1849 [repealed: see now Bankruptcy Act, 1914, s. 38 (c) (2) HALSBURY’S STATUTES (2nd Edn.) 321]; the goods were in the “order and disposition” of the bankrupt with their consent, and, therefore, the goods passed to the assignees in bankruptcy save for the £10 worth of fixtures; (ii) the assignees in bankruptcy were not precluded from setting up that the goods were in the order and disposition of the bankrupt with the consent of W., because they were, in a sense, claiming through him, but, on the other hand, they were setting up their own title and were not precluded from pleading a jus tertii.

Notes. The Bankrupt Law Consolidation Act, 1849, has been repealed. The provisions of s. 125 of that Act are reproduced in the Bankruptcy Act, 1914, s. 38 (c): see 2 HALSBURY’S STATUTES (2nd Edn.) 321.

Applied: *Hornsby v. Miller* (1858), 1 E. & E. 192. Referred to: *Spackman v. Miller* (1862), 12 C.B.N.S. 659.

As to reputed ownership, see 2 HALSBURY’S LAWS (3rd Edn.) 438-447; and for cases see 5 DIGEST (Repl.) 808 et seq.

Case referred to:

- (1) *Quartermaine v. Bittleston* (1853), 13 C.B. 133; 22 L.J.C.P. 105; 20 L.T.O.S. 236; 17 Jur. 281; 1 W.R. 131; 138 E.R. 1147; 5 Digest (Repl.) 1037, 8376.

Also referred to in argument:

- (2) *Jeffries v. Great Western Rail. Co.* (1856), 5 E. & B. 802; 25 L.J.Q.B. 107; 26 L.T.O.S. 214; 2 Jur.N.S. 230; 119 E.R. 680; sub nom. *Jeffries v. South Western Rail. Co.*, 4 W.R. 201; 43 Digest 514, 519.
- (3) *Bradley v. Copley* (1845), 1 C.B. 685; 14 L.J.C.P. 222; 5 L.T.O.S. 198; 9 Jur. 599; 135 E.R. 711; 43 Digest 497, 361.
- (4) *Fenn v. Bittleston* (1851), 7 Exch. 152; 21 L.J.Ex. 41; 18 L.T.O.S. 197; 155 E.R. 895; 5 Digest (Repl.) 679, 5979.
- (5) *Heslop v. Baker* (1853), 8 Exch. 411; 22 L.J.Ex. 333; 20 L.T.O.S. 191; 17 J.P. 136; 155 E.R. 1408; 5 Digest (Repl.) 808, 6336.

Rule Nisi obtained by the defendants to enter the verdict or reduce the verdict either to £25 or £11, in an action for conversion of goods, chattels and effects, in which the defendants pleaded Not Guilty and not possessed.

At the trial, before WILLES, J., at Durham Assizes, it appeared that the defendants were the assignees of a bankrupt, named Hagestade. [The assignees were the equivalent of trustees in bankruptcy.] In February, 1844, and again in Octo-

A ber, 1852, the bankrupt mortgaged his furniture, etc., to Ward. These mortgages did not include effects to the value of £25, which were subsequently mortgaged to the plaintiffs. In January, 1855, the bankrupt executed a mortgage to the plaintiffs of all his goods, chattels, fixtures and effects mentioned in the former mortgage, comprising the effects to the value of £25 already mentioned as not covered by the former deed, including fixtures to the value of £10. These were articles screwed
B to the walls. The assignment being absolute in terms, was subject to a proviso for defeasance on condition of payment on demand of a certain sum, with a power of seizure and sale in the event of default of payment on demand; there being also a stipulation that the bankrupt should be at liberty to remain in possession until such default.

On May 9, 1855, the sum of £169 was due from the bankrupt to the plaintiffs
C and on that day he, without their knowledge, filed a declaration of insolvency, on which at about noon on May 10, there was an adjudication of bankruptcy. The plaintiffs, before 3 p.m. on that day, served notice of demand of payment on the bankrupt and immediately afterwards took possession of all the goods on his premises, including the fixtures referred to. Shortly afterwards, on the same day, the assignees, the defendants, seized the goods and subsequently obtained from the
D Court of Bankruptcy an order for the sale of the goods, as having been in the order and disposition of the bankrupt. The order recited that it had been shown that the bankrupt was, with the consent of the true owner thereof, possessed of certain goods (specifying them), and that an application had been made by the assignees that the said goods should be sold, and then directed that the same should be sold for the benefit of the creditors. The order, however, did not specify the party
E who was the "true owner," and with whose "consent" the goods had been in the bankrupt's order and disposition. Under this order the goods were disposed of, and it was admitted that there had been a conversion in fact.

It was objected that there was no possession sufficient to maintain the action for conversion, and that the plaintiffs, at all events, could not recover, except as to the goods to the value of £25, not included in the first mortgage, or as to the fixtures
F to the value of £10. On the other side, it was contended that the order for sale was not valid, and that the defendants could not set up Ward's title. WILLES, J., ruled that there was a possession of all the goods sufficient to sustain the action but reserved the points. The verdict accordingly was entered for the plaintiffs for £169, and a rule was obtained by counsel for the defendant to reduce the verdict.

Hugh Hill and Unthank for the plaintiffs showed cause against the rule.—The
G assignees claim through the bankrupt, under an assignment by operation of law, and cannot take anything to which the bankrupt was not legally entitled: *Jeffries v. Great Western Rail. Co.* (2). Hence, they cannot set up Ward's title, unless they show that they have it. The plaintiffs were in possession, and they were deprived of possession by the defendants, the assignees in bankruptcy, on the ground that the goods were Ward's. [MARTIN, B.—They claimed the goods as theirs.] But
H because Ward, being the owner, left them in the bankrupt's order and disposition. [MARTIN, B.—That is not setting up *jus tertii*: they set up their own title; not Ward's.] They claim through Ward's title. [POLLOCK, C.B.—The case cited only establishes the principle that a defendant on the plea of not possessed, in an action for conversion, may set up that he is the owner, but not merely that some one else
I is, from whom he derives no right or title. Here, the defendants claimed the goods as their own.] It is conceived that the case proceeded on the principle that even a stranger in possession can recover against a wrongdoer. [MARTIN, B.—The defendants here were not in the position of mere wrongdoers, if they claimed and seized goods they were entitled to.] The plaintiffs had a prior possession. [MARTIN, B.—Of an hour or so. That cannot affect the question, if the assignees had a title.] Either they were in the position of wrongdoers, or if they had a colour of title it was only acquired by operation of law through the bankrupt, and they cannot set up a title which he could not set up, however inconsistent with his own prior

assignment to Ward. The defendants cannot set up the title of a third party, unless they derive title through him; and here they claim against Ward, not through him. Moreover, the case did not come within the principle of the provision in the bankrupt law, as to goods in the order and disposition of the bankrupt with consent of the true owner. For the possession here by the bankrupt was consistent with the terms of the assignment, which in effect amounted to a lease of the goods: *Bradley v. Copley* (3) and *Fenn v. Bittleston* (4). Further, the order [of the Bankruptcy Court] was invalid. It should have specified the "true owner," with whose consent the goods were in the order and disposition of the bankrupt, for otherwise it does not appear that there was any adjudication on his claim: *Heslop v. Baker* (5) and *Quartermaine v. Bittleston* (1). The plaintiffs here were not owners until after demand of payment and default on such demand. They must clearly recover as to the goods to the value of £25. At all events, the plaintiffs must recover as to the fixtures, which could not be in the order and disposition of the bankrupt.

Manisty for the defendants supported the rule.—The assignees here do not set up *jus tertii*. They do not set up Ward's title, but their own; and, on the other hand, they do really derive their own title through or under Ward, and their title is founded on his. But, in truth, they do not require his title at all; they can claim under the deed of 1855. [POLLOCK, C.B.—I agree that Ward's title is not necessary for the assignees; but if it were so, it would not help them.] The order for sale was valid, and the assignees can stand on that without reference to Ward's title. It is admitted, however, that they cannot recover as to the fixtures.

POLLOCK, C.B.—As to the fixtures, they clearly could not come within s. 125 of the Bankrupt Law Consolidation Act, 1849, as to "goods and chattels" in the order and disposition of the bankrupt. As to the rest of the effects, they were within the order and disposition of the bankrupt with the consent of the true owner and, therefore, the assignees were justified in seizing and selling them, having obtained an order for that purpose.

The question whether, as regards Ward, the goods were in the order and disposition of the bankrupt with the consent of the true owner might be one of nicety. I think that if Ward was the true owner, the assignees, although aware of his title, were entitled to treat the goods as in the order and disposition of the bankrupt. The assignees, as regards the true owners, claim adversely, but yet consistently with and in a certain sense through his title, and had a right to set it up in this action. The defendants, therefore (except as already intimated), are entitled to judgment.

MARTIN, B.—I am of the same opinion. The right of the assignee(s) [trustees in bankruptcy] is governed by the state of things on May 10, the day of the adjudication in bankruptcy. At that time, as between the plaintiff and the assignees, the bankrupt was in possession of certain goods by virtue of a provision in the deed of assignment of Jan. 2, 1855, under which the plaintiffs claim. That deed transferred the property absolutely to them (subject only to a proviso for redemption), and they became the "true owner," and were only to cease to be so on the performance by the bankrupt of a condition subsequent. According to all the principles and analogies of law, the effect was to pass to them, the plaintiffs, the absolute property, subject only to a condition subsequent. The deed, however, contained a stipulation enabling the bankrupt to retain possession of the goods until default, which, however, might be on demand by the plaintiffs of payment at any time. The plaintiffs, therefore, by virtue of the deed were the "true owners" of the goods in question.

Then had the bankrupt at the time of his bankruptcy these goods in his possession, order and disposition as reputed owner, with the consent of the true owner? The deed provides for his having such possession of them. It is one of the terms of the very deed under which the plaintiffs claim. Surely that was a case of that very kind of "reputed ownership" which the bankrupt law contemplates. The effect

A of the law is, that if the true owner of goods and chattels permits another person to have them in his possession as reputed owner he must suffer this consequence, that in case of bankruptcy the goods will pass to the assignees in bankruptcy. As to *jus tertii*, my opinion was always in conformity with that expressed in *Quartermaine v. Bittleston* (1), that the order for sale vests the property in the assignees. The assignees, however, set up their own title, and not another's. If it is said

B that Ward was the true owner by virtue of the former deed, still, as the rule of law is, with regard to personal chattels, that a party can only, except by sale in market overt, transfer such title as he possesses, if the assignees could make out a case of reputed ownership as against the true owner, they gave themselves a title as against all the world.

C As to the order for sale I think it was sufficient, and vested the goods in the assignees. It is necessary that the attention of the Commissioners should be directed to particular goods; but it is unnecessary that it should be mentioned in the order who was the party claiming as the owner. It seems to me, therefore, that (except as admitted) the verdict must be entered for the defendants.

Rule absolute to reduce the verdict to £10, the value of the fixtures.

D

E

R. v. LOPEZ. R. v. SATTLER

F [COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Lord Campbell, C.J., Cockburn, C.J., Pollock, C.B., Coleridge, Wightman, Erle and Williams, JJ., Martin, B., Crompton, Willes and Crowder, JJ., Watson and Channell, BB., and Byles, J.), January 23, 1858]

[Reported Dears. & B. 525; 27 L.J.M.C. 48; 30 L.T.O.S. 277; 22 J.P. 84; 4 Jur.N.S. 98; 6 W.R. 227; 7 Cox, C.C. 431, C.C.R.]

G *Criminal Law—Jurisdiction—Offence committed on board British ship—Charge against foreigner—Effect of illegal detention in ship—Trial in court within jurisdiction of which prisoner found.*

H A foreigner on board a British ship on the high seas owes obedience to the law of England, and if he commits an offence against that law he is triable by any court of justice in Her Majesty's dominions within the jurisdiction of which he is found to be, provided that that court would have had cognizance of the offence if it had been committed within the limits of its ordinary jurisdiction. It makes no difference whether the offender came on board the British ship voluntarily or was brought and detained there against his will.

I **Notes.** The Merchant Shipping Amendment Act, 1855, has been repealed by s. 745 of the Merchant Shipping Act, 1894; and s. 21 of the Act of 1855 is now replaced by s. 686 of the Act of 1894 (23 HALSBURY'S STATUTES (2nd Edn.) 711).

I Considered: *R. v. Leslie* (1860), 8 Cox, C.C. 269. Referred to: *R. v. Anderson*, [1861-73] All E.R.Rep. 999; *R. v. Keyn* (1876), 2 Ex.D. 63; *R. v. Carr* (1882), 10 Q.B.D. 76.

As to offences committed on board a British ship, see 10 HALSBURY'S LAWS (3rd Edn.) 321; and for cases see 14 DIGEST (Repl.) 151 et seq.

Cases referred to in argument:

Forbes v. Cochrane (1824), 2 B. & C. 448; 2 State Tr.N.S. 147; 3 Dow. & Ry.K.B. 679; 2 L.J.O.S.K.B. 67; 107 E.R. 450; 14 Digest (Repl.) 152, 1155.

- R. v. Depardo* (1807), 1 Taunt. 26; Russ. & Ry. 134; 127 E.R. 739, C.C.R.; A
14 Digest (Repl.) 155, 1181.
- R. v. De Mattos* (1836), 7 C. & P. 458; 14 Digest (Repl.) 155, 1182.
- R. v. Smythies* (1849), 2 Car. & Kir. 878; 1 Den. 498; T. & M. 190; 19 L.J.M.C.
31; 13 J.P. 572; 13 J.P. 746; 13 Jur. 1034; 4 Cox, C.C. 94, C.C.R.; 15 Digest
(Repl.) 1254, 12,869.
- R. v. Whiley* (1840), 2 Mood.C.C. 186.
- R. v. Serva* (1845), 2 Car. & Kir. 53; 1 Den. 104; 6 State Tr.N.S. 197; 10 J.P.
134; 1 Cox, C.C. 292; sub nom. *R. v. Majavel*, 6 L.T.O.S. 188, C.C.R.; 14
Digest (Repl.) 153, 1159.
- United States v. Palmer*, 3 Wheat. Rep. 609.
- United States v. Holmes*, 3 Wheat. Rep. 112.
- R. v. Stevenson* (1759), 19 State Tr. 846; 15 Digest (Repl.) 950, 9173.
- Calvin's Case* (1608), 7 Co. Rep. 1a; 2 State Tr. 559; Moore, K.B. 790; Jenk. 306;
77 E.R. 377; 2 Digest (Repl.) 174, 37.
- Watson's Case* (1839), 9 Ad. & El. 731; 112 E.R. 1389; sub nom. *R. v. Wixon*,
8 L.J.Q.B. 129; sub nom. *R. v. Batcheldor*, 1 Per. & Dav. 516; 2 Will. Woll.
& H. 19; sub nom. *Canadian Prisoners' case*, 3 State Tr.N.S. 963; subse-
quent proceedings sub nom. *Re Parker, Canadian Prisoners' Case*, 5 M. & W. D
32; 2 Horn & H. 45; 151 E.R. 15; sub nom. *Canadian Prisoners' Case*, 3
State Tr.N.S. 963; 7 Dowl. 208; 8 L.J.Ex. 81; 3 J.P. 64; 16 Digest (Repl.)
291, 616.
- R. v. Allen* (1837), 7 C. & P. 664; 1 Mood.C.C. 494, C.C.R.; 14 Digest (Repl.)
152, 1145.

Cases Stated for the opinion of the court by CROMPTON, J., and MARTIN, B.

R. v. LOPEZ

The prisoner, Benito Lopez, was tried before CROMPTON, J., at the Exeter Assizes, on an indictment charging him with feloniously wounding George Smith with intent to do him grievous bodily harm, and he was found guilty of unlawfully wounding, and sentenced to two years' imprisonment with hard labour. It was proved at the trial that the prisoner, a foreigner, being a sailor and one of the crew of the British ship *Ontario*, wounded the prosecutor, also a foreigner, a sailor, and one of the crew of the same ship, while in the ship on the high seas on a voyage from London to the coast of Africa. The learned judge reserved for the consideration of the court the question whether the prisoner was properly convicted of the offence committed on the high seas.

Serjeant Ballantine for the prisoner.

Welsby for the Crown.

R. v. SATTLER

The prisoner, Christian Sattler, was a foreigner. On Nov. 2, 1857, he committed a larceny at St. Ives, in Huntingdonshire, and left England with part of the stolen property for Hamburg. The owner of the property gave information to the London police, and the deceased, who was a detective officer of that force, and an English subject, proceeded to Hamburg, and there, with the assistance of the Hamburg police, arrested the prisoner and brought him against his will on board an English steamer trading between Hamburg and London in order that he might be tried for the larceny. Hamburg was on the River Elbe, sixty miles from the sea, but the tide flowed higher up than the place where the steamer was when the prisoner was taken on board. The steamer left Hamburg on the morning of Nov. 21, the prisoner being in irons, and on Nov. 22, while the steamer was on the high seas, he shot the officer who afterwards died of the wound. If the killing had been by an Englishman in an English county it would have been murder. The deceased held no warrant for the arrest. The question submitted to the court was whether there was any jurisdiction to try the prisoner at the Central Criminal Court. The learned judge also asked for the opinion of the court on the following questions:

A First, was the custody of the prisoner on board the steamer lawful? and was there any distinction as to the times while the steamer was on the River Elbe, and while she was upon the high seas? Secondly, supposing the custody not to have been lawful, was the killing only manslaughter?

Serjeant Ballantyne for the prisoner.

The Solicitor-General (Sir H. S. Keating) for the Crown.

B

LORD CAMPBELL, C.J., delivered the following judgment of the court.—We are all of opinion that both these convictions must be sustained. In *R. v. Lopez* it was proved that the prisoner, being a foreigner and a sailor, one of the crew of a British ship, maliciously wounded the prosecutor, also a foreigner and one of the crew, while on board the ship on the high seas. We have no doubt that an offence

C

was committed by the prisoner under the circumstances against the law of England, for he was in an English ship and under the protection of the English laws and owed obedience to those laws. It is unnecessary to enter into a consideration of the authorities which have been cited to prove that proposition, which I am glad to find is also the law in America and France. The other question is whether it was within the jurisdiction of the court sitting under the commission for the county of

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Exeter to try the offence. Upon that we entertain as little doubt. Before the passing of the Merchant Shipping Amendment Act, 1855 [repealed by Merchant Shipping Act, 1894, of which now see s. 686], I think there would have been jurisdiction to try the offence. But we are of opinion that that statute is quite conclusive upon the question. It seems to have been enacted for the purpose of removing any doubt which might by possibility be suggested, for the prisoner is

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clearly found within the jurisdiction of the court where he was tried. If that offence had been committed within the limits of the court where he was tried, he would have been liable to have been indicted. I think there was clear jurisdiction in the court that sat at Exeter to try the prisoner.

With regard to *R. v. Satler*, I think it is equally clear that, although the prisoner was a foreigner he had committed an offence against the law of England. It is

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found in the Case that, if the killing had been by an Englishman in an English county, the offence would have been murder. I am of opinion that the prisoner, whether his capture at Hamburg was legal or not, whether his custody on board the steamer was lawful or unlawful, was guilty of an offence against the law of England, for he was in an English ship, which is to be considered as part of the territory of England, and subject to the law of England, and he, therefore, owed obedience

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to the law of England. He was guilty of murder, for he shot the officer, not with the view of obtaining his liberation, but from revenge and malice prepense. The question is whether the Central Criminal Court had jurisdiction to try him. It was contended that as he had been brought within the jurisdiction against his will, he could not be said to be found there within the meaning of s. 21 of the Act of 1855, but as we said in *R. v. Lopez*, that statute was passed for the purpose of obviating

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questions of this kind, and it is quite enough that he was found within the jurisdiction of the court. A man is "found" where he is actually present. The prisoner was found, then, within the jurisdiction of the Central Criminal Court, and we think, therefore, that that court had jurisdiction to try him. It is unnecessary for us to answer the second question put, whether the custody of the prisoner on board the steamer was lawful, and whether there is any distinction as to the times while the steamer was on the River Elbe and while she was on the high seas, for the prisoner did not commit the crime with the view of liberating himself, but from malice prepense. Were it needful to decide it, some distinction might possibly be taken between the state of affairs in the River Elbe and on the high seas. Thirdly, it is asked, supposing the custody not to have been lawful, was the killing only manslaughter?—that must mean, was it necessarily only manslaughter? We have no hesitation in saying that, notwithstanding the custody had been illegal, as the act was done of malice prepense, the offence was murder.

I

EARL NELSON *v.* LORD BRIDPORT AND OTHERS

[ROLLS COURT (Lord Langdale, M.R.), July 4, 5, 7, 9, 10, November 4, 1845]

[Reported 8 Beav. 527; 8 L.T.O.S. 18; 10 Jur. 871; 50 E.R. 207]

Evidence—Foreign law—Proof as matter of fact—Evidence of qualified and experienced witnesses—Testimony as to terms of foreign law and interpretation of those terms—Reference by witnesses to laws and treatises.

No knowledge of foreign law is to be imputed to a judge of English law sitting in a court of English jurisdiction. Foreign law and its application, like other matters of which no knowledge is to be imputed to the judge, must be proved, as facts are proved, by appropriate evidence, i.e., by properly qualified witnesses, or by witnesses who can state from their own knowledge and experience, gained by study and practice, not only what are the words in which the law is expressed, but also what is the proper interpretation of those words and their legal meaning and effect as applied to the case in question. Witnesses, in giving their testimony, may refer to laws or to treatises to aid their memory and assist them in the subject of their examinations, but in general it is the testimony of the witness, and not the authority of the law or the text writer, detached from the testimony of the witness, which is to influence the judge.

Per LORD LANGDALE, M.R.: There may be cases in which the judge may, without impropriety, take on himself, to some extent, to construe the words of a foreign law and determine their application to the case in question, especially if there should be a variance or want of clearness in the testimony of the witnesses.

Notes. Considered: *Di Sora v. Phillips* (1863), 10 H.L.Cas. 624.

As to proof of foreign law, see 15 HALSBURY'S LAWS (3rd Edn.) 328-332; and for cases see 22 DIGEST (Repl.) 613 et seq.

Cases referred to:

- (1) *Lindo v. Belisario* (1795), 1 Hag. Con. 216; 161 E.R. 530; 22 Digest (Repl.) 613, 7078.
- (2) *Dalrymple v. Dalrymple* (1811), 2 Hag. Con. 54; 161 E.R. 665; on appeal (1814), 2 Hag. Con. 137, n.; 22 Digest (Repl.) 618, 7112.
- (3) *De Bode's Case* (1844), 8 Q.B. 208; 115 E.R. 854; sub nom. *De Bode v. R.*, 10 Jur. 215; 22 Digest (Repl.) 619, 7133.
- (4) *Collier v. Simpson* (1831), 5 C. & P. 73, N.P.; 22 Digest (Repl.) 510, 5657.

Also referred to in argument:

Trimbey v. Vignier (1834), 1 Bing.N.C. 151; 4 Moo. & S. 695; 3 L.J.C.P. 246; 131 E.R. 1075; 22 Digest 621, 7150.

Sussex Peerage Case (1844), 11 Cl. & Fin. 85; 6 State Tr.N.S. 79; 8 Jur. 793; 8 E.R. 1034, H.L.; 22 Digest (Repl.) 620, 7136.

Lacon v. Higgins (1822), 3 Stark. 178; Dow. & Ry.N.P. 38; 22 Digest (Repl.) 621, 7146.

Breadalbane v. Chandos (1837), 2 My. & Cr. 711; 7 L.J.Ch. 28; 40 E.R. 811, L.C.; 11 Digest (Repl.) 495, 1166.

Gage v. Bulkeley (1744), 3 Atk. 215; Belt's Sup. 409; Ridg. temp. H. 263; 28 E.R. 563, L.C.; 11 Digest (Repl.) 502, 1198.

Action by the plaintiff, grandson of Susanna, the sister of the first Lord Nelson, against Lord and Lady Bridport and others, for the recovery of the estate of Bronte in Sicily, granted to the first Lord Nelson by the sovereign of that country.

Lord Nelson's title was (in the event of his dying without issue), limited to his father and the heirs male of his body, and then to his sister Susanna Bolton, and next to his sister Mrs. Matcham. The estate of Bronte was given him with a power of nominating a successor, and by his will he directed that it should go as far

- A as possible along with the title. After his death without issue his elder and only brother William succeeded to the title and estates and he, the King of Sicily, having in the year 1818 abolished feudal tenures, destroyed the entail and by his will left Bronte to his daughter, Lady Bridport. The title then went to Thomas, the son of Mrs. Bolton, upon whose death the plaintiff, his eldest son, succeeded. The object of the present suit was to ascertain the rights of the plaintiff who claimed
- B adversely to Lady Bridport on the ground that it was not competent to Earl William to bar the entail.

Tinney, Gardner and R. Palmer for the plaintiff.

Lewin for the executors of Earl Thomas.

Turner and Bowyer for Lord and Lady Bridport.

Hodgson for other defendants.

Cur. adv. vult.

- C Nov. 4, 1845. **LORD LANGDALE, M.R.**, read the following judgment.—This case was heard on exceptions to the Master's report under a decree whereby it was referred to him to make various inquiries as to the effect of the law of Sicily on several points which were thought to be important in the consideration of the claims of the several parties to the cause.
- D In the year 1842 the statements of the facts were carried in to the Master's office, and the parties were at liberty to examine their witnesses. The plaintiff having stated his case in a manner of which no substantial complaint has been made, procured the joint opinion of Ruggiero and Cacace, two Sicilian lawyers, on several questions proposed to them. Ruggiero and Cacace were examined in the examiner's office on a Case, their joint opinion was produced to them severally, and each of
- E them stated he had deliberately and with much reflection considered the context and the opinion was the joint opinion of himself and the other witness—it was given bona fide and conscientiously according to the best of his experienced judgment and ability, and was, as far as he knew or believed, in accordance with the law of Sicily. A commission was issued to examine witnesses in Sicily, and under that commission the plaintiff and the defendants, Lord and Lady Bridport, respectively
- F examined several Sicilian lawyers and witnesses; and in 1844, the depositions having been published, the parties carried in their further statements of facts and charges. The plaintiff's further statement and charge were left on Mar. 19, and amended on June 26, 1844.

- In this statement of facts the plaintiff submitted to the consideration of the Master various writings and books, of which he set forth a list intituled "Documentary evidence." That list comprised the Case and joint opinion to which I have referred, and several printed books, which, according to the description of the plaintiff's witness, Viola, consist partly of compilations of the Roman feudal law, the common feudal law of Europe, and the ancient and modern law of Sicily, and partly of treatises on the ancient feudal law, the same witness describing them as being, to the best of his knowledge and belief, all of them genuine publications
- G such as they purported to be, and held in estimation by the judges and other members of the legal profession in Sicily. He says that such of them as contain compilations of laws are commonly received as evidence by the courts of law in Sicily of the text of the law which they respectively purport to set out, and such of them as are treatises are often referred to as useful commentaries on the law, and are considered to contain authoritative explanations of the law. For the
- H laudable purpose, as it would seem, of relieving the subject from the vagueness of this general testimony, and showing what particular parts or passages of those voluminous works were intended to be referred to, an exhibit marked "Z" was produced to the witness. It contains a list of the books which had been referred to by the witness, with references to particular passages specifically marked by pages or other appropriate indications, and the witness stated that the law which he had quoted would be found at the pages specified in the exhibit, and that at each of the places or passages set forth in the exhibit would be found an authority or confirmatory opinion in support of the answer he had given.
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The defendants, Lord and Lady Bridport, carried in their further statement of facts and charges on Mar. 27, 1844, and they also submitted to the consideration of the Master the depositions of their witnesses and certain documentary evidence, including certain Sicilian laws and decrees dated in the year 1818, and also the civil code of laws of the Two Sicilies. The witnesses for the defendants, Lord and Lady Bridport, in their depositions referred to several law books which they do not produce or authenticate, but, as it would seem, assuming them to be genuine and authentic books, they refer to them with more or less particularity, sometimes stating the law, and then adding to the statement a mere reference to the books, sometimes stating the law to be as appearing in the books, and sometimes setting forth extracts or passages from the books. Among the books referred to by the witnesses of the defendants, Lord and Lady Bridport, are some which are not mentioned by the plaintiff's witness Viola, or in the exhibit "Z" produced to him, in particular, certain works or publications of ROSENTHAL, CATELLI, MILLANENSIS, and ROCHETTI. A B C

The plaintiff afterwards carried in two further statements. On June 7 he carried in a statement of that which he called his "Documentary evidence," as adduced on his behalf. This further statement contains at length the Case and opinion upon which Ruggiero and Cacace were examined, and several extracts or passages from many of the books specified in the exhibit "Z." I think that the further statement does not contain all the passages, or even mention all the books specified in the exhibit "Z"; but it does contain several passages purporting or alleged to be contained in books which are contained in the exhibit "Z," although such passages are not therein specifically referred to. Thus it contains an annotation of YSCRUIR, upon the CONSTITUTIO DIRAE MEMORIAE, two acts from the books of feuds, and several passages from STRUVIUS, CANNETIUS, INTRIGLIOBUS, GUIRBA, GASTONE, and DE NEAPOLI, which annotations, titles, and passages are some of them specified in the exhibit "Z," although the books from which the same passages purport to be taken are therein specified. On June 10, 1844, he carried in a further statement, as to the feudal common-law text writers, and Sicilian civil law text writers and reporters of Sicilian decisions, stated or referred to in the depositions of the witnesses of Lord and Lady Bridport, as authorities for them. This statement contains extracts from the books of ROSENTHAL, CATELLI, MILLANENSIS, and ROCHETTI; and those extracts were submitted to the consideration of the Master as qualifying, explaining, correcting, or contradicting the effect of the passages from the same books which were referred to or cited by the witnesses of Lord and Lady Bridport. At the close of the statement the plaintiff insists on his right to refer to or make use of all works or authorities, or, as I understand it, any passages from any works or authorities cited for the defendants, Lord and Lady Bridport, which he, the plaintiff, has not used in that statement. D E F G

The question has been raised as to the admissibility of the evidence. It appears that the Master admitted various books, which were produced to him as evidence of the written laws of Sicily, to be read before him as such, and also various extracts or passages from every text writer which was cited by the plaintiff in his statement of facts, and referred to by the exhibit "Z." On these points the defendants, Lord and Lady Bridport, have filed no exceptions, and upon them, therefore, there is no controversy upon this occasion. But the Master refused to admit as evidence the Case or the joint opinion of Ruggiero and Cacace, and so much of the depositions of Ruggiero and Cacace as related thereto. He also refused to admit as evidence any passage from the books exhibited by the plaintiff which were not cited by the witnesses examined by the plaintiff, and especially referred to in the exhibit "Z." He did receive as evidence for the defendants, Lord and Lady Bridport, the depositions of witnesses who referred to certain books which were not then produced and he refused to receive as evidence other extracts from the same books which were tendered on behalf of the plaintiff. On the evidence as it was constituted after such admissions and refusals, the Master made his report, dated Dec. 17, 1844. H I

A To this report the plaintiff and some of the defendants have taken several exceptions. The first seven of the plaintiff's exceptions and the first five of the exceptions of the excepting defendants relate to the reception and rejection of evidence, and are the subject of our present consideration. For some reason not appearing, the subjects of the exceptions are arranged in an order different from that in which the Master's findings are placed in his report; but taking them in the order adopted

B in the exceptions, and avoiding the complication of the exceptions which perhaps could not be avoided in framing them, it is in substance alleged by the plaintiff as follows: (i), that the Master ought not to have received the depositions of the witnesses of the defendants, Lord and Lady Bridport, without the production of the laws and treatises therein referred to; (ii), the Master ought to have permitted the plaintiff to read passages from books cited by the witnesses of the defendants,

C Lord and Lady Bridport, although such passages were not cited by the plaintiff's witness, Viola, or specified in the exhibit "Z."; (iii), the Master ought to have permitted the plaintiff to read from books cited by the witnesses for the defendants, Lord and Lady Bridport, such passages as were specifically distinguished in the affidavit of Mr. Hugh Jackson, containing references to the original text; (iv), the Master ought to have permitted the plaintiff to read from books cited by the

D witnesses of the defendants, Lord and Lady Bridport, such particular passages as were purported to be extracted or set forth in the depositions of the witnesses of the defendants, Lord and Lady Bridport; (v), the plaintiff alleges that the Master ought to have permitted the plaintiff to read from his own exhibits passages which support or authorise the depositions of his own witnesses, though not cited by them or specifically referred to in the exhibit "Z.;" (vi), he alleges that the Master ought

E to have permitted the plaintiff to read such exhibits and the English translations of parts thereof containing references to, and specifically designating parts of, the original text of such laws and treatises; and, (vii), the plaintiff and the excepting defendants allege the Master ought to have received as evidence the joint opinions of Ruggiero and Cacace. The first four exceptions relate to the manner in which the Master has dealt with the evidence of Lord and Lady Bridport, and

F three others the manner in which he has dealt with the evidence of the plaintiff.

The questions which arise are to be considered with reference to the manner in which foreign law ought to be dealt with in an English court of justice. With foreign laws an English judge cannot be familiar; there are many of which he must be totally ignorant. There is in every case of foreign law an absence of all the accumulated knowledge and ready associations which assist him in the consideration of that which is the English law, and the manner in which it ought to be

G applied in a given state of circumstances to which it is applicable. He is not only without the usual assistance afforded by the accumulated knowledge and able suggestions contained in the arguments which are addressed to him, but he is constantly liable to be misled by the erroneous suggestions of analogies which arise in his own mind and are pressed on him on all sides. Those difficulties are

H obvious enough even in cases in which he may have before him the very words of that which is proved to have been the law applicable to the events in question. Even if he suppose it to be proved that the law has not been legislatively repealed or varied and has not fallen into disuse in the country in which it was in force, and that the words have been accurately translated, still the words require a due construction, and the construction depends on the meaning of words to be con-

I sidered with reference to other words not contained in the mere text of the law, and also with reference to the subject-matter, which is not insulated from all others. The construction may have been, and probably has been, the subject of judicial decision; instead of one decision, there may have been a long succession of decisions, varying more or less from each other, and ultimately ending in that which alone ought to be applied to the particular case.

The difficulty which arises under such circumstances is obviously very great, but it is vastly increased when the law itself, or the words in which the law is expressed, has never been authoritatively declared, when that which is alleged to be the law

is to be discovered from decisions or usages, or from the opinions of unauthorised writers, who may have written much which is acknowledged to be existing law, and may also, in the very same books, have written much which is contrary to the existing law. The decisions were subjects of appeal and may have been altered by subsequent decisions, and the precise application of them to the case in question may only be ascertainable by means of an accurate historical and legal deduction from all that has passed in the courts on the subject, and a judge who seeks information as to foreign law, has not in himself the means of distinguishing the correct from the incorrect propositions of the text writers. Whoever has considered the nature of the difficulties which frequently arise in our own courts in the investigation of English law applicable to particular cases, and the mode of reasoning and investigation by which it is endeavoured to surmount those difficulties, will easily perceive what presumption it would often, nay, generally, be in an English judge to attempt to apply the same process to the investigation of foreign law and its proper application in particular cases. A B C

The rule of English law, that no knowledge of foreign law is to be imputed to a judge of English law sitting in a court of English jurisdiction is, undoubtedly, well founded, and as cases arise in which the rights of parties litigating in English courts cannot be determined without ascertaining, to some extent, what is the foreign law applicable to such cases, the foreign law and its application, like any other result of knowledge and experience, on matters of which no knowledge is imputed to the judge, must be proved, as facts are proved, by appropriate evidence, i.e., by properly qualified witnesses, or by witnesses who can state from their own knowledge and experience, gained by study and practice, not only what are the words in which the law is expressed, but also what is the proper interpretation of those words and the legal meaning and effect of them as applied to the case in question. Such, I conceive, to be the general rule, but the cases to which it is applicable admit of very great variety. D E

Though a knowledge of foreign law is not to be imputed to the judge, you must impute to him such a knowledge of the general art of reasoning as will enable him, with the assistance of the law, to discover where fallacies are probably concealed, and in what cases he ought to require testimony more or less strict. If the utmost strictness were required in every case, justice must often have to stand still; and I am not disposed to say that there may not be cases in which the judge may, without impropriety, take on himself, to some extent, to construe the words of a foreign law and determine their application to the case in question, especially if there should be a variance or want of clearness in the testimony of the witnesses. In *Lindo v. Belisario* (1), in which the evidence was not clear and positive, on the interrogatories, LORD STOWELL thought he would not transgress his duty if he looked beyond the evidence, but not further than the evidence fairly led; and in both *Lindo v. Belisario* (1) and *Dalrymple v. Dalrymple* (2), I understand him not to have considered any authority, opinion, or any passages from any writer, not distinctly referred to by the witnesses, and in that way he did not look further than he considered the evidence to have fairly led, and yet to have gone beyond the mere evidence in considering for himself the effect of the authorities referred to, with a view of acquiring for himself a notion by which he might be able to decide on the effect of the varying and obscure testimony of the witnesses. There are many cases in which, it appears to me, that this is a mode of proceeding which might not improperly be adopted, but they are cases of a simple nature, and in all cases it would be necessary to use the greatest caution. A judge endowed as LORD STOWELL was, might perhaps safely do some things which other judges might find extremely hazardous. In this, as in many other instances, there is room for the exercise of a sound and cautious discretion, by the employment of which courts are enabled to bring some cases, otherwise interminable, to a good and even satisfactory conclusion. F G H I

The opinion—the considered and carefully formed opinion—which is the result of any man's knowledge and experience, applied to a complicated case, is founded

A upon views of the subject so extensive, upon authorities so far differing in authority, and upon such various degrees of practice, that it would be impossible to trace all the sources whence it is derived, or to examine and determine on the elements of which it is composed; and it is held to be sufficient if a person, proved to be experienced, and to have had the means of acquiring an accurate knowledge, thinks fit to state distinctly, in his opinion, that the law and its application to the case in question are such as he states them to be. An opinion so proved must be received and attended to, subject to the observations which may justly be made upon the witnesses themselves, upon the circumstances under which their testimony is given, and upon attention and consideration, whether contrasted with the opinions of other witnesses or not. Considering the nature of the case, it seems to me that witnesses, in giving their testimony, may, if they think fit, refer to laws or to treatises for the purpose of aiding their memory and assisting them in the subject of their examinations, but in general it is the testimony of the witness, and not the authority of the law or the text writer, detached from the testimony of the witness, which is to influence the judge. The testimony of the witness, or the information which the judge is to obtain from him, ought to be founded on the knowledge which he possesses, and which ought to have been derived, not merely from his own observation as a witness in the course of his own practice and experience, but also from a study of the law itself, and the recognised commentators thereon, in connection with his observations and inferences made in the course of his practice; and when he refers to lawyers and books in connection with the testimony he gives, he must be considered as indicating them only to be among the subjects of his consideration in the formation of his opinion. If he does not distinctly say so, he is not to be understood as saying that the lawyers or commentators to which he refers are the sole foundation of his opinion.

It has been made a question whether a certain law to which a witness refers ought not to be produced and proved, and there are cases in which the party has been entitled to prove the context of the written law by formal evidence. I conceive that it would be an advantage if every law or commentary to which the witness may refer was produced, for, although I think that when it is produced the judge has in general no right to take on himself the business of considering it and determining its application, yet when the passages are produced they may enable the party affected by the testimony not only to cross-examine the witness as to his own interpretation or inferences, and the grounds thereof, but also to call other witnesses to the same point; but in matters of foreign law, particularly when complicated, where every party engaged in the inquiry is a mere disciple, where there is no adept, and where re-investigation and further inquiries must be allowed in every case of surprise, and in which surprise is not in this as in most other cases unlikely to happen, the advantage of immediate cross-examination is perhaps of less importance than might at first be supposed and the difficulty of producing and proving the written law greater than might have been supposed.

H In *De Bode's Case* (3), it appears to have been determined that the party was not bound to produce a written law or decree which his witness referred to, and the evidence of the witness was received without producing the decree or law. This case appears to me to be stronger than that which was the subject of the first exception to the Master's report; and I think the Master was right in receiving the depositions of the witnesses of the defendants, Lord and Lady Bridport, without the books therein referred to being produced. The same rule applies to other cases, in which the witness professes a scientific knowledge which is not imputed to the judge. Thus in *Collier v. Simpson* (4), TINDAL, C.J., did not allow medical books to be read, but said he saw no objection to the witness being asked his opinion and the grounds of it, which might in some degree be founded on books as a part of his general knowledge. If the law and passages referred to were authorities understood by the judge—if the interpretation was to be so—if he could, a priori, and until it appeared that there was some sufficient reason for his doing so, look at them unconnected with the testimony, the case would be different; but in the

first instance at least he can only regard them as connected with the testimony, and, except with regard to the degree of weight given by the testimony, cannot consider them at all important. If he reads them they may appear to him to accord with the testimony or to differ from it; if in his view, they accord with it, nothing is gained; if, in his view, they differ from it, he, being ignorant of the foreign law, cannot weigh his opinion against the opinion of the witness whose opinion ought to be derived not only from the citations in question, but from all the sources of knowledge of the law which he is proving. The citations, however, appear to me to be material, and to require the most careful attention of the other party who can avail themselves of them for the purpose of correcting any error or supplying any defect in the opinion of the witness already examined, by means of other witnesses to be afterwards examined for the purpose. A

This must, however, be done in a proper manner; and this brings me to the question raised by the exceptions (ii), (iii), and (iv). For the purpose of the argument I may take it to be as the plaintiff alleges, that the passages from the several books to which the defendants have specifically referred, when taken by themselves, bear a sense different from that which would fairly be deduced from them if taken in connection with other passages to be found in the same books, and such other passages are specifically referred to in the affidavit of Mr. Jackson. I say nothing of the translations, because on that subject no complaint has been made, and I presume them to be correct. I have throughout considered the translations and the originals as one. The plaintiff being supposed to have discovered that the opinions of the witnesses, so far as they were derived from the passages referred to, have no solid or sufficient foundation, would have a right to bring that matter under the consideration of the court. To that extent I agree with him, and if he desired to examine witnesses for the purpose of showing the fallacy or correcting the error, I should, in my present view of the case, have been greatly disposed to assist him, if it were necessary; but instead of desiring to examine witnesses on the subject, he seems to have assumed that the new passages he proposed to read were evidence of existing law, or that every party who cited a passage from the work of a text writer was bound to consider every other passage taken from the same work as good law; and he has desired the Master to permit him to select parts, and read such passages as he thought fit, from the books cited by the witnesses for the defendants, Lord and Lady Bridport, in order, I suppose, that the Master might himself, and without the assistance of any witness, consider which passages were good law, and which not, and might, if he considered them good law, interpret them or consider the weight of authority which ought to be attached to them, and after contrasting them with the passages cited by the defendant's witnesses, at last decide by his own judgment on the effect they ought to have on the case. B C D E F G

I am of opinion that the second, third, and fourth exceptions must be overruled. It is alleged that a particular passage is erroneously set out in the depositions of the witness Tedaldi, and certain words are alleged to have been improperly substituted for the word "confirmatum." It may be so, but I cannot consider this case as different from the other. There is so much reason to think that the substituted words are a mere clerical error, capable of being corrected by a very moderate skill in verbal criticism, that I cannot help feeling some regret that any difference should have arisen between the parties on the subject; but if any importance is attached to it—if any verbal or clerical error be detected—then the case is like the rest, a subject of evidence, and the Master was right in rejecting the passage which was tendered to him without any proper evidence to support it. The two next exceptions of the plaintiff, the fifth and sixth, relate to the plaintiff's evidence, and are subject to very similar considerations. All the extracts and passages which are specifically referred to in the exhibit "Z," are connected with the evidence of the witnesses. The closeness of the connection, and the assistance which the passages cited may afford for inquiry into the grounds of the opinion of the witnesses, and affecting their testimony, may have to be hereafter very H I

A carefully considered, but there is a connection between the passages and the testimony, and, perhaps, also a reasonable presumption that, in the opinion of the witness, the passages were at the time in question considered to be legal authorities applicable to the case, and to be interpreted in conformity with the opinion of the witness, but the passages which are not specified in the exhibit "Z," are not connected with the testimony of the witnesses. There is no testimony from which

B it can be inferred or presumed that, in the opinion of any witness, the passages now sought to be introduced were, at the time in question, considered to be legal authorities applicable to the case, or interpretations in conformity with the opinion of any witness. For these reasons I am of opinion that the plaintiff's fifth and sixth exceptions must be overruled.

The seventh exception of the plaintiff, which is the same as the fifth and sixth of Lady Nelson, and those who are joined with her, relate to the Case with the joint opinions of Ruggiero and Cacace. It is fully established that the opinions of properly qualified persons are receivable as evidence of foreign law. No objection is made to the qualifications of the witnesses, and no substantial objection is stated to the mode in which the facts are stated in the Case submitted to them; and each of the witnesses has distinctly sworn that, according to the best of his knowledge

D and belief, the opinion is in accordance with the law of Sicily in the manner therein expressed. It may be noticed that the Case was considered by four lawyers, of whom only two, the witness Ruggiero and the younger Cacace, have been examined. The other two, Gamboa and the elder Cacace, have not been examined, but no objection was taken on that ground. It was stated to me as an objection that the Case was stated by the plaintiff himself, and not by the Master, and that it was

E not communicated to the defendants. By this mode of proceeding the plaintiff appears to me to have exposed himself to considerable hazard—to the hazard of being deprived of the benefit of his testimony in the possible event of its appearing that the Case stated by him is not the very Case between the parties, or that it contained improper suggestions, calculated to mislead the witnesses; but under the circumstances I think that, at the risk to which he inevitably exposed himself,

F the plaintiff had a right to state his case in his own way, and that this objection to the evidence cannot prevail.

The other objection stated is, that the evidence ought to be considered as concerted between the two witnesses, and that the deposition containing the joint opinion ought to be considered as a deposition prepared and concerted before the examination, contrary to the established rule of the court. I am of opinion that

G the objection cannot be sustained. All rules must be considered with reference to the subject to which it is proposed to apply them; and I am very much inclined to think that a conclusive opinion, formed, as this is sworn to have been, on the deliberate and conscientious consultation of two lawyers in consultation with others, is more likely to be correct and satisfactory than the separate opinions of the two would have been. If the witnesses have mutually assisted one another, it may

H perhaps be so much the better. A common result from the separate studies and experience of the two, as stated by them, is perhaps more satisfactory than the result at which an English judge might arrive after a consideration of the two opinions separately. On the whole, after a consideration of the subject with all the attention which is due to the Master and the arguments I have heard, it appears to me that the joint opinion of the two witnesses on the Case submitted

I to them ought to have been received in evidence. It will be received, of course, subject to every proper consideration and objection which may be made to it. On the whole, I overrule the first six of the plaintiff's exceptions, which are the same as the first four of the exceptions filed by the defendant Lady Nelson and the Matchams; and I allow the seventh of the plaintiff's exceptions, and which is the same as the fifth of Lady Nelson and the Matchams.

Order accordingly.

DALBY v. INDIA AND LONDON LIFE ASSURANCE

[COURT OF EXCHEQUER CHAMBER (Parke and Alderson, BB., Wightman and Erle, JJ., Platt, B., and Crompton, J.), November 27, December 2, 1854]

[Reported 15 C.B. 365; 3 C.L.R. 61; 24 L.J.C.P. 2; 24 L.T.O.S. 182; 18 Jur. 1024; 3 W.R. 116; 139 E.R. 465]

Insurance—Life assurance—Nature of contract—Not contract of indemnity—Contract to pay sum on death in consideration of premium.

The contract commonly called life assurance in no way resembles a contract of indemnity, but is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life.

Insurance—Life assurance—Insurable interest—Material date—Time when policy entered into—Life Assurance Act, 1774 (14 Geo. 3, c. 48), s. 1.

By s. 1 of the Life Assurance Act, 1774: "No insurance shall be made by any person or persons . . . on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by way of gaming or wagering; and every assurance made contrary to the true interest and meaning hereof shall be null and void . . ." To satisfy the provisions of this section it is sufficient if the assured had an insurable interest in the life assured at the time of entering into the policy. It is not necessary that his interest should continue until the death of the person whose life is assured.

Godsall v. Boldero (1) (1807), 9 East 72, overruled.

Notes. Followed: *Law v. London Indisputable Life Policy Co.* (1855), 1 K. & J. 223. Considered: *Pritchard v. Merchants and Tradesman's Mutual Life Assurance Society* (1858), 3 C.B.N.S. 622; *Knox v. Turner* (1870), L.R. 9 Eq. 155. Applied: *Bradburn v. Great Western Rail. Co.*, [1874-80] All E.R.Rep. 195. Considered: *Gould v. Curtis*, [1912] 1 K.B. 635. Referred to: *Waters v. Monarch Life Assurance* (1856), ante p. 654; *Hebdon v. West* (1863), 3 B. & S. 579; *Rankin v. Potter* (1873), L.R. 6 H.L. 83; *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333; *Re Harrison and Ingram, Ex parte Whinney*, [1900] 2 Q.B. 710.

As to the contract of life assurance and insurable interest, see 22 HALSBURY'S LAWS (3rd Edn.) 272, 277-281; and for cases see 29 DIGEST (Repl.) 367, 368, 370 et seq. For the Life Assurance Act, 1774, see 13 HALSBURY'S STATUTES (2nd Edn.) 7.

Cases referred to:

- (1) *Godsall v. Boldero* (1807), 9 East, 72; 103 E.R. 500; 29 Digest (Repl.) 367, 2805.
- (2) *Cousins v. Nantes* (1811), 3 Taunt. 513; 128 E.R. 203, Ex. Ch.; 29 Digest (Repl.) 53, 82.
- (3) *Lucena v. Craufurd* (1806), 2 Bos. & P.N.R. 269; 127 E.R. 630, H.L.; 29 Digest (Repl.) 120, 649.
- (4) *Hamilton v. Mendes* (1761), 2 Burr. 1198; 1 Wm. Bl. 276; 97 E.R. 787; 29 Digest (Repl.) 317, 2405.
- (5) *Barber v. Morris* (1831), 1 Mood. & R. 62.
- (6) *Humphrey v. Arabin*, L. & G. temp. Plunk. 318.
- (7) *Henson v. Blackwell* (1845), 4 Hare, 434; 14 L.J.Ch. 329; 5 L.T.O.S. 191; 9 Jur. 390; 67 E.R. 718; 29 Digest (Repl.) 415, 3108.
- (8) *Phillips v. Eastwood* (1835), L. & G. temp. Sugd. 270, 291; 44 Digest 705, c.

Appeal against a ruling of CRESSWELL, J., in an action brought by the plaintiff

A on a policy of life assurance for £1,000 granted by the defendant company to him on behalf of the Anchor Life Assurance Co.

The declaration set out the policy, which was in the usual form, and then stated that Adolphus Frederick Duke of Cambridge lived beyond the period of twelve calendar months (mentioned in the policy), and until a certain day, to wit, July 8, 1850, when he died, and stated that during the life of the duke, and at the
B expiration of the last-mentioned period, and of each and every subsequent period of twelve calendar months during the life of the duke, he, the plaintiff, for and on behalf of the Anchor Life Assurance Co. did pay to the defendant company the sum or premium of £122 15s. 10d. for and in respect of the then next succeeding period of twelve calendar months, and that the policy remained and was in force from the making thereof until and at the time of the death of the duke. The
C plaintiff further said that after the death of the duke, to wit, on Nov. 28, 1850, his death was notified by the plaintiff to the directors of the defendant company and proof thereof was then made to the satisfaction of the directors of the company. It was further said that at the time of the making of the policy, and thence until the death of the duke, the Anchor Life Assurance Co. was interested in the life of the duke to the amount insured thereon, and that the plaintiff and the Anchor
D Life Assurance Co. had respectively complied with all the conditions contained in the policy, but that the defendant company had failed to pay the plaintiff the sum of £1,000 assured by the policy or any part thereof. The plaintiff claimed £1,200 damages. By their defence the defendant company contended that the Anchor Life Assurance Co. had no insurable interest in the duke's life.

The trial came on at the sittings in Middlesex, on Nov. 29, 1851, before CRESS-
E WELL, J., and thereupon it was, on the part of the plaintiff, given in evidence that before the date of the policy the Anchor Life Assurance Co. had granted to the Rev. John Wright four several policies of insurance on the life of the Duke of Cambridge for four several sums of money, amounting together to the sum of £3,000; that John Wright, at the time of the granting of these policies, was interested in the life of the duke to the amount of £3,000; that the said four several
F sums were by the terms of the policies to be paid by the Anchor Life Assurance Co. to John Wright on the death of the duke; that the Anchor Life Assurance Co., being desirous to secure and indemnify themselves to the extent of £1,000 against their liability for the £3,000 payable according to the policies to John Wright on the death of the duke, the plaintiff, as one of the members and directors of the
G company, did, by authority and on behalf of the company, effect the policy in the declaration mentioned with the defendants for the sum of £1,000, by way of a cross or counter assurance to that amount on the life of the duke, against the policies effected by John Wright with the Anchor Life Assurance Co. John Wright surrendered the policies to the Anchor Life Assurance Co., and in consideration of that surrender and the payment of £325 the company granted to him an annuity of £120 sterling during the joint lives of himself and Honoria his wife, and upon the
H decease of either of them, then to the survivor of them one annuity or clear yearly sum of £80 sterling during the rest of the life of such survivor.

The grounds of appeal stated were that the Anchor Life Assurance Co., being at the time of the making of the policy in the declaration mentioned liable to pay to John Wright the sum of £3,000 on the death of the Duke of Cambridge, were interested in the life of the duke as in the declaration alleged; that it was necessary that
I the interest of the Anchor Life Assurance Co. in the life of the duke should continue until and at the time of his death or of action brought, because, a wager policy being good at common law, the existence of an interest at the time of the making of the policy was sufficient to satisfy the Life Assurance Act, 1774, and because such interest was the only interest to which that statute referred; that the Anchor Life Assurance Co., having purchased from Mr. Wright the policies effected by him with the company on the life of the Duke of Cambridge, were entitled to the benefit of the interest which Mr. Wright had in the life of the duke at the time of his death; that an insurance of a person on his own life, or on the life of another, was not

in its nature a contract of indemnity; and that *Godsall v. Boldero* (1) was wrongly A decided.

Bramwell, Q.C. (with him *H. Tindal Atkinson* and *F. J. Smith*), for the plaintiff.
Serjeant Channell (with him *Partridge* and *Coxon*) for the defendants.

Cur. adv. vult.

Dec. 2, 1854. **PARKE, B.**, delivered the following judgment of the court.— B
 This case comes before us on a bill of exceptions to the ruling of my brother CRESSWELL, J., at nisi prius. We learn that on the trial he reserved the important point which arose for the consideration of the Court of Common Pleas, and that when it came on for discussion it was thought right to put it on the record in the shape of a bill of exceptions that it may be carried, if it should be thought proper, to the highest tribunal. We have now, after a very able argument on both sides, C to dispose of it in this court of error.

This is an action on what is usually termed a policy of life assurance, brought by the plaintiff, as a trustee for the Anchor Life Assurance Co., on a policy for £1,000 on the life of his late Royal Highness the Duke of Cambridge. It may be conceded for the purpose of the present argument that the transactions between Mr. Wright and the office totally put an end to that interest which the Anchor D company had when the policy was effected and in respect of which it was effected, and that, at the time of the duke's death, and up to the commencement of the suit, the plaintiff had no interest whatever. This raises the very important question whether, under these circumstances, the assurance was void and nothing could be recovered thereon. If the court had thought some interest at the time of the duke's death was necessary to make the policy valid, the facts attending the keeping up of the policy would have undergone further discussion. There is the usual averment E in the declaration that at the time of the making of the policy and thence until the death of the duke, the Anchor Life Assurance Co. was interested in the life of the duke, and a plea that they were not interested *mode et forma*, which traverse makes it unnecessary to prove more than the interest at the time of making the policy if that interest was sufficient to make it valid in point of law. We are of F opinion that it was sufficient, and, but for *Godsall v. Boldero* (1), should have felt no doubt upon the subject.

The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life—the amount of the annuity, being calculated in the first instance according to the probable duration of the life; G when once fixed, it is constant and invariable. A stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of the death is always, except when bonuses have been given by prosperous offices, the same on the other. This species of insurance in no way resembles a contract of indemnity. A policy of insurance against fire and against marine risks are both properly contracts of indemnity—the insurer engaging to make good within certain H limited amounts the losses sustained by the assured in their buildings, ships, and effects. Policies on maritime risks were afterwards used improperly and made mere wagers on the happening of those perils. This practice was limited by the [repealed] Marine Insurance Act, 1745, and put an end to in all except a few cases, but, at common law, before this statute with respect to maritime risks and the Life Assurance Act, 1774, as to insurances on lives, it is perfectly clear that all I contracts for wager policies and wagers which were not contrary to the policy of the law, were legal contracts. So it is stated by the court in the report of *Cousins v. Nantes* (2), to have been solemnly determined in *Lucena v. Craufurd* (3), without even a difference of opinion among the judges. The contract, therefore, in this case to pay a fixed sum of £4,000 on the death of the Duke of Cambridge would have been unquestionably legal at common law if the plaintiff had had an interest therein or not, and the sole question is whether the policy was rendered illegal and void by the provisions of the Life Assurance Act, 1774.

A This depends upon its true construction. The statute recites

“that the making insurances on lives or other events wherein the assured shall have no interest hath introduced a mischievous kind of gaming”;

and, for the remedy thereof, it enacts that no insurance shall be made by anyone on the life or lives of any person or persons or any other events whatsoever wherein
 B the person or persons for whose use or benefit or on whose account such policy shall be made shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true interest and meaning thereof shall be null and void to all intents and purposes whatsoever. As the Anchor Life Assurance Co. had unquestionably an interest in the continuance of the life of the Duke of Cambridge to the amount of £1,000 because they had bound themselves to pay a sum
 C of £1,000 to Mr. Wright on that event, the policy effected by them with the defendants was certainly legal and valid, and the plaintiff without the slightest doubt could have recovered the full amount if there were no other provision in the Act. This contract is good at common law, and certainly not avoided by s. 1 of the Life Assurance Act, 1774. This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, how-
 D ever small, the policy would not be avoided.

The question arises on s. 3 which is as follows :

“That in all cases where the insured has interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.”

E What is the meaning of this provision? On the part of the plaintiff it is said that it means only that in all cases in which the party insuring has an interest when he effects the policy, his right to recover and receive is to be limited to that amount, otherwise, under colour of a small interest, a wagering policy might be made to a large amount, as it might if s. 1 stood alone. The right to recover, therefore, is
 F limited to the amount of the interest at the time of effecting the policy. Upon that value the assured must have the amount of premium calculated. If he states it truly, no difficulty can occur. He pays in the annuity for life the fair value of the sum payable on death. If he misrepresents by overrating the value of the interest, it is his own fault in paying more in the way of annuity than he ought, and he can recover only the true value of the interest in respect of which he effected the
 G policy, but that value he can recover. Thus the liability of the insurer becomes constant and uniform to pay an unvarying sum on the death of the cestui que vie in consideration of an unvarying and uniform premium paid by the insured. The bargain is fixed as to amount on both sides. This construction is effected by reading the word “hath” as referring to the time of effecting the policy. By s. 1 the assured is prohibited from effecting an insurance on a life or on an event
 H wherein he shall have no interest, that is, at the time of insuring, and then s. 3 requires that he shall recover only the interest that he hath. If he has an interest when the policy is made he is not wagering or gaming, and the prohibition of the statute does not apply to his case. Then s. 3 provided that no more than the amount or value of the interest should be insured. A question might have been raised whether, if the insurance had been for a larger amount, the whole would
 I not have been void, but the prohibition to recover or receive more than that amount obviates any difficulty on that head.

On the other hand, the defendants contend that the meaning of this clause is that the assured shall recover no more than the value of the interest which he has at the time of the recovery, or receive more than its value at the time of the receipt. The words must be altered materially to limit the sum to be recovered to the value at the time of the death, or, if payable at a time after death, then when the cause of action accrues. But there is the most serious objection to any of these constructions. It is, that the written contract, which, for the reasons

given before, is not a wagering contract, but a valid one, permitted by the statute and very clear in its language, is, by this mode of construction, completely altered in its terms and effect. It is no longer a contract to pay a certain sum on the value of a then existing interest in the event of death, in consideration of a fixed annuity, calculated with reference to that sum, but a contract to pay, contrary to its express words, a varying sum, according to the alteration of the value of that interest at the time of the death, or the accrual of the cause of action, or the time of the verdict or execution; and yet the premium to be paid is fixed and calculated on an original fixed value and is unvarying, so that the assured is obliged to pay a certain premium every year, calculated on the value of his interest at the time of the policy, in order to have a right to recover an uncertain sum, namely, that which happens to be the value of the interest at the time of the death, or afterwards at the time of the verdict. He has not, therefore, a sum certain, which he stipulated for and bought with a certain annuity; but it may be a much less sum, or even none at all. This seems to us so contrary to justice, and fair dealing, and common honesty, that this construction cannot, we think, be put upon this section.

We should, therefore, have no hesitation, if the question were *res integra*, in putting the much more reasonable construction upon the statute that, if there is an interest at the time of the policy it is not a wagering policy, and the true value of that interest may be recovered in exact conformity with the words of the contract itself. The only effect of the statute is to make the assured value his interest at its true amount when he makes the contract. But it is said that *Godsall v. Boldero* (1) has concluded this question. Upon considering this case it is certain that LORD ELLENBOROUGH decided it upon the assumption that a life policy was in its nature a contract of indemnity, as policies in marine risks and against fire undoubtedly are, and that the action was in point of law founded on a supposed damnification occasioned by the death of the debtor existing at the time of the action brought, and his Lordship relied upon the decision of LORD MANSFIELD in *Hamilton v. Mendes* (4), that the plaintiff's demand was for an indemnity. LORD MANSFIELD was speaking of a policy against marine risks, which is in its terms a contract for indemnity only. But that is not of the nature of what is termed an insurance for life. It really is what it is on the face of it—a contract to pay a certain sum in the event of death. It is valid at common law; and, if it is made by a person having an interest in the duration of the life, is not prohibited by the Life Assurance Act, 1774. But, though we are quite satisfied that *Godsall v. Boldero* (1) was founded on a mistaken analogy and wrong, we should hesitate to overrule it, though sitting in a court of error, if it had been constantly approved and followed, and not questioned, though many opportunities had been offered to question it. It was stated that it had not been disputed in practice, and had been cited by several eminent judges as established law. The judgment itself was not, and could not, be questioned in a court of error, for one of the issues, *nil debet*, was found for the defendant. Since that case we know practically, and that circumstance is mentioned by some of the judges in the case hereinafter referred to, that insurance offices, generally speaking, have not availed themselves of the decision as they found it very injurious to their interests to do so. They have, therefore, generally speaking, paid the amount of their life insurances, so that the number of cases in which it could be questioned is probably very small indeed, and it may be truly said, instead of the decision of *Godsall v. Boldero* (1) being uniformly acquiesced in, it has been very uniformly disregarded. There is no case at law except *Barber v. Morris* (5), in which *Godsall v. Boldero* (1) was accidentally noticed as proving it to be necessary that the interest should continue till the death of the *cestui que vie*. It was proved in that case to be the practice of the particular office in which that assurance was made to pay the sums assured without inquiry as to the existence of an insurable interest, and on that account it was held that the policy, though in that case the interest had ceased, was a valuable policy, and the plaintiff could not recover on the ground that the defendant, the vendor of it, was guilty of fraudulent concealment in not disclosing that the interest had ceased. This was the point of

A the case; and, though there was a dictum of LORD TENTERDEN, that the payment of the sum insured could not be enforced, it was not at all necessary to the decision of the case.

The other cases cited on the argument in this case were cases in equity where the propriety of the decision in *Godsall v. Boldero* (1) did not come in question. The questions arose as to the right of the creditor and debtor, inter se, where the offices have paid the value of a policy; *Humphrey v. Arabin* (6); *Henson v. Blackwell* (7) before WIGRAM, V.-C., and *Phillips v. Eastwood* (8), a case in the time of SUGDEN, L.C., of Ireland, where the point decided was that a life policy, as a security for a debt, passed under a will bequeathing debts, in which the Lord Chancellor stated that the offices found it not for their benefit to act on the rigid rule of *Godsall v. Boldero* (1). In these cases, the different judges concerned in them do not dispute, some indeed appear to approve, of *Godsall v. Boldero* (1), but it was not material in any to controvert it; and the questions to be decided were quite independent of the authority of that case. We do not think we ought to feel ourselves bound, sitting in error, by the authority of this case, which itself could not be questioned by writ of error, when so few, if any, subsequent cases have arisen in which the soundness of the principle there relied upon could be made a subject of judicial inquiry, and in practice it may be said that it has been constantly disregarded. The judgment will, therefore, be reversed, and a venire de novo issue.

Venire de novo.

E

MORLEY v. ATTENBOROUGH

F [COURT OF EXCHEQUER (Pollock, C.B., Parke, Rolfe and Platt, BB.), May 11, 1848, February 17, 1849]

[Reported 3 Exch. 500; 18 L.J.Ex. 148; 12 L.T.O.S. 532;
13 J.P. 427; 13 Jur. 282; 154 E.R. 942]

G Pledge—Sale of forfeited pledge—No warranty of title by pawnee—Undertaking that pledge irredeemable and no defect of title known.

A pawnbroker who sells a chattel as a forfeited pledge merely undertakes that the subject of the sale is a pledge and irredeemable and that he is not cognisant of any defect of title to it. He does not warrant the title of the goods sold.

H Sale of Goods—Fraud on sale—Concealment of absence of title to goods sold—Concealment of defective quality.

Per Curiam: If the seller of goods knows that he has no title to them, or if he knows that the goods are of defective quality and he conceals either of those facts from the buyer, he is liable to the buyer as for a fraud.

Notes. By s. 12 of the Sale of Goods Act, 1893, a condition on the part of the seller that he has a right to sell the goods is implied in a contract of the sale of goods, rendering obsolete the main decision in this case, but the case is included in these reports on the points mentioned in the headnotes. By s. 14 of the Act certain warranties as to the fitness of the goods sold are specified.

Considered: *Sims v. Marryat* (1851), 17 Q.B. 281; *Collen v. Wright* (1857), ante p. 146; *Hall v. Conder* (1857), 2 C.B.N.S. 22. Applied: *Emmertton v. Mathews* (1862), 7 H. & N. 586; *Bagueley v. Hawley* (1867), L.R. 2 C.P. 625. Followed: *Richardson v. Crosbie* (1876), Turner on Pawnbrokers Act 1872, (3rd Edn.) 66, n. Considered: *Wood v. Baxter* (1883), Cab. & El. 325; *Calipe v. Thomson*

(1902), 66 J.P. 313; *Benton v. Campbell, Parker & Co. Ltd.*, [1925] All E.R. Rep. 187. Referred to: *Bandy v. Cartwright* (1853), 8 Exch. 913; *Aiken v. Short* (1856), ante p. 425; *Smith v. Neale* (1857), 2 C.B.N.S. 67; *Buddle v. Green* (1857), 27 L.J.Ex. 33; *Eichholz v. Bannister* (1864), 17 C.B.N.S. 708. A

As to sale of unredeemed pledges, see 29 HALSBURY'S LAWS (3rd Edn.) 220, 221; and for cases see 37 DIGEST (Repl.) 14, 15. As to seller's want of title see 34 HALSBURY'S LAWS (3rd Edn.) 81, and cases cited in note (c). B

Cases referred to:—

(1) *Sprigwell v. Allen* (1648), Aleyn, 91; 2 East, 448, n.; 82 E.R. 931; 35 Digest (Repl.) 30, 205.

(2) *Early v. Garret* (1829), 9 B. & C. 928; 4 Man. & Ry.K.B. 687; 8 L.J.O.S.K.B. 76; 109 E.R. 345; 35 Digest (Repl.) 60, 541. C

(3) *Williamson v. Allison* (1802), 2 East, 446; 102 E.R. 439; 39 Digest (Repl.) 510, 527.

(4) *Dering v. Farington* (1674), 1 Freem.K.B. 368; 86 E.R. 772; sub nom. *Deering v. Farrington*, 3 Keb. 304; 1 Mod. Rep. 113; 8 Digest (Repl.) 610, 515.

(5) *Walker's Case, Walker v. Harris* (1587), 3 Co. Rep. 22a; Moore, K.B. 351; 76 E.R. 676; 38 Digest (Repl.) 805, 250. D

(6) *Medina v. Stoughton* (1700), 1 Salk. 210; Holt, K.B. 208; 1 Ld. Raym. 593; 91 E.R. 188; 39 Digest (Repl.) 512, 545.

(7) *Pasley v. Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 39 Digest (Repl.) 512, 547.

(8) *Furnis v. Leicester* (1618), Cro. Jac. 474; 79 E.R. 404; 39 Digest (Repl.) 525, 630. E

(9) *Ormrod v. Huth* (1845), 14 M. & W. 651; 14 L.J.Ex. 366; 5 L.T.O.S. 268; 153 E.R. 636, Ex. Ch.; 39 Digest (Repl.) 538, 740.

Also referred to in argument:

Chandelor v. Lopus (1603), Cro. Jac. 4; 79 E.R. 3; sub nom. *Lopus v. Chandler*, Dyer, 75, n., Ex. Ch.; 39 Digest (Repl.) 510, 526.

Paget v. Wilkinson (1696), 2 East, 448, n. F

Crosse v. Gardner (1688), Carth. 90; Comb. 142; Holt, K.B. 5; 3 Mod. Rep. 261; 1 Show. 68; 90 E.R. 656; 39 Digest (Repl.) 512, 544.

Raswel v. Vaughan (1607), Cro. Jac. 196; 79 E.R. 171; 35 Digest (Repl.) 69, 626.

Adamson v. Jarvis (1827), 4 Bing. 66; 12 Moore, C.P. 241; 5 L.J.O.S.C.P. 68; 130 E.R. 693; 39 Digest (Repl.) 525, 637.

Peto v. Blades (1814), 5 Taunt. 657; 128 E.R. 849; 39 Digest (Repl.) 525, 635. G

Allen v. Hopkins (1844), 13 M. & W. 94; 13 L.J.Ex. 316; 3 L.T.O.S. 204; 153 E.R. 39; 39 Digest (Repl.) 526, 639.

Walker v. Mellor (1848), 17 L.J.Q.B. 103.

Rule Nisi obtained by the defendant to move to enter a nonsuit in an action in which the plaintiff alleged that the defendant had caused to be sold to him by auction a harp to which he (the defendant) had no title whereby the plaintiff had suffered damage through having to restore the harp to its rightful owner. H

At the trial, before PLATT, B., in 1847 it appeared that in 1839 a person of the name of Poley, having hired a harp of Messrs. Chappell, music-sellers, pledged it with the defendant, a pawnbroker, for £15 15s., on the terms that, if the sum advanced were not repaid within six months, the defendant should be at liberty to sell it. The defendant had no knowledge that the harp did not belong to Poley. The harp not having been redeemed at the stipulated time, the defendant, in 1845, sent it with other articles to be sold by public auction. The auctioneers were accustomed to have quarterly sales of unredeemed pledges of which the sale in question was one, and on those occasions they were in the habit of putting other lots into the sale. The sale extended over several days, and a general catalogue comprising the articles to be sold on each day stated on the title-page that the goods for sale consisted of I

A "a collection of forfeited property, reserved, agreeably to Act of Parliament, for quarterly sale, pledged prior to May, 1844,"

with certain pawnbrokers, naming them, and among others the defendant, and that the lots without numbers were "other effects." The harp, which was numbered in the catalogue, was knocked down to the plaintiff for £15 15s., but no warranty of title was given. Messrs. Chappell, having afterwards discovered that
B the harp was in the plaintiff's possession, commenced an action against him for its recovery, whereupon the plaintiff gave up the harp to them, and paid the costs, for which, together with the price of the harp, the present action was brought. On behalf of the defendant it was objected, that there was no warranty of title, either express or implied, and that the plaintiff ought to be nonsuited. The learned judge directed a verdict for the plaintiff, reserving leave for the defendant to move
C to enter a nonsuit. A ruling having been obtained,

Humfrey and Bovill for the plaintiff, showed cause against the rule.

Martin and Petersdorff for the defendant, supported the rule.

Cur. adv. vult.

Feb. 17, 1849. **PARKE, B.**, delivered the following judgment of the court.—

D This case was argued some time ago before the Lord Chief Baron, **ROLFE, B.**, **PLATT, B.**, and myself, and stood over for our consideration. The plaintiff brought an action of assumpsit, stating that in consideration that the plaintiff would buy a harp for a certain sum, the defendant promised that he, the defendant, had lawful right to sell it, and the breach assigned was that he had not. It appeared on the trial, before **PLATT, B.**, that the defendant, who was a pawnbroker, had the harp
E pledged with him in the way of his business, and, the time having elapsed for its redemption and the pledge being unredeemed, he offered it for sale through certain auctioneers, who sold it to the plaintiff. It turned out that the harp had been pledged to the defendant by a person who had no title to it, and the real owner obliged the plaintiff to give it up after it had been delivered to him by the defendant. But of the want of title of the pawner to it the defendant was ignorant,
F and there was no express warranty. **PLATT, B.**, directed a verdict for the plaintiff, reserving leave to move to enter a nonsuit. On showing cause the case was fully argued, and every authority bearing on the question whether there is an implied warranty of title in the contract of sale of an article, or in what circumstances there is a liability on the part of the vendor to make good a loss by defect of title was cited and commented upon on both sides.

G It is very remarkable that there should be any doubt, as that certainly is a question so likely to be of common occurrence, especially in this commercial country. Such a point, one would have thought, would not have admitted of any doubt. The bargain and sale of a specific chattel by our law (which differs in that respect from the civil law), undoubtedly transfers all the property the vendor has where nothing further remains to be done according to the intent of the parties to
H pass it. But it is made a question whether there is annexed by law to such a contract, which operates as a conveyance of the property, an implied agreement on the part of the vendor, that he has the ability to convey. With respect to executory contracts of purchase and sale, where the subject is unascertained and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred in the same manner as it
I would be implied under similar circumstances that a merchantable article was to be supplied. Unless goods, which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery, and, if he did, and the goods were recovered from him, he would not be bound to pay, or, having paid, he would be entitled to recover back the price as on a consideration which had failed.

But when there is a bargain and sale of a specific ascertained chattel which operates to transmit the property, and nothing is said about title, what is the legal

effect of that contract? Does the contract necessarily import, unless the contrary be expressed, that the vendor has a good title? Or has it merely the effect of transferring such title as the vendor has? According to the Roman law (vide *DOMAT*, Book 1, tit. 2, s. 2, art. 3) and in France (*CODE CIVIL*, chap. 4, s. 1, art. 1603) and Scotland, and partially in America (1 *Johns. Rep.* 274; *BROOM'S LEGAL MAXIMS*, 628, where this subject is well discussed) there is always an implied contract that the vendor has the right to dispose of the subject which he sells (*BELL ON SALE*, 94); but the result of the older authorities is that there is by the law of England no warranty of title in the actual contract of sale any more than there is of quality. The rule of caveat emptor applies to both, but if the vendor knew that he had no title and concealed that fact, he was always held responsible to the purchaser as for a fraud in the same way as he is if he knew of the defective quality. This rule will be found in *Co. Litt.* 102, a, and 3 *Co. Rep.* 22 a; *NOY'S MAXIMS*, 42; *FITZ-HERBERT'S NATURA BREVIVM*, 94 c; *Sprigwell v. Allen* (1), cited by *LITLEDALE, J.*, in *Early v. Garret* (2) (9 B. & C. at p. 932); and in *Williamson v. Allison* (3), referred to in the argument. The same principle applies to transfer by deed. *LORD HALE* says:

"Though the words 'assign, set over, and transfer,' do not amount to a covenant against an eign title, yet, as against the covenantor himself, it will amount to a covenant against all claiming under him":

Deering v. Farrington (4), which was an assignment of a chose in action.

It may be that, as in the earlier times the chief transactions of purchase and sale were in markets and fairs where the bona fide purchaser without notice obtained a good title as against all except the Crown (and afterwards a prosecutor to whom restitution is ordered by the statute 21 Hen. 8, c. 11 [relating the restitution of stolen goods], the common law did not annex a warranty to any contract of sale. Be that as it may, the older authorities are strong to show that there is no such warranty implied by law from the mere sale. In recent times a different notion appears to have been gaining ground: see note of the learned editor to *Walker's Case* (5), 3 *Co. Rep.* 22 a; and *BLACKSTONE, J.*, says:

"In contracts for sale it is constantly understood that the seller undertakes that the commodity he sells is his own."

MR. WOODDESON, in his *LECTURES*, vol. 2, p. 415, goes so far as to assert that the rule of caveat emptor is exploded altogether which no authority warrants. At all times, however, the vendor was liable if there was a warranty in fact, and at an early period the affirming those goods to be his own by a vendor in possession appears to have been deemed equivalent to a warranty. *LORD HOLT*, in *Medina v. Stoughton* (6), says that

"where one in possession of a personal chattel sells it, the bare affirming it to be his own amounts to a warranty."

BULLER, J., in *Pasley v. Freeman* (7), disclaims any distinction between the effect of an affirmation when the vendor is in possession or not, treating it as equivalent to a warranty in both cases.

Some of the text writers drop the expression of "warranty" or "affirmation," and lay down in general terms, that if a man sells goods as his own, and the title is deficient, he is liable to make good the loss: 2 *BLACKSTONE'S COMMENTARIES*, 451; the commentator cites for that proposition *CRO. JAC.* 474 [*Furnis v. Leicester* (8)], and *ROLLE'S ABRIDGMENT*, 90, in both which cases there was an allegation that the vendor affirmed that he had a title, and, therefore, it would seem that the learned author treated the expression "selling as his own" as equivalent to an affirmation or warranty. So *CHANCELLOR KENT* [Chancellor of New York, 1814] in 2 *KENT'S COMMENTARIES*, 478, says:

"In every sale of a chattel, if the possession be in another, and there be no covenant or warranty of title, the rule of caveat emptor applies, and the party

- A buys at his peril; but if the seller has possession of the article, and he sells it as his own, and for a fair price, he is understood to warrant the title."

From the authorities in our law, to which may be added the opinion of TINDAL, C.J., in *Ormrod v. Huth* (9), it would seem that there is no implied warranty of title on the sale of goods, and that, if there be no fraud, a vendor is not liable for a bad title unless there is an express warranty, or an equivalent to it by declarations or conduct; and the question in each case where there is no warranty in express terms will be whether there are such circumstances as to be equivalent to such a warranty. Usage of trade, if proved as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement, and without proof of such usage the very nature of the trade may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys as against all persons. It is, perhaps, with reference to such sales, or to executory contracts, that BLACKSTONE makes the statement above referred to.

- Similar questions occur in cases as to the quality of goods in which it is clear there is, by law, no implied warranty, yet, if goods are ordered of a tradesman, in the way of his trade, for a particular purpose, he may be considered as engaging that the goods supplied are reasonably fit for that purpose. We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells "as his own," and that is what is equivalent to a warranty of title. But in the case now under consideration, the defendant can be made responsible only as on a sale of a forfeited pledge *eo nomine*. Though the harp may not have been distinctly stated in the auctioneer's catalogue to be a forfeited pledge, yet the auctioneer had no authority from the defendant to sell it except as such. The defendant, therefore, cannot be taken to have sold it with a more extensive liability than such a sale would have imposed upon him, and the question is whether, on such a sale, accompanied with possession, there is any assertion of an absolute title to sell, or only an assertion that the article has been pledged with him and the time allowed for redemption has passed. On this question we are without any light from decided cases.

- In our judgment, it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge and irredeemable and that he is not cognisant of any defect of title to it. By the statute law (see 1 Jas. 1, c. 21: repealed by Sale of Goods Act, 1893, s. 60), he gains no better title by a pledge than the pawnbroker had; and as the rule of the common law is that there is no implied warranty from the mere contract of sale itself, we think that where it is to be implied from the nature of the trade carried on the mode of carrying on the trade should be such as clearly to raise that inference. In this case we think it does not. The vendor must be considered as selling merely the right to the pledge which he himself had, and, therefore, we think the rule must be absolute.

- It may be that, though there is no implied warranty of title, so that the vendor would not be liable for a breach of it in unliquidated damages, yet the purchaser may recover back the purchase-money, as on a consideration that failed if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But if there is no implied warranty of title, some circumstances must be shown to enable the plaintiff to recover for money had and received. This case was not made at the trial, and the only question is whether there is an implied warranty.

Rule absolute.

MACDONALD AND ANOTHER v. LONGBOTTOM

[COURT OF QUEEN'S BENCH (Lord Campbell, C.J., Wightman and Erle, JJ.),
April 16, May 27, 1859]

[Reported 1 E. & E. 977; 28 L.J.Q.B. 293; 34 L.T.O.S. 200;
5 Jur.N.S. 1102; 7 W.R. 507; 120 E.R. 1177]

[COURT OF EXCHEQUER CHAMBER (Williams, J., Martin, B., Willes, J., Channell, B.,
Byles, J., Wilde, B.), June 15, 1860]

[Reported 1 E. & E. 987; 29 L.J.Q.B. 256; 2 L.T. 606;
6 Jur.N.S. 724; 8 W.R. 614; 120 E.R. 1181]

Sale of Goods—Contract—Written contract—Subject-matter of contract—Identification by extrinsic evidence.

When a specific thing is the subject of a written contract and it is doubtful what that specific thing is any fact may be given in evidence which is within the knowledge of both parties in order to identify it.

Accordingly, where a conversation was shown to have taken place between a buyer and a seller regarding the estimated quantity of the goods the subject-matter of the contract,

Held: evidence of what was said during that conversation was admissible to prove to what the contract referred.

Notes: Considered: *Mumford v. Gething* (1859), 7 C.B.N.S. 305. Applied: *Newell v. Radford* (1867), L.R. 3 C.P. 2. Considered: *Burton v. Rust* (1872), L.R. 7 Exch. 279; *Bank of New Zealand v. Simpson*, [1900] A.C. 182. Referred to: *Cullen v. O'Meara* (1867), 15 W.R. 1174; *Crane v. Powell* (1868), 17 W.R. 161; *Heffield v. Meadows* (1869), L.R. 4 C.P. 595; *Roden v. London Small Arms Co.* (1876), 46 L.J.Q.B. 213; *Cunningham v. Dunn*, [1874-80] All E.R.Rep. 349; *McCullin v. Gilpin* (1881), 6 Q.B.D. 516; *Plant v. Bourne* (1897), 76 L.T. 820; *Krell v. Henry*, [1900-3] All E.R.Rep. 20; *Great Western and Midland Rail. v. Bristol Corpn.* (1918), 87 L.J.Ch. 414; *A/S Tankexpress v. Campagnie Financière Belge des Petroles S.A.*, [1948] 2 All E.R. 939.

Cases referred to in argument:

Sarl v. Bourdillon (1856), 1 C.B.N.S. 188; 26 L.J.C.P. 78; 2 Jur.N.S. 1208; 5 W.R. 196; 140 E.R. 79; 39 Digest (Repl.) 477, 265.

Smith v. Jeffryes (1846), 15 M. & W. 561; 15 L.J.Ex. 325; 7 L.T.O.S. 231; 153 E.R. 972; 17 Digest (Repl.) 317, 1239.

Levy v. Green (1857), 8 E. & B. 575; 27 L.J.Q.B. 111; 4 Jur.N.S. 86; 6 W.R. 80; 120 E.R. 214; affirmed (1859), 1 E. & E. 969; 28 L.J.Q.B. 319; 33 L.T.O.S. 241; 5 Jur.N.S. 1245; 7 W.R. 486; 120 E.R. 1174, Ex. Ch.; 39 Digest (Repl.) 693, 1865.

Humphrey v. Dale (1857), 7 E. & B. 266; 26 L.J.Q.B. 137; 3 Jur.N.S. 213; 5 W.R. 466; 119 E.R. 1246; affirmed sub nom. *Dale v. Humphrey* (1858), E.B. & E. 1004; 6 W.R. 854; 120 E.R. 783; sub nom. *Humphrey v. Dale*, 27 L.J.Q.B. 390; 31 L.T.O.S. 328; 5 Jur.N.S. 191, Ex. Ch.; 39 Digest (Repl.) 478, 269.

Gorrissen v. Perrin (1857), 2 C.B.N.S. 681; 27 L.J.C.P. 29; 29 L.T.O.S. 227; 3 Jur.N.S. 867; 5 W.R. 709; 140 E.R. 583; 39 Digest (Repl.) 493, 407.

Appeal by the defendant from a decision of the Court of Queen's Bench on a rule nisi obtained by the plaintiffs for a verdict to be entered for them in the action.

The plaintiffs were sheep farmers in Scotland. The defendant, a wool dealer at Liverpool, employed one Stewart, who resided at Perth, to buy wool for him. On Sept. 5, 1857, Stewart wrote the following to the second plaintiff:

"Dear Sir,—I wrote you on the 1st instant enclosing letters from Mr. Longbottom [the defendant], and not having received your reply, I beg to state that

A I have heard from him today, and he desires me to offer you 'for your wool 16s. per stone,' delivered in Liverpool, less two months' discount, and as there is now so little between you, I hope to receive your acceptance of the above offer in due course.

“(Signed) WILLIAM STEWART.

“To A. M'Donald, jun.”

B To this letter the plaintiffs replied as follows :

“Dear Sir,—I yesterday received your favour, and in reply beg to say that I agree to your offer for the wool of 16s. per stone, less two months' discount at the rate of 5 per cent. for ready money.

“(Signed) A. MACDONALD.”

C The quantity of wool offered by the plaintiffs for acceptance was 2,505 stones, and it was rejected on the ground that it was a larger quantity than agreed upon. The plaintiffs sought to explain the term “your wool,” by giving evidence that in a conversation between one of the plaintiffs and Stewart the latter was informed that, besides their own clip of wool, the plaintiffs had bought the clips of four or five neighbouring farmers, whose names were mentioned, and that the whole quantity
D amounted to about 2,300 stones, 100 stones more or less, and that this was the wool upon which the negotiation proceeded and which had been delivered by them. The defendant contended that this evidence was inadmissible, and that the contract was so indefinite as to be void altogether, and, further, that, if admissible, it established a contract for 2,300 stones, 100 stones more or less, which was not fulfilled by an offer to deliver 2,505 stones. The learned judge at the trial,
E BYLES, J., was of opinion that the evidence was inadmissible, and that, without it, there was no sufficient contract, but received it subject to the objection. The jury assessed the damages at £825 16s. 3d., and a nonsuit was entered by the direction of the learned judge with liberty to the plaintiffs to move to enter the verdict for them for that amount. A rule nisi was, accordingly, obtained on their behalf.

Edward James and Brett showed cause against the rule.

F *Monk and Kemplay* supported the rule.

LORD CAMPBELL, C.J.—I am of opinion that the plaintiffs are entitled to have the verdict entered for them. It is clear from the letters that there was a contract between the parties. An offer was made and accepted, and the only question is as to the subject-matter of the contract. When a specific thing is the subject
G of a written contract and it is doubtful what that specific thing is any fact may be given in evidence which is within the knowledge of both parties in order to identify it. Applying that principle to this case, a conversation was shown to have taken place between Stewart, the agent of the defendant, and one of the plaintiffs as to what was the estimated quantity, the whole of which was clearly the subject of negotiation between them. Is there any difficulty in admitting in evidence what
H then passed between that plaintiff and Stewart? I think there is none. It is no addition to the contract, but only enables us to say to what the contract refers. It is said, if this be so, then the contract is limited to 2,300 stones of wool, 100 stones more or less. Not so, because there was no contract made till Sept. 5, and the letter of that date does not make it a condition that the quantity shall not exceed 2,300 stones by more than 100 stones. It is “for your wool,” tantum quan-
I tum. If the excess was so unreasonable as to make the contract void on the ground of misrepresentation, then the opinion of the jury should have been taken on that point.

WIGHTMAN, J.—The question is, What is meant by the term “your wool”? If there had been any conversation between the parties previous to the contract, one might suppose that it was some wool therein referred to. There can be no doubt that by “your wool” was meant the 2,300 stones, 100 stones more or less, mentioned by the plaintiffs to Stewart. I quite agree that the evidence of this

conversation was admissible to show what was meant by "your wool," but the point on which I have the misfortune to differ from the rest of the court is, that while my learned brothers think that the effect of this is only to explain the words "your wool," I think it has the effect of specifying the quantity of wool sold, and that the quantity mentioned becomes an ingredient in the contract. It is as if the defendant had said in his letter: "You having represented that you have 2,300 stones of wool, 100 stones more or less, I agree to purchase that quantity." It is unnecessary to refer to the cases, but there are numerous decisions which show that such a contract is not fulfilled by an offer to deliver 2,505 stones. I, therefore, think that upon this ground the defendant is entitled to retain his verdict. A

ERLE, J.—I think this rule ought to be made absolute. I assume that the written contract must contain all the material terms of the contract, and I think that these letters do so. The defendant says: "I will buy your wool." It is the universal practice to admit parol evidence to identify the subject-matter of a contract. It is not contended that this contract is on the face of it void for uncertainty; parol evidence must, therefore, be admitted to show to what it refers. It is contended that, this being so, all that passed between the plaintiff and Stewart as to quantity must be considered as embodied in the contract. I cannot agree to this. B

It was only preliminary talk, which cannot alter or vary the contract, although it may explain to what it applies. Even if it is to be taken as embodied in the contract, I think it would still be a question which the defendant should have desired to be left to the jury, whether or no the excess was unreasonable. C

The defendant appealed to the Court of Exchequer Chamber. D

W. B. Brett for the defendant. E

Kemplay for the plaintiffs was not called on to argue.

WILLIAMS, J.—We are all of opinion that the judgment of the court below should be affirmed. As to the main ground of the argument for the plaintiffs, none of us entertains any more doubt than the court below. We all think that the evidence was admissible. That evidence does not vary the written contract: it only identifies the subject-matter to which it refers. On the other point I felt at one time the same doubt as **WIGHTMAN, J.**, did, although my learned brethren here feel no doubt upon it. It cannot be disputed that if, as a matter of fact, it could be proved that the treaty was on a condition that the wool should amount to a particular quantity, namely, 2,300 stones, 100 stones more or less, it would have been gross injustice to admit the oral evidence for the purpose of fixing the subject-matter of the contract and exclude it from fixing the particular quantity of that subject-matter, or to hold that an action lay against the defendant for refusing to accept that which he had never bargained for. But, upon the whole, I incline to the opinion of the rest of the court that the statement as to the quantity in the previous conversation was a mere expression of opinion by the plaintiffs, and not a material element in the contract by which the defendant bound himself to accept the wool. F

MARTIN, B.—I also think that the judgment of the Court of Queen's Bench should be affirmed. The letters of Sept. 5 and 8 constitute a contract, which, in my opinion, would be a good contract at common law, if the Statute of Frauds had never existed. The ambiguity in the expression "your wool" would not prevent the contract from being a good one, and there is nothing in s. 17 of the Statute of Frauds [repealed by Sale of Goods Act, 1893, and substantially re-enacted by s. 4 (1) of that Act, s. 4 (1) itself being repealed by the Law Reform (Enforcement of Contracts) Act, 1954] to invalidate it. If the previous conversation had been the only evidence as to what was meant by the expression "your wool," I think that, as **WIGHTMAN, J.**, suggested, it would have been a question whether the contract was not for the quantity mentioned at that conversation, viz., 2,300 stones, 100 stones more or less, and, if so, the tender of 2,542 stones would not have been a tender in conformity with the contract. But, looking at the letter of Aug. 26, in G

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I

A which one of the plaintiffs speaks of a fresh parcel of wool which he had secured, and which he says "will go along with my other wool," I have no doubt that the defendant, in using the term "your wool," meant any wool that was then under the control of the plaintiff.

WILLES, J., and CHANNELL, B., concurred.

B BYLES, J.—I am of the same opinion, upon three grounds. First, the expression "your wool" is the expression of the defendant, and should, therefore, be taken in the sense which is widest and most against him. Secondly, the ordinary rule is that a latent ambiguity, an ambiguity which is raised by extrinsic evidence, may be removed by extrinsic evidence. Thirdly, such evidence, to be admissible, must not vary, but apply, the contract, and that is the effect of the oral evidence in this case. As to the statement of quantity, I agree with MARTIN, B., that the precise quantity was not an element in the contract.

WILDE, B., concurred.

Appeal dismissed.

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COLLINSON *v.* LISTER

[ROLLS COURT (Sir John Romilly, M.R.), February 14, 15, April 19, 1855]

[Reported 20 Beav. 356; 24 L.J.Ch. 762; 26 L.T.O.S. 9;

1 Jur.N.S. 835; 52 E.R. 639]

F [COURT OF APPEAL IN CHANCERY (Knight-Bruce and Turner, L.JJ.), November 25, 26, December 3, 1855]

[Reported 7 De G.M. & G. 634; 25 L.J.Ch. 38; 26 L.T.O.S. 132;

2 Jur.N.S. 75; 4 W.R. 133; 44 E.R. 247]

G *Administration of Estates—Loan to executor for purposes of estate—Personal debt of executor—Repayment claimed by lender from estate—Need to prove that executor would have been allowed sum in account with estate—Loan for purpose inconsistent with due administration—No charge on estate.*

H Where a person lends money to an executor in order that he may apply it for the purposes of the testator's assets, this is a personal debt of the executor. If the lender claims repayment out of the testator's assets he must show that the executor himself would have been allowed that sum in taking the accounts of the testator's estate. If a person advances money to an executor confessedly for a purpose which, though relating to the testator's estate, is, to the lender's knowledge, inconsistent with the due administration of the trusts, he does not acquire any charge on the assets of the testator.

I *Executor—Power to carry on business of testator—No directions in will—Power generally limited to winding-up—Completion of contract—Expenditure to improve mortgage security—Need for exercise of great care.*

Per SIR JOHN ROMILLY, M.R.: The acts which an executor, in the absence of any directions contained in the will, can or ought to do to complete or render available the contract or property of a testator depend so much on the peculiar circumstances of each case that I find it difficult to state with distinctness a general principle applicable to all such cases. Some points, however, are settled. Thus it is clear that an executor cannot carry on the trade of the testator except for the mere purpose of winding it up, but the executor may,

and in some cases is bound to, complete contracts entered into by his testator. If the testator has advanced money on the mortgage of a property which was originally an insufficient security or has become so by some subsequent accident, and the mortgagor applies to the executor for a further advance on the ground that the outlay of this further money would render the property sufficient to pay both sums, I know of no principle or decision which would preclude the executor from advancing such further sum out of the assets of the testator in order to effect this object. The expenditure of money to recover money either lost or endangered is a matter which requires very careful and grave consideration, and if the result shows that the transaction is such as only to create an additional loss, it is incumbent on the executor to prove that he used every means in his power to ascertain the chances of success and acted as a reasonable man would have done in similar circumstances with reference to his own property after he had obtained the best evidence on the subject.

Notes. As to the duties and powers of an executor, see 16 HALSBURY'S LAWS (3rd Edn.) 357 et seq.; and for cases see 24 DIGEST (Repl.) 610 et seq.

Cases referred to:

- (1) *Marshall v. Broadhurst* (1831), 1 Cr. & J. 403; 1 Tyr. 348; 9 L.J.O.S.Ex. 105; 148 E.R. 1480; 24 Digest (Repl.) 610, 6080.
- (2) *Downes v. Power* (1814), 2 Ball & B. 491; 1 Digest (Repl.) 711, *2095.
- (3) *Wilson v. Wilson* (1832), 1 My. & K. 126; on appeal (1834), 1 My. & K. 337; 39 E.R. 709, L.C.; 24 Digest (Repl.) 627, 6219.
- (4) *Pennell v. Deffell* (1853), 4 De G.M. & G. 372; 1 Eq. Rep. 579; 23 L.J.Ch. 115; 22 L.T.O.S. 126; 18 Jur. 273; 1 W.R. 499; 43 E.R. 551, L.J.J.; 12 Digest (Repl.) 553, 4193.

Also referred to in argument:

- Hughes v. Morris* (1852), 9 Hare, 636; 2 De G.M. & G. 349; 21 L.J.Ch. 761; 19 L.T.O.S. 210; 16 Jur. 603; 42 E.R. 907, L.J.J.; 41 Digest 171, 116.
- McCalmont v. Rankin* (1852), 2 De G.M. & G. 403; 22 L.J.Ch. 554; 20 L.T.O.S. 1; 42 E.R. 928, L.C.; 41 Digest 196, 351.
- Duncan v. Tindall* (1853), 13 C.B. 258; 22 L.J.C.P. 137; 17 Jur. 347; 138 E.R. 1197; 41 Digest 171, 110.

Appeal from a decree of SIR JOHN ROMILLY, M.R., in an administration action.

On Mar. 26, 1850, Mrs. Hannah Hardisty, the testatrix, advanced £1,500 to a Mr. Fletcher upon the security of a steam-vessel called the *Toward Castle*. In the month of October following, Mrs. Hardisty, at Fletcher's request, agreed to permit the engines to be removed from the *Toward Castle* to a ship called the *Engineer*, on the terms of having a mortgage of that vessel and also of another called the *Orion* which was already mortgaged to another person. Accordingly, by a deed dated Oct. 30, 1850, Mr. Fletcher, for the consideration before stated, assigned the *Orion* to Mrs. Hardisty, subject to the prior mortgages upon it, and also covenanted to assign the *Engineer* as soon as the transfer of the machinery and other repairs which he then contemplated making to that ship were completed. Mrs. Hardisty was made a party to this deed, but she never executed it. The defendant Lister acted as the friend and adviser of Mrs. Hardisty in these transactions.

On Dec. 24, 1850, Mrs. Hardisty died. By her will she appointed Lister her sole executor, and made the plaintiffs, who were her sisters, her residuary legatees. Lister proved the will. The testatrix died possessed of little property beyond the principal sum due from Fletcher. At the time of the decease of the testatrix, Francis Lister was agent and manager of the Goole branch of the York City and County Bank, and in that character advanced the funds to customers of the bank on such terms as he thought fit. In the lifetime of Mrs. Hardisty, the Bank Quay Foundry Co. was employed by Mr. Fletcher to transfer the engines from the *Toward Castle*

A to the *Engineer*, and to make other repairs to that ship, on account of which he paid the company a sum of £443 a few days before the death of the testatrix. Early in 1851 the company refused to proceed further with the repairs, unless a further sum of £300 was paid to them. Fletcher being unable to pay this money, applied to Lister to advance it, which he did, as stated by him in his answer,

B "by a cheque drawn by me on account of Mrs. Hardisty on the banking company for the sum of £300, and the same is debited in the books of the banking company, in sundry persons' accounts, to Mrs. Hardisty's executors."

Mr. Fletcher subsequently required a further advance of £700 for the same purpose, which Lister proposed also to advance, and he (Lister) wrote to Mr. England, who acted as his solicitor in the transaction, a letter dated Mar. 15, 1851, as follows:

C "It is now decided that I, as Mrs. Hardisty's executor, should advance another £1,000 [i.e., the £300 and £700] to Mr. Thomas Fletcher, and take a mortgage on the *Engineer* for £2,500. I think it probable that the family will relieve me of it rather than allow me to sell, which, of course, I must do in the long run, to wind-up her [Mrs. Hardisty's] affairs, so that you will be good enough to prepare a mortgage to me for £2,500. The ship is to be ready in about a fortnight."

D The vessel was completed in April, 1851, when the Foundry company, in addition to the sums of £443 and £300 already paid, claimed a lien on it (the sum of £700 was not then paid to the Foundry company) for £1,598 4s. 5d. in respect of the repairs. Thereupon Mr. Lister made a compromise with the company, who agreed to accept the hull of the *Toward Castle* and the sum of £1,320, in full of their demands. Mr. Lister advanced this sum, according to his answer,

E "as being money in his hands belonging to the estate of Mrs. Hardisty, and, as her executor, to the said Bank Quay Foundry Co."

He said:

F "The said sum of £1,320 was procured by me by a cheque drawn by me on the said banking company, and signed as follows: 'Francis Lister, Hardisty's executor,' and the same was debited in the books of the said banking company, in sundry persons' account, as follows: 'Hardisty's executors, £1,320,' making altogether £1,620, for there was only £300 advanced before. The £700 forms in fact part of this. The transactions took place without any communication by me with the directors or any person having the management of the said banking company."

G It appeared from the evidence that the testatrix never had any account with the bank, nor had Mr. Lister opened any account there as her executor.

H By a deed of assignment, dated April 26, 1851, which recited the advance of the £1,500 by Mrs. Hardisty and the advance of the two sums of £300 and £1,320 by Lister, in his character of executor, Fletcher assigned the vessel, the *Engineer*, to Lister, to secure payment of these sums and interest. On May 5 the ship and the mortgage were registered. At the close of the year 1851 the directors of the bank inspected the accounts of the Goole branch, and, observing the two entries of the £300 and the £1,320, debited to Mrs. Hardisty's executor, made further inquiry, and were made acquainted with the facts stated. Thereupon the directors insisted upon Lister's depositing with, and transferring to them, the securities held by him in the vessel. This he did by an indenture dated Jan. 16, 1852, made by him of the first part, and Mr. Price and Mr. Meek, trustees of the bank, of the second part, whereby, after reciting the assignment of the *Engineer* by Fletcher to Lister and the registry; that the three sums of £1,500, £300 and £1,320 were due to Lister; and that Lister had applied to the banking company to lend him £1,620 in consideration of £1,620 by the trustees paid to Lister. Lister transferred and assigned to Price and Meek, their executors, administrators and assigns, the three sums of £1,500, £300 and £1,320, and all interest to become

due in respect thereof, and also the steam-vessel called the *Engineer* and all the policies of insurance effected or to be effected thereon (subject to the equity of redemption therein), as security for the repayment of the said £1,620 and interest, with power to sell the vessel. Under this instrument the banking company caused the ship, the *Engineer*, to be sold for £1,150, which was paid to the banking company. The *Orion* had been previously sold by the prior mortgagee, and did not realise sufficient to pay what was due to him.

This suit was instituted by the residuary legatees against Lister and the banking company, to test the right of the company to retain the proceeds of the sale of the *Toward Castle*.

Roupell, Q.C., and *Amphlett* for the plaintiffs.

Follett, Q.C., and *Robson* for the defendant Lister.

Roundell Palmer, Q.C., and *J. V. Prior* for the banking company.

SIR JOHN ROMILLY, M.R.—This, in form, is an administration suit, but a question of considerable difficulty is raised between the plaintiffs, who are the residuary legatees of the testatrix, and the York City and County Bank, with reference to the claim of the company to have a first charge on the proceeds of the sale of a ship mortgaged to the testatrix, in respect of further advances made by the executor with moneys obtained from the bank. The plaintiffs deny the authority of the executor to obtain a loan from the bank for this purpose, and contend that it is a mere debt incurred personally by the executor to the bank which in no way affects the estate of the testatrix. The executor and the bank allege that he, as her legal personal representative, had authority to borrow money from the bank; that he did so; and that the money so obtained must be treated as advanced for the benefit of her estate, and as part of her estate.

The question to be determined is the effect of these transactions, and for this purpose, I think it material first to consider the effect of them as between the plaintiffs and the defendant Lister, without regard to the interests of the banking company, because, in my opinion, the rights of the banking company must in a great measure depend on the effect of these transactions as between Lister and his cestuis que trust. It is established by the evidence, in my opinion, that the testatrix consented to the transfer of the mortgage from the *Toward Castle* to the *Engineer*. If, therefore, the *Engineer* produced nothing after her decease, the loss would fall on her estate. It is also clear that the Foundry company, who repaired the ship and transferred the engines, had a lien on the vessel for the costs of such repairs, and that, except by discharging those costs, the vessel could not have been recovered, or the mortgage on it made available. It is also, in my opinion, equally clear, first, that Fletcher, by discharging these costs out of his own moneys, could not have defeated or prejudiced the mortgage he had covenanted to give to the testatrix; and that if he had borrowed money for that purpose from a stranger who had received notice of the testatrix's mortgages that person could not have obtained from Fletcher a priority over the testatrix. It follows, therefore, that Lister could not, by advancing his own moneys to Fletcher, have obtained such a priority, neither could he, as agent for the bank and by advancing moneys on account of the bank to Fletcher, have obtained for his principals such a priority, but this is not the way in which the advance was made, and the facts, as I have stated them, must be borne in mind in considering this matter.

It is contended on behalf of Lister, first, that in his character of executor he was entitled to advance the assets of the testatrix to make the mortgage available, and that, if he acted bona fide, the result cannot affect the question of breach of trust; and, secondly, that, if he was entitled to advance the assets of the testatrix for this purpose, he was equally entitled to borrow money for that purpose. This opens a question of great importance as regards the powers and liabilities of executors in discharge of the duties entrusted to and undertaken by them. The acts which an executor, in the absence of any directions contained in the will, can or ought to do for the purpose of completing or rendering available the contract or

- A property of the testatrix, depend so much on the peculiar circumstances of each case that I find it difficult to state with distinctness a general principle applicable to all such cases. Some points, however, are settled. Thus it is clear that an executor cannot carry on the trade of the testator except for the mere purpose of winding it up, but the executor may, and in some cases is bound to, complete contracts entered into by his testator, and the instance of a testator who had contracted to build a house, and died, having provided the materials, and half completed the work (*Marshall v. Broadhurst* (1)), was cited and relied on at the Bar, as an undoubted instance where the executor's duty would be to complete the imperfect work. In TOLLER ON EXECUTORS, 487, a case is mentioned where the testator, a wine cooper, had left a stock of wines, which could not have been advantageously sold unless the executor had purchased other wines for the purpose of refining the whole stock. That act was held not to constitute him a trader, but to have been done in the due discharge of his duty as executor. If a testator has advanced money on the mortgage of a property which was originally an insufficient security or has become so by some subsequent accident, and the mortgagor applies to the executor for a further advance on the ground that the outlay of this further money would render the property sufficient to pay both sums, I know of no principle or decision which would preclude the executor from advancing such further sum out of the assets of the testator in order to effect this object. It would be dangerous to lay down any rule which would prevent the executor from exercising a bona fide discretion in any such case, or even to charge him with a devastavit in case the result should disappoint his expectations, but if a loss should be the result, it appears to me to be a preliminary condition, before such an advance could be allowed to him, that he should have carefully investigated the probability of success before he advanced the money of his cestuis que trust for such a purpose. The expenditure of money to recover money either lost or endangered is a matter which requires very careful and grave consideration, and if the result shows that the transaction is such as only to create an additional loss, it is incumbent on the executor to prove that he used every means in his power to ascertain the chances of success and acted as a reasonable man would have done under similar circumstances with reference to his own property after he had obtained the best evidence on the subject.
- F

- To apply that rule to the present case, treating this suit as an ordinary suit for the administration of the testatrix's estate, and assuming that Lister had, out of her assets, advanced first £300, and then £1,320 for the purposes detailed in his answer and the evidence and that he now seeks to have these advances allowed to him in taking his accounts, I am of opinion that he did not take the precautions which were fitting and proper before he advanced these sums, and, if he had done so, and acted prudently, he would not have made these advances. In the case, therefore, which I have supposed, of Lister having in his hands assets belonging to the testatrix, I am of opinion that these advances could not have been allowed to him, but that he would be charged with that amount as a loss improperly occasioned by him to the estate. The case, however, becomes much stronger against him when it is considered that he borrowed money for this purpose, which is always a more dangerous proceeding than the laying out of money already existing. If the question had rested between the plaintiffs and the executor, and the interest of a third party had not been concerned, this point would have been immaterial, for no assets exist out of which Lister could seek for payment, and it could not be contended that the plaintiffs were personally liable to repay the advances made. The consideration of the point, however, has become important as affecting the rights of the banking company and the claim made by the plaintiffs against them; and I shall consider it, first, independently of the deed of Jan. 16, 1852, and then inquire how it is affected by that deed.
- I

The mode by which these sums were obtained by Lister in April, 1851, requires to be noticed. He was both the borrower and the lender. It is not denied that, as agent of the bank, he had the authority, as well as the power, to advance the

moneys of the bank to such persons as he should think fit, and all facts known to him as executor were also known to him as agent of the bank and must bind the bank exactly in the same manner as if they had acted directly in the transaction with full knowledge of these facts. The circumstance of his being also executor does not, in my opinion, affect the transaction, and I look at it in exactly the same light as I should do if he had advanced the money to any other person who was the executor of the testatrix, and when he did so he knew all the facts and the purpose for which the money was advanced. It was, therefore, an advance by the agent of the banking company on behalf of the company to the executor of the testatrix without taking any security from him, made in order to enable the executor to lend the money to Fletcher, to be by him applied in discharging a lien which the ship-builders had on the ship which Fletcher had covenanted to assign to the testatrix as security for former advances, which mortgage would constitute the first charge on the vessel as soon as it was registered. If the agent of the bank and the executor had been distinct persons, and the money had been advanced by the agent on an assignment of the mortgage by the executor, though with knowledge of the purpose for which the executor had required the money, the case would have been wholly different, whatever might have been the rights of the *cestuis que trust* against the executor. But no such contract is made; the union of both characters in Lister would have rendered it difficult to make any contract of this kind, which would be legal and effectual. A contract requires two parties to it, and a man in one character can with difficulty contract with himself in another character. In this case it is not even alleged that the original advance was made on the security of the mortgage to the testatrix: probably Lister thought the vessel would be able to pay both charges. Whether this was so or not, all that occurs is the introduction of the two entries in the books of the bank, which entries I consider wholly inoperative for any purpose except to show the purpose for which Lister wanted and took the money. The fact I consider to be this. Lister advanced the money of the bank in his character of agent to Fletcher, and took an assignment of the ship in his name of executor to secure these advances, in addition to the prior mortgage of the testatrix. Even regarding it as a bona fide advance by the bank to the executor for the purpose for which it was applied, it could not, in my opinion, be allowed to the bank against the assets of the testatrix, though it might bind her assets, if it had been properly and beneficially applied for the purpose of her estate—that is, if the *cestuis que trust* had had the benefit of it.

The right of the bank is to stand in the place of the executor, and it is limited to his rights as against the assets of the testatrix. I have already stated my opinion that, in this case, the executor could not be allowed these sums against the assets of the testatrix. If a man, without taking any security, advances money to another who is an executor, and the executor informs the lender that he requires the money for the purposes of the testator's estate but in fact misapplies the money, that cannot bind the persons interested in the testator's estate, but constitutes simply a general debt from the borrower to the lender. In *Downes v. Power* (2) LORD MANNERS said:

“Whatever may have been the old decisions on this subject, it is now clearly established, that whoever will deal with an executor for the assets of the testator for a purpose perfectly inconsistent with the due administration of those assets, subjects himself to the consequences of a *deceit*.”

I think that the same observation applies to a person who advances money to an executor confessedly for a purpose, though relating to the testator's estate, which is perfectly inconsistent with the due administration of the trusts, and that he does not thereby acquire any charge on the assets of the testator. Where a person lends money to an executor in order that he may apply it for the purposes of the testator's assets, this is a personal debt of the executor. But if the lender claims repayment out of the testator's assets, it can only be in case he show that the

A executor himself would have been allowed that sum in taking the accounts of the testator's estate. This is, in my opinion, the case as it originally stood, and the original loan of the money does not therefore give the banking company any lien on any part of the assets of the testatrix.

I now come to the deed of January, 1852, which is, in form, an assignment of the three debts due from Fletcher, and of the ship, to secure the sum of £1,620, then for the first time advanced by the banking company. From what I have already stated it follows that, if this had been the real transaction, it might have constituted a good assignment of the property therein mentioned to secure that advance. But the real transaction is not expressed on the face of the deed. No money was then advanced by the bank; it was in truth only an attempt to secure the money already advanced upon no security at all, with full knowledge of all the facts, and by that means to obtain a priority over a prior mortgage of the testatrix. In my opinion, neither the testatrix's mortgage nor the interest of the residuary legatees are affected by this deed. It leaves the matter exactly as it stood before it was executed. The deeds and their recitals disclose fully all matters relative to the mortgage of the testatrix, and the subsequent advances of money by Lister, and if the prior transaction did not give the bank a charge on the testatrix's assets, or on the ship as a part of them, this deed did not, in my opinion, mend their position in this respect. In fact I consider this part of the case as coming within the principle of the decision in *Wilson v. Wilson* (3).

The short result is that the executor was not justified in making the advance to Fletcher out of any assets of the testatrix, that, such advance being made a charge upon the assets with the full knowledge of the testatrix's mortgage, it did not give the bank priority over it, or displace the prior charge of the testatrix, and, consequently, that the proceeds of the sale of the vessel are to be applied, in the first instance, in payment of what is due on the charge of the testatrix, then in payment of the debt due to the banking company, and, as the sale of the ship has not produced sufficient for that purpose, the banking company must pay the £1,150 into court to the credit of this cause, to be administered as part of the assets of the testatrix. I shall make the usual decree for an account against Lister, and that, in taking that account, no allowance is to be made to him in respect of the two sums of £300 and £1,320 obtained by him from the moneys of the bank, and I shall declare that the testatrix's estate is not liable to pay those sums. I shall stay all proceedings in the suit against the defendants who represent the bank, but, as this suit has, in my opinion, up to this point been occasioned by a contention on the part of the bank and of the defendant Lister, which cannot be sustained, they must pay the costs up to and including the hearing.

The defendants appealed.

Follett, Q.C., Palmer, Q.C., Robson and Hobhouse for the defendants.
Roupell, Q.C., and Amphlett for the plaintiffs.

H **KNIGHT-BRUCE, L.J.**, said that this appeal was from a decree in a cause exhibiting too much unscrupulous conduct to be observed without regret and something more. The decree, by relieving the small estate of Mrs. Hardisty from two sums of £300 and £1,320, alleged to have been applied by the executor for its benefit and for that purpose to have been obtained from the York City and County Bank, and by restoring to it a sum of £1,150 which had been abstracted from it, had given it a chance of escape from annihilation. To this decree the executor and the other defendants, the officers of the bank, objected.

I The first question was whether the bank had a stronger right against the estate than their dismissed officer and present ally, Lister, could have, and this question must be answered in the negative. There had been instances in which a dishonest executor, by borrowing money in that character, had been able to make the lender a creditor upon the estate. But if, at the time of the loan and before parting with the money, the lender had notice of a breach of trust, or of an intention to misapply the money, he must stand and fall with the executor. This rule was not

only founded upon justice, but was supported by the authority of Lord Eldon, and not by that great authority alone. Further, if a banking company employed an agent to carry on their business at a branch bank, and the agent lent money under questionable circumstances, as in the instance of a trustee borrowing money in that character, and the circumstances were known to the agent, the bank acquired no better title than their agent or than the trustee. Here, if the banking company were lenders to Mrs. Hardisty's executor, the executor borrowing and their agent lending were the same person. Lister had helped himself and his friend Mr. Fletcher first to £300 and then to £1,320, before June, 1851, nor had the alleged security of Jan. 16, 1852, any other foundation than these advances made so many months previously. Those sums were the £1,620 mentioned in that security and in the deed of April, 1852. For the purposes of the suit, as far as the sums of £300, £1,320, and £1,150 were concerned, Lister was the banking company, and the banking company was Lister. It was material to consider the conduct of Lister as to the removal of the machinery of the ship *Toward Castle*, which was made a security for £1,500 lent by the testatrix to Mr. Fletcher through him, and also as to the rash and heavy expense incurred in the mending of the ship *Engineer* in the years 1850 and 1851.

Having considered the facts and the documents, the manner in which they affected Lister, and the degree of credit due to the statement of Lister as a witness, the circumstance that Mrs. Hardisty was a party to the mortgage of the *Toward Castle* and not to that of the *Orion*, and the entire evidence, he (his Lordship) could not say he thought the court ought to believe that Mrs. Hardisty ever consented to relinquish the security upon the *Toward Castle* or agreed to the removal of the machinery, or to accept the security on the *Orion* and *Engineer*. It was clear, however, that the engines of the *Toward Castle* were removed with the knowledge and consent of Lister, who professed to act in the matter as Mrs. Hardisty's agent. It was also clear that Lister was aware of the contents of the will, and that he accepted the executorship with a knowledge of the facts as to the ships. No ground had been shown for believing that Mr. Fletcher was then insolvent or out of England, if he was ever insolvent or out of England. It was, therefore, the clear duty of Lister, with all dispatch, to prove the will, and to demand payment of the £1,500, or so much of that sum as was due to the estate, and to proceed against him personally in the usual way to recover it. Lister, however, had done no such thing, but had taken the unjustifiable course which had ended in the security of April, 1851. By such conduct he became personally liable to the estate—if not for the whole £1,500, at least for that part of it which belonged to her estate, and which was admitted to have been more than four-fifths. The estate accordingly, and, therefore, the plaintiffs, upon the security being taken, became entitled, in aid of Lister's liability, to a charge upon the ship *Engineer* and her machinery, a lien and charge preferable to that of the banking company under the mortgage of January, 1852, and to any charge in favour of Lister, or otherwise in respect of repairs and works on that or any other vessel or any machinery. The lien of the shipbuilders was satisfied in April, 1851, when the ship was parted with. This lien was not intended to be kept up, if it could be kept up. It was never transferred or revived, if it was intended to be, or could be transferred or revived. The notion of bringing the charge claimed by the bank upon an equality with the lien to which Mrs. Hardisty's estate was entitled was absurd, it being manifest that the executor had no right to lay out Mrs. Hardisty's assets in improving the ship *Engineer*. He had no apology or excuse of intending to benefit the estate of his testatrix, for the evidence showed that he thought of nothing but his own advantage, or of Mr. Fletcher's as connected with his own.

The result was, that, as between him and the plaintiffs, the purchase-money of the ship was money of the plaintiffs' or of Mrs. Hardisty's estate. It was not less so as between the plaintiffs and the banking company. The banking company could have no right to indemnify themselves by assisting Lister to commit a fraud upon the plaintiffs, whose trustee the banking company in fact knew him to be.

- A The Ship Registry Acts had nothing to do with the question; and no case of acquiescence had been established against the plaintiffs. The decree did no more than justice. The appellants must pay the costs of this more than unfounded appeal, and the banking company must also be charged with interest upon the sum of £1,150 from the time it was received by them.
- B **TURNER, L.J.**, said that he was also of opinion that this appeal must be dismissed, and that the banking company could not stand in a better position with respect to Mrs. Hardisty's estate than Lister the executor. The bank had taken an assignment of securities, which upon the face of them appeared to belong to the estate of the testatrix, for securing an antecedent debt due to them from Lister, and neither upon principle nor upon authority could they claim any better right
- C than Lister himself had. The question was whether Lister was entitled to set up his own advances in priority to those of the testatrix. To make a case for this he must show that those advances were necessary and were made bona fide with a view to the benefit of the estate. Neither of those matters had been shown. [His LORDSHIP referred to certain parts of the evidence.] Counsel for the defendants had referred the court to *Pennell v. Deffell* (4). It was clear that the doctrine of that case could not be applied here in favour of the bank, for, in the first place,
- D the bank had treated the transaction as a loan from them to Lister, and taken the assignment of the securities on that ground; and if it were a case in which it was possible to apply the doctrine of following trust-moneys, the bank would be affected by the consequences of the act of Lister, who was their agent, in making these advances. In one respect the decree should have gone further than it did. Interest
- E at 4 per cent. should be allowed upon the £1,150 received by the bank. The defendants would pay the costs.

Appeal dismissed.

F

PARKER *v.* MARCHANT

- G [VICE-CHANCELLOR'S COURT (Knight-Bruce, V.-C.), February 19, 21, 22, March 8, 18, April 18, 1842]

[Reported 1 Y. & C.Ch. Cas. 290; 11 L.J.Ch. 223; 6 Jur. 292;
62 E.R. 893]

- [LORD CHANCELLOR'S COURT (Lord Lyndhurst, L.C.), March 24, 29, April 7, 8, 22, 1843]

H

[Reported 1 Ph. 356; 12 L.J.Ch. 385; 41 E.R. 667]

Will—"Ready money"—*Balance at bank.*

By his will a testator gave to trustees "the rest and residue of my ready money, securities for money, and moneys in the funds" to invest and to deal with the interest and capital as directed in the will.

- I **Held:** having regard to the other provisions of the will and construing the will according to the ordinary acceptation of language in the transactions of mankind, the words "ready money" included balances standing to the credit of the testator at his bankers.

Will—*Construction*—*Construction of language according to ordinary acceptation in transactions of mankind.*

In construing a will of personal property the terms used in the will are to be construed according to the ordinary acceptation in the transactions of mankind: per LORD LYNDBURST, L.C.

Will—"Goods, chattels, and effects"—*Prima facie general and unlimited expressions as applied to personality—Application of ejusdem generis rule.*

By his will a testator, after giving various pecuniary legacies and bequeathing the rest and residue of his ready money and securities to trustees for the benefit of his wife, gave and bequeathed to his wife "all my jewels, plate, linen, china, carriages, wines, and other goods, chattels, and effects whatsoever, as her own goods and chattels for ever."

Held, by KNIGHT-BRUCE, V.-C.: *prima facie* the words "goods, chattels, and effects" were general and unlimited expressions as applied to personality, and, in the absence of any intention to use them in any other sense being apparent in the will, the *ejusdem generis* rule was not applicable, and the effect of the words was sufficient to pass the residue of his property to his wife.

Will—Servants—Gift to servants—Claim of servant in service at time of codicil, but leaving it before testator's death.

A testator, by a codicil, bequeathed pecuniary legacies to named persons, who were described as having lived many years in his family, and then added: "to the other servants £500 each."

Held, by KNIGHT-BRUCE, V.-C.: a person who was in the testator's service at the date of the codicil, but who left it before his death, was entitled to a legacy of £500.

Notes. Considered: *Fisher v. Hepburn* (1851), 14 Beav. 626; *Langdale v. Whitfield* (1858), 4 K. & J. 426. Applied: *Re Powell's Trust* (1858), John. 49. Considered: *Hopkins v. Abbott* (1875), 31 L.T. 820; *Re Marcus, Marcus v. Marcus* (1887), 56 L.J.Ch. 830. Applied: *Re Powell* (1890), 5 Jur.N.S. 331; *Anderson v. Anderson*, [1895] 1 Q.B. 749. Considered: *Re Hammersley, Heasman v. Hammersley* (1899), 81 L.T. 150; *Re Derbyshire, Webb v. Derbyshire*, [1906] 1 Ch. 135. Referred to: *Foley v. Hill* (1848), ante p. 16; *May v. Grave* (1849), 3 De G. & Sm. 462; *Cooke v. Wagster* (1854), 2 Sm. & G. 296; *Lowe v. Thomas* (1854), Kay, 369; *Harris v. James* (1864), 12 W.R. 509; *Peacock v. Peacock* (1865), 11 Jur.N.S. 280; *South Australian Insurance Co. v. Randell* (1869), 6 Moo.P.C.C.N.S. 341; *Knutsford (Owners) v. Tillmanns & Co.* (1908), 99 L.T. 399; *Re Layard, Layard v. Bessborough* (1916), 85 L.J.Ch. 505; *S.S. Magnhild v. McIntyre Bros. & Co.*, [1920] 3 K.B. 321; *Ambatielos v. Anton Jurgens Margarine Works*, [1922] 2 K.B. 185; *Re Elwood, Ex parte River Dee Drainage Board v. Hooson*, [1927] All E.R.Rep. 320.

As to the construction of wills, words passing property, and gifts to servants, see 39 HALSBURY'S LAWS (3rd Edn.) 973 et seq., 1018 et seq., and 1078-1080. For cases see 44 DIGEST 830 et seq., 899-908.

Cases referred to:

- (1) *Jones v. Henley* (1685), 2 Rep. Ch. 361; 21 E.R. 688; 44 Digest 899, 7584.
- (2) *Saumarez v. Saumarez, De Havilland v. Saumarez* (1839), 4 My. & Cr. 331; 41 E.R. 129, L.C.; 44 Digest 755, 6141.
- (3) *Church v. Mundy* (1808), 15 Ves. 396; 33 E.R. 804, L.C.; 44 Digest 659, 4984.
- (4) *Stuart v. Marquis of Bute* (1806), 11 Ves. 657; 32 E.R. 1243, L.C.; on appeal (1813), 1 Dow, 73, H.L.; 44 Digest 677, 5181.
- (5) *Hotham v. Sutton* (1808), 15 Ves. 319; 33 E.R. 774, L.C.; 44 Digest 723, 5740.
- (6) *Arnold v. Arnold* (1834), 2 My. & K. 365; 4 L.J.Ch. 123; 39 E.R. 983; 44 Digest 592, 4160.
- (7) *Campbell v. Prescott* (1808), 15 Ves. 500; 33 E.R. 844; 44 Digest 694, 5351.
- (8) *Michell v. Michell* (1820), 5 Madd. 69; 56 E.R. 821; 44 Digest 694, 5354.
- (9) *Rawlings v. Jennings* (1806), 13 Ves. 39; 33 E.R. 209; 44 Digest 695, 5363.
- (10) *Choat v. Yeats* (1819), 1 Jac. & W. 102; 37 E.R. 314; 23 Digest (Repl.) 487, 5544.

- A (11) *Carr v. Carr* (1811), 1 Mer. 541, n.; 35 E.R. 799; 44 Digest 728, 5813.
 (12) *Phillips v. Eastwood* (1835), L. & G. temp. Sugd. 270, 291; 44 Digest 705, c.
 (13) *Browne v. Groombridge* (1819), 4 Madd. 495; 56 E.R. 788; 44 Digest 587, 4104.
 (14) *Hawley v. Cutts* (1677), Freem. Ch. 24.
 (15) *Harcourt v. Morgan* (1838), 2 Keen, 274; 48 E.R. 633; 44 Digest 656, 4955.
- B (16) *Doe d. Evans v. Evans* (1839), 9 Ad. & El. 719; 1 Per. & Dav. 472; 2 Will. Woll. & H. 128; 8 L.J.Q.B. 212; 112 E.R. 1384; 44 Digest 701, 5435.
 (17) *Edwards v. Barnes* (1835), 2 Bing.N.C. 252; 1 Hodg. 293; 2 Scott, 411; 5 L.J.C.P. 32; 132 E.R. 99; 44 Digest 733, 5879.
 (18) *Jones v. Curry* (1818), 1 Swan. 66; 1 Wils. Ch. 24; 36 E.R. 300; 44 Digest 523, 3405.
- C (19) *Webb v. Honnor* (1820), 1 Jac. & W. 352; 37 E.R. 410; 44 Digest 524, 3416.
 (20) *Devaynes v. Noble, Sleech's Case* (1816), 1 Mer. 529, 539; 35 E.R. 767, 771; 3 Digest (Repl.) 340, 1101.
 (21) *Sims v. Bond* (1833), 5 B. & Ad. 389; 2 Nev. & M.K.B. 608; 110 E.R. 834; 3 Digest (Repl.) 178, 299.
 (22) *Vaisey v. Reynolds* (1828), 5 Russ. 12; 6 L.J.O.S.Ch. 172; 38 E.R. 931; 44 Digest 722, 5727.
- D (23) *Taylor v. Taylor* (1837), 1 Jur. 401; 44 Digest 729, 5823.
 (24) *Hogan v. Jackson* (1775), 1 Cowp. 299; affirmed sub nom. *Jackson v. Hogan* (1776), 3 Bro. Parl. Cas. 388; 1 E.R. 1387, H.L.; 44 Digest 696, 5376.

Also referred to in argument :

- E *Hearne v. Wigginton* (1821), 6 Madd. 119; 56 E.R. 1037; 44 Digest 742, 5996.
Collier v. Squire (1827), 3 Russ. 467; 5 L.J.O.S.Ch. 186; 38 E.R. 650; 12 Digest (Repl.) 567, 4320.
Rose v. Bartlett (1633), Cro. Car. 292; 79 E.R. 856; 44 Digest 714, 5627.
Thompson v. Lady Lawley (1800), 2 Bos. & P. 303; 126 E.R. 1295; 44 Digest 716, 5655.
- F *Bennet v. Batchelor* (1789), 1 Ves. 69; 3 Bro.C.C. 28; 30 E.R. 231, L.C.; 44 Digest 742, 5993.
Woollam v. Kenworthy (1803), 9 Ves. 137; 32 E.R. 554, L.C.; 44 Digest 700, 5254.
Chapman v. Hart (1749), 1 Ves. Sen. 271; 27 E.R. 1026, L.C.; 44 Digest 676, 5164.
- G *Sanders v. Earle* (1680), 2 Rep. Ch. 188; 21 E.R. 653; 44 Digest 709, 5541.
Roberts v. Kuffin (1741), 2 Atk. 112; Barn. Ch. 259; 26 E.R. 470, L.C.; 44 Digest 735, 5894.
Hunt v. Hort (1791), 3 Bro.C.C. 311; 29 E.R. 554, L.C.; 44 Digest 736, 5909.
Sutton v. Sharp (1826), 1 Russ. 146; 38 E.R. 57; 44 Digest 594, 4187.
Collison v. Girling (1837), 4 My. & Cr. 63.
- H *Hartley v. Hurle* (1800), 5 Ves. 540; 31 E.R. 727; 44 Digest 505, 5693.
Addis v. Clement (1728), 2 P. Wms. 456; 2 Eq. Cas. Abr. 348; 24 E.R. 811, L.C.; 44 Digest 715, 5628.
Dixon v. Dawson, Slawin v. Farside (1825), 2 Sim. & St. 327; 3 L.J.O.S.Ch. 195; 57 E.R. 371; 44 Digest 301, 1328.
Doe d. Belasyse v. Lucan (1808), 9 East, 448; 103 E.R. 644; 44 Digest 674, 5148.
- I *Lowther v. Cavendish* (1758), 1 Eden, 99; Amb. 356; 28 E.R. 621; affirmed sub nom. *Lord Cavendish v. Lowther* (1759), 3 Bro. Parl. Cas. 186, H.L.; 44 Digest 440, 2663.
Turner v. Husler (1780), 1 Bro.C.C. 78.
Goodman v. Edwards (1833), 2 My. & K. 759.
Judd v. Pratt (1808), 15 Ves. 390; 33 E.R. 802; 20 Digest (Repl.) 435, 1524.
Pennington v. Pennington (1813), 1 Ves. & B. 406; 35 E.R. 158; 44 Digest 701, 5437.

All Souls' College v. Coddington (1719), 1 P.Wms. 597; 24 E.R. 533; 44 Digest **A** 648, 4881.

Gayre v. Gayre (1705), 2 Vern. 538; 23 E.R. 949; 44 Digest 671, 5113.

Masters v. Masters (1718), 1 P.Wms. 421; 24 E.R. 454; 44 Digest 623, 4531.

Dean and Chapter of Christchurch v. Barrow (1767), Amb. 641; 27 E.R. 415; 44 Digest 653, 4925.

Sheffield v. Earl of Coventry (1833), 2 Russ. & M. 317; 39 E.R. 415; 44 Digest **B** 651, 4914.

Sherer v. Bishop (1792), 4 Bro.C.C. 55; 29 E.R. 776; 44 Digest 764, 6234.

Garratt v. Niblock (1830), 1 Russ. & M. 629; 39 E.R. 241; 44 Digest 872, 7286.

Hastings v. Hane (1833), 6 Sim. 67; 58 E.R. 520; 44 Digest 726, 5782.

Appeal from part of a decree made by KNIGHT-BRUCE, V.-C., on a bill filed by the widow of the testator praying that the trusts of the will might be declared and carried into execution. **C**

The testator, Robert Parker, by his will bequeathed and devised as follows:

"I direct in the first place all my debts to be paid. I then give and bequeath to my dear and affectionate wife, Helen, £60,000, £3 per cent. consols, part of a larger sum standing in my name in the Bank of England. Also, I give and bequeath to Elizabeth, the widow of Charles Bedford Young, deceased, £10,000, part of the aforesaid £3 per cent. consols. Also, to Mary Ann Young, her daughter, £5,000, other part of my aforesaid £3 per cent. consols. Also, I give to Ariana, wife of — Aickin, Esq., formerly Ariana Shelley, £500. To my godson, John Shelley. £100. . . . Also, I give and bequeath to my dear brother-in-law, Sir Timothy Shelley, Bart., and Sir John Shelley Sidney, Bart., all the rest and residue of my ready money, securities for money, and moneys in the funds, in trust to invest the same in their joint names, and to pay to or permit and suffer my dear wife Helen, or her agent, for her use, to receive the dividends or interest of the same during her life, and after her decease for this further trust, to divide, transfer, and pay the said stocks and monies unto and amongst my cousins, Thomas Marchant, John Marchant, the children of my late cousin William Marchant, and the children of my late cousin Mary Knight—namely, one equal share to Thomas, one equal share to John, one equal share to the children of William, and the remaining share to the children of Mary Knight." **D** **E** **F**

As to the messuages, lands, tenements, and real estates, he disposed thereof as follows. He gave and devised unto the said Sir T. Shelley and Sir J. Sidney, and their heirs, all those his two-third parts, and all other his right and interest in and to all those messuages, lands, and tenements, situate at Ifield, in the county of Sussex; also in and to all that messuage, lands, and tenements in Charlewood, in the county of Surrey, with their and every of their appurtenances, either in the said or in any other parishes or places situate and called or known by the name of Westfield, or by whatever other name called or known; also, all that his manor, or royalty, messuages, and hereditaments and castle, situate at Otford, in the county of Kent, with the appurtenances; also, all that his messuage with the appurtenances at Chevington, in the county of Suffolk; also his farm and lands in Hargrave and Hasset, in Suffolk; also, in Hoo, in Kent, in Ifield, in the county of Sussex, in Charlewood, in Surrey; also, his house and premises in Catherine Place, Bath; and all other his messuages, lands, tenements, and hereditaments which might not be therein particularly described or mentioned, upon the following trusts: First, for the use of his said wife Helen, for her natural life, and after her decease to the use of the said Thomas Marchant and John Marchant, and the children of the said William Marchant and Mary Knight, in equal shares and proportions, as tenants in common. The testator then bequeathed as follows: **G** **H** **I**

"And I do further give and bequeath to my said wife all my jewels, plate, linen, china, carriages, wines, and other goods, chattels, and effects what-

A soever, as her own goods and chattels for ever. And I do hereby constitute and appoint my said wife sole executrix of this my will."

By a codicil the testator bequeathed as follows:

B "I give and bequeath to the following persons, who have lived many years in my family; viz., to Mrs. Down, £1,000; to Mr. Jones, £1,000; to Martha Isgrove, £1,000; to the other servants, £500 each. This writing I direct to be taken as a codicil to my will."

The testator died on Mar. 27, 1837. Thomas Marchant died in his lifetime. The bill was filed by the widow against the several other persons interested under the will and against the trustees, praying that the trusts of the will might be declared and carried into execution. In pursuance of the decree made in this cause in December, 1838, the master found that the testator was, at the time of his death, possessed of £22,891 15s. 7d. ready money, the greater part of which consisted of balances in the hands of two banking houses, and the residue of money in his dwelling-house, and in the hands of his agents. The master also found that the testator was, at the time of his will and of his death, seised of or well entitled to the estates mentioned in his will, all of which were freehold or copyhold, and stated that Ann Relfe, who had been in the testator's service at the date of his codicil, but had quitted it before the testator's death, had claimed a legacy of £500, under the bequest to "the other servants," which claim he had disallowed, but recommended it to the attention of the court.

Sir Charles Wetherell, Wilbraham and Lovat for the plaintiff.

Bethell and Boyle for the defendant John Marchant.

Simpkinson and Whatley for the children of William Marshall.

E *Kenyon Parker and Pitman* for the assignees of John Marchant and the encumbrancers on the shares of William.

Koe and Hood for the children of Mary Knight.

Russell and Tripp for other parties cited.

Roupell, Wilcock, Glasse, J. H. Hall, Stone, Lewin and Dumergue for other parties.

F *Walpole* for Ann Relfe.

Cur. adv. vult.

Mar. 8, 1842. **KNIGHT-BRUCE, V.-C.**, read the following judgment.—The questions in this case are upon the will and codicil, dated respectively in 1829 and 1830, of Robert Parker, who died in 1837. It may be convenient in the first place to dispose of the codicil by stating my opinion that the legacies given by it are general pecuniary legacies, payable in the ordinary way out of the general personal estate, and not otherwise, and that the legacy claimed by Ann Relfe under the bequest "to the other servants" of £500 each is due. She is admitted to have been within that description when the codicil was made, for the "many years' service" is not contended to have applied to "the other servants." She subsequently quitted the testator's service in his lifetime, did not return to it, and was, therefore, argued to have lost her legacy. The codicil does not, in express terms, annex to the gift the condition of continuing service. It has not been argued to be capable of extension to servants, if any, who subsequently to the codicil entered his service for the first time, though continuing in his service at his death. On the other hand, the circumstance that he has described the legatees by their employment and not by name does not, as I conceive, import that the employment and character must continue. *Jones v. Henley* (1), which was cited at the Bar, did not turn upon the same language as that now before me. I think that this disputed legacy ought to be paid—a conclusion probably agreeable to the civil law, for a law of **ULPIAN**, in the **PANDECTS**, lib. 34, tit. 5, art. 19, *De rebus dubiis*, provides thus:

"Si cognatis legatum sit, et hi cognati quidem esse desierint [this might be through emancipation], in civitate autem maneant, dicendum deberi legatum; cognati enim testamenti facti tempore fuerunt."

ULPIAN goes on to say :

"Certe si quis testamenti facti tempore cognatus non fuit, mortis autem tempore factus est per adrogationem, facilius legatum consequitur."

How far this latter position is one adopted by the English law it is unnecessary now to consider. The former is, I conceive, in conformity with our principles.

The first point upon the will that it may be right to mention is the question whether the testator has disposed of the beneficial interest in the general residue of his personal estate or has so far died intestate. This turns upon the meaning to be attributed to the words "goods, chattels, and effects," having regard to the position in which they are found in the will, and having regard, also, to the whole contents of the will. LORD COTTENHAM, in *Saumarez v. Saumarez* (2), expressed his assent, and I agree with him in assenting, to a general rule of construction as laid down or recognised by LORD ELDON in *Church v. Mundy* (3), thus (15 Ves. at p. 406) :

"It is much more safe to consider those subjects intended which the words describe, than to supply a purpose by conjecture; determining for the testator upon the more or less convenience with which that subject may be, which he has declared shall be, applied. The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary."

The words "goods, chattels, and effects," which the bequest contended to be residuary contains, or any of them, are terms that, in their proper sense and nature, are sufficiently large to include and pass the absolute interest in the whole personal estate. But a will may be so worded as to show that, according to a reasonable construction of it, the testator must have intended to use those terms in a limited and restricted sense, and when this appears the intention so collected must have effect given to it. It is, however, incumbent on those who contend for the limited construction to show that a rational interpretation of the will requires a departure from that which ordinarily and prima facie is the sense and meaning of the words. Such I take to be in substance the rule to be collected from all the authorities, and to this test the gift in question must be subjected.

The testator, after directing the payment of his debts, and making bequests of stock and money to his wife and other persons (which exhaust all the ready money that he might have at his death, and at least all the securities for money and moneys in the funds that he had when he made his will), and disposing of his landed property (in which the wife takes a life interest, and which disposition of the landed property is asserted on one hand and denied on the other to have included his chattel leasehold property), concludes his will thus :

"And I do further give and bequeath to my said wife all my jewels, plate, linen, china, carriages, wines, and other goods, chattels, and effects whatsoever, as her own goods and chattels for ever."

That is the whole of the clause now in question. It is to be observed, first, that it does not contain any limitation in point of locality—any reference to place; secondly, that the larger and generic terms, "goods, chattels, and effects," follow the specific terms, "jewels, plate, linen, china, carriages, wines," and are the last-enumerated subjects of the gift; thirdly, that there is not, in any subsequent part of the will or in the codicil any disposition or expression denoting a belief in the testator's mind that there was anything not expressly given to some other person which the clause in question would not carry to the wife; and fourthly, that the gift to her, followed by her appointment to the sole executorship and by nothing else, is in that part of the will where, according to habit and custom, the disposition of the residue, if any, would be expected to be found.

These considerations, each of more or less importance in construing the instrument, are only met by a rule, certainly of frequent, but not of universal application, confining such a general term as "goods," "chattels," or "effects," following a

A particular enumeration of specified articles to things ejusdem generis with the articles specified. To this rule LORD ELDON alludes in *Stuart v. Marquis of Bute* (4) and *Hotham v. Sutton* (5), and its recognition is of frequent occurrence elsewhere in the books. That it is not of universal application is clearly shown by several authorities, of which some have been mentioned in the course of the argument. In *Arnold v. Arnold* (6), LORD COTTENHAM [then SIR CHARLES PEPYS, M.R.]

B thus expresses himself on the subject (2 My. & K. at pp. 372, 373):

C “The question, then, is, whether, assuming this to be the right construction, the expression ‘my wines and property in England,’ will not include every description of property found to be locally situate in this country, or whether there be any rule which necessarily limits that property to articles of the same kind with the subject-matter of the previous gift. That the mere enumeration of particular articles followed by a general bequest does not of necessity restrict the general bequest is obvious because, as has been stated, a testator often throws in such specific words, and then winds up the catalogue with some comprehensive expression for the very purpose of preventing the bequest from being so restricted. Clearly, therefore, in the ordinary case, the gift of the wines would not be limited by the occurrence of the subsequent word, ‘property,’ which, be it observed, is as large and comprehensive a term as can possibly be used. The question, then, remains, whether the limit, in point of place, imposed by the testator on the extent of the bequest, ought to make any difference; and I can find neither reason nor authority for holding that it should. Indeed, I have been unable to discover any instance in which the word ‘property’ has been confined to articles of the description before enumerated, unless where other expressions occurred, from which it was clear that the word was not there used in its ordinary sense.”

E SIR WILLIAM GRANT, in *Campbell v. Prescott* (7), thus expresses himself (15 Ves. at p. 507):

F “The next question is whether the surplus belongs to the next-of-kin or to the residuary legatees: that is, whether the latter takes it by the express disposition; . . . and I think they do so take. There is no case for the restrictive sense which the grandchildren put on the general words ‘all my effects whatsoever.’ LORD MANSFIELD says [in *Hogan v. Jackson* (24)] the word ‘effects’ is equivalent to property or worldly substance. The plaintiffs are, therefore, entitled to a decree.”

G And in *Michell v. Michell* (8), SIR JOHN LEACH, V.-C., says (5 Madd. at pp. 71, 72):

H “The word ‘effects,’ used simpliciter, will carry the whole personal estate, as a gift of ‘all my effects’ without more; but it is frequently used in a restrictive sense, meaning goods and moveables, as in the common expression of ‘furniture and effects.’ In every case, the court has to collect from the context the particular sense in which the testator has intended to use it. In *Campbell v. Prescott* (7), there were added to the word ‘effects,’ ‘of what nature or kind soever’; and this addition excluded its restrictive sense. And it appears to me, that the words which follow the word ‘effects’ in the present case, ‘that he shall die possessed of,’ lead to the same conclusion.”

I Acknowledging, as I do, the principles recognised in these three cases, and in *Church v. Mundy* (3), and recollecting particularly that prima facie the words “goods, chattels, and effects,” are general and unlimited expressions as applied to personalty, what judicial ground have I for saying that an intention to use them in any other sense is apparent on this will? Conceiving the general interpretation to be not only consistent with propriety of language and expression, but to be at least as probably conformable with the testator’s views and intentions to be collected from the whole will as any other construction, I consider myself not

authorised to depart from it, and, therefore, not authorised to accede to the argument which contends against the wife's right to the residue. I declare it, accordingly, to belong to the plaintiff, her executor. A

Before leaving this part of the case, it may be remarked, that SIR WILLIAM GRANT's judgment in *Rawlings v. Jennings* (9), contains this passage (13 Ves. at p. 46):

"The second question arises on the widow's claim of the whole residue of the personal estate, as passing to her under the general word 'effects.' That claim cannot be sustained. Part of his property being particularly given to her afterwards, the word 'effects' must receive a more limited interpretation, and must be confined to articles ejusdem generis with those specified in the preceding part of the sentence, namely, household furniture." B

As the will in that case is stated in the report and in the registrar's book, the gift forming, apparently, the reason of the judgment as to the import of the word "effects" does not appear. The will, however, may have contained more than the report and the registrar's book show. Certainly there were bequests to various persons after the bequest to the wife of the "household furniture and effects." Perhaps, also, in that case the word "household" may be considered to have belonged to the word "effects" as much as to the word "furniture." C D

The next question is whether the plaintiff is right in contending that the testator's debts and the pecuniary legacies given by the will are payable, not in the ordinary course, but primarily or solely out of the "ready money, securities for money, and moneys in the funds." Here, also, the general rule, which in this instance is against the plaintiff's claim, must apply unless upon the will and codicil, or one of them, he can show a contrary intention manifested. The word "then" and the words "rest and residue" are said by him to manifest such an intention, and *Choat v. Yeats* (10) is cited in support of the proposition, which, I think, however, he does not as to the debts establish. The first passage of the will makes the real estate liable as equitable assets to the payment of all the debts, which otherwise it would not have been. The real estate, however, is not by the word "then" or otherwise charged primarily or pari passu with the personalty not specifically bequeathed, but is only made liable in case of necessity in its usual rank and order. So, as to the "ready money, securities for money, and moneys in the funds," of which the disposition is specific, or in the nature of a specific bequest. These the testator could not by law, as against his creditors, exempt from his debts. He could not give them except subject to his debts, and the word "then" appears to me to indicate that only or to show merely that, without meaning to disturb or vary the usual order of administration, he recognised the priority of his creditors over the objects of his bounty. As to the words "rest and residue," if they have any reference to the debts at all, I think that they do not carry the matter further. I find it, at least, impossible to say that the plaintiff has done more than bring this point into doubt, if he has done so much, and he must do more before he can ask the court to depart from a general rule. E F G H

My opinion, however, as to the pecuniary legacies given by the will is different. To these the specifically bequeathed personalty could not in any order under any circumstances be liable, unless made so by special provision for the purpose. The will, however, as I read it, recognises these legacies as matters of deduction from the ready money, securities for money, and money in the funds. If so, in what order and to what extent? Looking at the whole will, the particular part of it in which these legacies are found, and the language of the final bequest to the testator's wife, I am of opinion that there is to be found in the instrument an intention manifested that the "ready money, securities for money, and moneys in the funds," should be primarily, if not solely (the amounts, as I understand, render it immaterial whether primarily or solely), charged with these legacies, and I must declare accordingly. The lapsed share of the property thus charged must bear its portion, but no more than its portion, of the burthen. [But see now Adminis- I

A tration of Estates Act, 1925, s. 32, s. 33, Sch. 1: 9 HALSBURY'S STATUTES (2nd Edn.) 718.]

The next question made is as to the meaning of the term "ready money." That the will refers to such ready money as there might be at the testator's death, and not merely to such ready money as he had at the date of the will is, I think, plain from the nature of the subject, and agreed on all hands. The contention has been whether certain sums mentioned in the master's report do or do not from their nature fall under the description of "ready money."

Upon the £116 12s. cash in the house, there has been and can be no question. Clearly, it is ready money. It is, I think, on the other hand, equally clear that the debts due to the testator at his death from his agents and other persons, however safe, and with whatsoever facility obtainable, were not included under that description, with the exception only of the two sums of £6,024 0s. 11d and £16,615 15s. 1d. The former of these is described in the report as the balance at the testator's death in the hands of Messrs. Hobhouse & Co., the testator's bankers at Bath. The latter is described in the report as the balance due to the testator at his death from Messrs. Child & Co., his bankers in London. The argument has proceeded on the basis that these two sums were ordinary bankers' balances on banking accounts of the usual description kept in the usual manner, that neither of them bore interest, and that in the customary mode it was competent to the testator at any moment to have drawn cheques payable to the bearer on demand for the whole. He had a residence at Bath, but it seems, none in London or its vicinity.

The main dispute on this part of the case has been whether these two sums are to be considered as "ready money." According to the decision in *Carr v. Carr* (11), they would have passed, or might have passed, under a bequest of debts due to the testator. That, I think, is not conclusive against their capacity of passing under a bequest of ready money.

Undoubtedly, an ordinary balance in a banker's hands is in a sense a debt due from him—certainly, he may be sued for it as for a debt. But it may be equally true that in a sense it is ready money, and, if that description may in general be justly held applicable to it, possible difficulties, not existing here, which may exist in other cases, as of a bequest in the same will of the debts due to the testator to one person and of his ready money to another without an explanatory context, or of interest being allowed by the banker, or of a contract that, unless upon a certain notice, the balance should not be reduced below an agreed amount, or of acceptances by the banker for the customer, not at maturity at the latter's death, or of drafts upon the banker, drawn by the customer, but not at maturity, not presented, or not paid, ought not to prevent the court from giving full effect, according to a fair interpretation of the will, to the language which the testator has used. The term "debt," however technically correct, is not colloquially or familiarly applied to a balance at a banking-house. No man talks of his banker in that character being indebted to him. Men, speaking of such a subject, say they have so much at their bankers' or so much in their bankers' hands—a mode of expression indicating virtual possession rather than that right to which the law applies the term chose in action. Again, a man having not enough in his purse or in his house to pay a tradesman's bill for which he is asked, but having a large balance at his bankers', says that he has not so much about him or that he has not so much in the house; he does not say that he has not so much ready money. Agreeing that this term is applicable to money in the purse or the house, I cannot agree that it is confined to money so placed. Money paid into a banking-house in the ordinary mode is so paid for the purpose of being not merely safe, but ready as well as safe—available upon the instant for any exigency or object which may arise. According to a definition of the word "bank" in a book of high character, a bank is "a place where money is laid up to be called for occasionally." It is true, that the deposit is one which the banker is not bound to return in specie, i.e., he satisfies the engagement if he has always ready for his customer a sum equal to the amount

deposited. That, however, I think too thin and narrow a distinction to render the banker more in substance than a depository, though technically a debtor as well as a depository. A

I consider, therefore, these two balances as ready money—a conclusion at which, as it differs, though not necessarily from the decision, yet, from an opinion expressed in *Carr v. Carr* (11) by one of our greatest judges, I have arrived, not without feelings of embarrassment and distrust. But it is my unavoidable duty to express and act upon my own opinion in the present case, however slightly I may and must estimate it in comparison with that of a man such as SIR WILLIAM GRANT. B
I have the relief, certainly, of considering that the view which I take seems to be in accordance with the impression of two eminent judges—I mean SIR JOHN LEACH and LORD LANGDALE, M.R., and that the plaintiff has the right of bringing my judgment under the review of the Lord Chancellor. C

As to the testator's securities and funded property, in answer to an observation which I made during the argument, it was stated by the plaintiff's counsel that he claimed, as part of the residue, so much of them as subsequently to the will, or subsequently to the codicil at least, had been acquired by the testator. The point, however, was not much argued, and were it, in my judgment, incumbent on me to form and act upon an opinion respecting it, I should desire a further and full argument upon it. D
It appears, however, that throughout the cause, from its original commencement until after the further directions had been opened in this court, all the parties have proceeded under the impression that the testator, in bequeathing his securities for money and monies in the funds, meant to bequeath, and did bequeath, all such property of either description, as he might have at his death, and the decree takes the same view, for though it directs the master, in taking the account of the personal estate, to distinguish such part of the testator's estate as, at the respective times of making his will and of his death, consisted of leasehold property, yet the immediately succeeding sentence is thus: E

“And it is ordered, that the said master do also distinguish such part of the said testator's estate as at the time of his death consisted of ready money, securities for money, and moneys in the funds, from the other parts thereof” F

—a direction materially different from that respecting the leasehold estate, and though the master is authorised to state any circumstances specially on all or any of the inquiries, the decree does not direct him to find what securities for money, moneys in the funds, or funded property the testator had at the date of his will or of his codicil. The report, accordingly, though possibly furnishing that information indirectly as to securities for money, does not find or show what, if any, moneys in the funds or funded property the testator at either of those dates had. G
Certainly the decree declares the inquiries which it directs to be without prejudice to any question as to the construction of the will and codicil, but I must suppose, that had the court which pronounced it considered that the bequest of the testator's securities for money and moneys in the funds might, by possible construction, or ought to be, confined to such of those particulars as he had at the date of his will or of his codicil, the decree would not have contained merely the inquiries which it does. H
I must suppose that the court considered a full answer to those inquiries to be all that would be necessary to enable the estate to be administered on the further directions. In the circumstances, I do not consider it incumbent on me to open, or to treat as otherwise than settled, any question as to the construction of these words. But, in directing the estate to be administered, as for these reasons I do, upon the footing that the words “securities for money and moneys in the funds” mean all such securities for money and funded property as the testator had at his death, I desire to be understood as not declaring or intimating, and, indeed, as not having formed any opinion of my own, whether that is or is not the true construction of the will. I
It will, of course, be competent to the plaintiff, if so disposed, to have the decree of the Vice-Chancellor of England and my decree, or either of them, re-heard before the Lord Chancellor.

A In support of the construction as to the fund for paying the debts. and as to the meaning of the term "ready money," for which the plaintiff has contended, it was urged by counsel that a different construction, as matters stood when the will was made (the lapse having been a subsequent accident), would impute to the testator the intention in substance of leaving to his wife neither plate, nor jewels, nor residue of any kind. I may, however, in the first place, observe, that I very much agree with SIR THOMAS PLUMER, when, in *Choat v. Yeats* (10), he says (1 Jac. & W. at p. 104) :

"It is always the safest mode of construction to adhere to the words of the instrument, without considering either circumstances arising aliunde, or calculations that may be made as to the amount of the property, and of the consequences flowing from any particular interpretation."

C Secondly, I answer, that the plaintiff, if able to obtain, has not obtained for the court, and the court does not possess, more than partial and defective information respecting the amount and state of the testator's debts, property, and circumstances, at the date of his will, or at the date of his codicil. If the court could under any circumstances act, it has not here the means of acting on any notion of what the testator had or owed at either of those periods, or contemplated as the probable state of his affairs at his death.

The costs of the suit of all parties to the present time must be paid out of the residuary personal estate, except that so far as the costs have been increased by any shares of the property having been assigned or encumbered, that addition to the costs must fall wholly on the shares so assigned or encumbered respectively.

E It may be convenient to the Bar to mention that among the cases, besides those cited in the argument, at which I have looked, are these : *Phillips v. Eastwood* (12); *Browne v. Groombridge* (13); *Hawley v. Cutts* (14); *Harcourt v. Morgan* (15); *Doe d. Evans v. Evans* (16); *Edwards v. Barnes* (17); *Jones v. Curry* (18); *Webb v. Honnor* (19).

F The general residuary legatee appealed on the issue relating to the meaning of "ready money" in the will.

Sir Charles Wetherell, Tinney and Lovat for the appellant.

The Solicitor-General (Sir William Webb Follett), Simpkinson, Bethell, K. Parker, Whitmarsh, Koe, Lovat, Willcock, Hall, Boyle, Hood, Whatley, Tripp and Pitman for different parties in support of the decree.

Wigram for the trustees.

G

Cur. adv. vult.

April 22, 1843. **LORD LYNDHURST, L.C.**, read the following judgment.—The first question raised by this appeal was whether or not, under the description "all the rest and residue of my ready money," two balances of £6,024 and £16,615, which at the time of the testator's death were standing to his credit at his banker's, passed.

H It is material for the consideration of that question to advert to the frame of the will. The testator divides his property into three classes: first, his ready money, securities for money, and money in the funds; secondly, his real property; thirdly, his jewels, plate, wine, carriages, and property of that description, goods, chattels, and effects. Nothing can be more marked than this division of the property, and it seems, therefore, to have been the intention of the testator, under the first head, namely, "all my ready money, securities for money, and money in the funds," to include money in whatever shape or form it might present itself.

I There is another view, also, that has struck me with respect to the construction of this will, which is this. The testator begins by directing his debts to be paid. He then gives very large legacies of stock. This is followed by a disposition of pecuniary legacies, to a very considerable amount, of £500 each to several persons, making in the whole a pecuniary disposition of many hundreds of pounds. Immediately after this pecuniary disposition he says, "All the rest and residue of my

ready money I dispose of," so and so. He seems, therefore, to have considered that he had already disposed of a part of his ready money. That part of his ready money so disposed of was too large to be considered as money in the house, and he seems, therefore, to have considered that under the description of "ready money" some other fund must be included, and that fund could only have been the balance at his banker's. I think, therefore, on the frame of the will itself there is reason, and strong reason, to conclude that it was the intention of the testator that the money at his banker's should pass. A B

The question, therefore, is whether the terms he has used are sufficient for that purpose. In construing a will of personal property the terms that are used in the will are to be construed according to the ordinary acceptation of language in the transactions of mankind, and nobody can doubt that, in the ordinary use of language, money at a banker's would be considered as ready money. Everybody speaks of the sum which he has at his banker's as money: "my money at my banker's," is a usual mode of expression. And if it is money at the banker's, it is emphatically ready money because it is placed there for the purpose of being ready when occasion requires. It is received upon the understanding that it shall be so ready. If a man goes to his banker, the money is counted out to him on the table. If he sends an order for the money, it is counted out to his servant or the person in whose favour that order is made. I consider, therefore, that it is strictly ready money according to the ordinary acceptation of those terms among mankind. As it appears, therefore, for the reasons I have stated, to have been the intention of the testator that these sums should pass under this clause, if the terms which he has used are sufficient for that purpose, construing those terms according to the ordinary use of language in the transactions of mankind, I am of opinion that they would so pass. C D E

As to the authorities that have been cited, they have been so fully sifted and discussed at the Bar, that it is not necessary to enter very minutely into the consideration of them. The first was *Carr v. Carr* (11). In that case the testator bequeathed to the plaintiff all the debts that should be owing to him, and the question was whether, under the description of debts owing to him, the balance at his banker's would pass. SIR WILLIAM GRANT, after some hesitation, was of opinion that the balance at the banker's would pass under the description of a debt owing to the testator. He said, and I think he justly said, it is a debt, and may be recovered as a debt, and five or six years afterwards in the decision of *Devaynes v. Noble* (20), he held, on the same principle, that the balance at the banker's was a debt due to the party who deposited the money. The money is not to be returned in specie; the engagement is to be ready to pay an equal amount when called for: and on the same principle, in *Sims v. Bond* (21), the Court of Queen's Bench, quoting the authority of *Devaynes v. Noble* (20), decided that it was a loan—a debt. SIR WILLIAM GRANT, under these circumstances, there being a distinct disposition or bequest of debts owing to the testator, this being in point of law a debt, and there being nothing to restrain the operation of it or to show a contrary intention on the face of that will, decided, after some consideration, that the banker's balance would pass under the description of a debt, and nobody can question the correctness of that decision. In the course of his judgment he said it would not pass under the description of ready money. That was not necessary for the decision, although he founded an argument upon it, but it does not appear from anything that he stated upon that occasion, assuming the report to be correct, that, if there had been sufficient on the face of the will to manifest an intention that the balance at the banker's should pass under the description of ready money, he would not have given effect to it. F G H I

Those are the observations arising out of *Carr v. Carr* (11), but *Vaisey v. Reynolds* (22), as it appears to me, is directly in point. The circumstances were nearly similar—they were, at all events, similar in principle—to those of the present case. The testator bequeathed to his wife his book debts, his monies in hand, and his stock in trade. To his executors he bequeathed his money upon mortgage or other

A security, and money in the funds. SIR JOHN LEACH, upon a view of the will, was of opinion that it was the intention of the testator, under one or other of these descriptions, to dispose of everything that could be considered fairly as money. That was the ground and basis of his decision. In no sense, he said, could the balance at the banker's be considered as money on security, but, in a reasonable sense, it might be considered as money in hand for it was to be ready when called for. That case, therefore, is a distinct authority for the present decision, for I think there is no real difference between money in hand and ready money.

The remaining case was *Taylor v. Taylor* (23), before LORD LANGDALE, M.R., in which the question arose upon demurrer, and on the ground that a balance at a banker's would, in its ordinary acceptance, be considered as ready money, he decided that, in the will before him, it passed under that description.

C Counsel for the appellant suggested difficulties that might arise in particular cases by considering the words "ready money" in a will as embracing the testator's balance at his banker's. Those circumstances would deserve to be considered by the court for the purpose of forming a conclusion as to what was the intention of the testator in the particular case in which they might happen to exist. But in the present case there is no such difficulty. The sums in question were balances upon ordinary banking accounts. It does not appear that any interest was payable upon them, or that they were subject to any limitation, restriction, or condition of any description; nor does it appear that the sums, though large, were larger than the average sums usually kept at his banker's by this very wealthy individual. Therefore, it is one of the plainest cases that can be conceived of an ordinary deposit at a banker's, and, considering it as such, I am of opinion, for the reasons E I have already stated, that the judgment of the vice-chancellor was correct.

Appeal dismissed.

F

MACCARTHY v. YOUNG

G [COURT OF EXCHEQUER (Pollock, C.B., Bramwell, Channell and Wilde, BB.), June 22, 1860, January 11, 1861]

[Reported 6 H. & N. 329; 30 L.J.Ex. 227; 3 L.T. 785;
9 W.R. 439; 158 E.R. 136]

Bailment—Gratuitous bailment—Duty of care of bailor—Defect in article lent—Injury to servant of bailee—Liability of bailor.

H The defendant having contracted with one P. to pull down a wall belonging to him (the defendant) gratuitously allowed P. to use a scaffold which he (the defendant) had erected previously. One of the put-logs or cross-supports on which the planks of the scaffold rested was rotten, but there was no evidence that the defendant knew of this defect. The put-log gave way, and caused injury to the plaintiff, who was a labourer employed by P.

I **Held:** a gratuitous lender was not responsible to the borrower for injuries caused by defects in the chattel lent of which defects he was not aware; a servant of the borrower was in no better position than his master would have been; and, therefore, the defendant was not liable to the plaintiff.

Notes. Approved: *Coughlin v. Gillison*, [1895-9] All E.R.Rep. 730. Referred to: *Indermauer v. Dames*, [1861-73] All E.R.Rep. 15.

As to gratuitous loan for use, see 2 HALSBURY'S LAWS (3rd Edn.) 109-111; and for cases see 3 DIGEST (Repl.) 73, 74.

Cases referred to:

- (1) *Blakemore v. Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035; 31 L.T.O.S. 12; 120 E.R. 385; sub nom. *Blackmore v. Bristol and Exeter Rail. Co.*, 27 L.J.Q.B. 167; 4 Jur.N.S. 657; 6 W.R. 386; 3 Digest (Repl.), 73, 118.
- (2) *Coggs v. Bernard (Barnard)* (1703), 2 Ld. Raym. 909; Com. 133; 1 Salk. 26; 3 Salk. 11; Holt, K.B. 13; 92 E.R. 107; 3 Digest (Repl.) 71, 106.

Also referred to in argument:

- Southcote v. Stanley* (1856), 1 H. & N. 247; 25 L.J.Ex. 339; 27 L.T.O.S. 173; 156 E.R. 1195; 34 Digest (Repl.) 275, 1948.
- Hutchinson v. Harding* (1856), 11 Exch. 561; 25 L.J.Ex. 171; 26 L.T.O.S. 274; 2 Jur.N.S. 142; 4 W.R. 326; 156 E.R. 954; 5 Digest (Repl.) 1002, 6881.
- Hutchinson v. York, Newcastle and Berwick Rail. Co.* (1850), 5 Exch. 343; 6 Ry. & Can. Cas. 580; 19 L.J.Ex. 296; 15 L.T.O.S. 230; 14 Jur. 837; 155 E.R. 150; 34 Digest (Repl.) 274, 1943.
- Knight v. Fox* (1850), 5 Exch. 721; 20 L.J.Ex. 9; 16 L.T.O.S. 128; 14 Jur. 963; 155 E.R. 316; 34 Digest (Repl.) 200, 1405.

Rule Nisi obtained by the defendant to enter the verdict in an action for damages for personal injuries.

The declaration charged the defendant with undertaking to erect a scaffold, and with having so negligently and carelessly done so that the plaintiff, who was lawfully working upon it, was exposed to unreasonable risk, and thrown to the ground and injured by the scaffold giving way. The defendant pleaded not guilty and that he did not undertake to erect the scaffold as alleged.

At the trial before WILDE, B., it was proved that the plaintiff, who was a labourer, was employed by one Portlock to pull down the party-wall of a house belonging to the defendant; that Portlock said: "There is the scaffold for you to go to work." The scaffold to which the remark applied was erected under the following circumstances. The defendant was a builder, and had purchased a house which he was about to pull down; he erected the scaffold in question for his own use, and did use it in pulling down the front and back walls of the house; and, on being called upon afterwards to pull down the party-wall, he was about to do so when Portlock, who was his carpenter, asked for the job, and, accordingly, the defendant entered into a written contract with him to pull down the party-wall for £18. The written contract contained no provision for the use of the scaffold already erected, nor was it in any way understood at the time of making such contract that Portlock was to have the use of the scaffold; but the defendant was aware of its being used when the wall came to be pulled down, and it might be taken that he allowed Portlock the use of it gratuitously. One of the put-logs, or cross-supports on which the planks of the scaffold rested, turned out to be rotten. There was no evidence that the defendant knew of this defect. The put-log gave way, and was the cause of the accident for which the action was brought. The plaintiff was thrown to the ground and injured. The jury found the defendant guilty of negligence in the original construction of the scaffold by reason of the defective put-log, and that the plaintiff's injury was caused by such negligence. A verdict was entered for the plaintiff for £50, the defendant having leave to move to enter the verdict for him. The defendant obtained a rule accordingly.

Montague Chambers, Q.C. (Tapping with him), for the plaintiff, showed cause against the rule.

T. Jones for the defendant, supported the rule.

Cur. adv. vult.

Jan. 11, 1861. **WILDE, B.**, delivered the following judgment of the court.—The question that has arisen for this court is whether the defendant is liable in any form of action to the plaintiff for what has occurred. The court is of opinion that no such liability exists. The scaffold in question was lent by the defendant without

A reward to Portlock, as a ladder, or any tool might have been, to assist him in completing the work he had undertaken to perform. The plaintiff was the servant of Portlock, and nothing more. So far as the relation of the parties is concerned, it is the case of a gratuitous lender for use, on the one hand, and the servant of the party to whom the article is lent on the other. In this relation of parties, and in the absence of all proof of knowledge by the lender of the defect which created the mischief, what are the obligations of the lender towards those to whom the article is lent, or by whom it is afterwards used?

When the case was argued it appeared to the court that the matter was of sufficient general interest and novelty to make it desirable that time should be taken to consider, maturely, the terms of the judgment they were prepared to give. Upon consulting the authorities, however, they find that the whole matter has been fully considered lately in the Court of Queen's Bench and an elaborate judgment delivered, in which we entirely concur. This makes it unnecessary to do more than to refer to the decision in *Blakemore v. Bristol and Exeter Rail. Co.* (1), which was an action for an injury by an insufficient crane lent by the defendant. The court laid down the rule of the lender's responsibility thus (8 E. & B. at pp. 1050, 1051):

D "It may, however, we think, be safely laid down, that the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for the defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured."

E Again (*ibid.* at pp. 1051, 1052):

F "The principle laid down in *Coggs v. Barnard* (2), and followed by LORD KENYON, and BULLER, J., and by LORD TENTERDEN in the *nisi prius* cases cited in the note, 1 [SMITH'S] LEADING CASES (4th Edn.) 162, that a gratuitous agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender. By the necessarily implied purpose of the loan, a duty is contracted towards the borrower not to conceal from him those defects known to the lender, which may make the loan perilous or unprofitable to him."

G It is obvious that, upon the above principles, the defendant would not have been liable even to Portlock, to whom the scaffold was lent, if the accident had happened to him, inasmuch as the defendant was not aware of the defects in question, and, without deciding anything as to the position of the plaintiff, it is plain that at any rate he stands in no better position than Portlock would have done. The verdict must, therefore, be entered for the defendant.

Rule absolute.

STIKEMAN v. DAWSON

[VICE-CHANCELLOR'S COURT (Knight-Bruce, V.-C.), February 20, March 5, 1847]

[Reported 1 De G. & Sm. 90; 4 Ry. & Can. Cas. 585;
16 L.J.Ch. 205; 9 L.T.O.S. 551; 11 Jur. 214; 63 E.R. 984]

Infant—Contract—Fraud—Liability after attaining majority.

An infant, however generally for his own sake protected by incapacity from binding himself by contract, may be *doli capax*, in a civil sense and for civil purposes, in the view of a court of equity, and may, therefore, commit a fraud for the consequence of which he may be made, after his majority, civilly answerable. But the notion of charging a man in equity after his majority on a purchase or sale or contract made during his minority merely because, without any false assertion by him, the other party believes he is not a minor on the ground that adults only can have such dealings is contrary to principle, is of dangerous consequence, and is not established by authority.

Notes. Considered: *Miller v. Blankley* (1878), 38 L.T. 527. Referred to: *Wright v. Leonard* (1861), 11 C.B.N.S. 258; *Stocks v. Wilson*, [1913] 2 K.B. 235; *R. Leslie, Ltd. v. Shiell*, [1914-15] All E.R.Rep. 511.

As to misrepresentation of his age by an infant, see 21 HALSBURY'S LAWS (8rd Edn.) 148, 149; and for cases see 28 DIGEST (Repl.) 520-523.

Cases referred to:

- (1) *Williams v. East India Co.* (1802), 3 East, 192; 102 E.R. 571; 22 Digest (Repl.) 35, 155.
- (2) *R. v. Burdett* (1820), 4 B. & Ald. 95; 1 State Tr.N.S. 1; 106 E.R. 873; 22 Digest (Repl.) 154, 1400.
- (3) *Bristow v. Eastman* (1794), 1 Esp. 172; Peake, 291, N.P.; 28 Digest (Repl.) 526, 419.
- (4) *Mills v. Graham* (1804), 1 Bos. & P.N.R. 140; 127 E.R. 413; 3 Digest (Repl.) 57, 21.
- (5) *Johnson v. Pye* (1665), 1 Sid. 258; 1 Keb. 905, 913; 1 Lev. 169; 82 E.R. 1091; 28 Digest (Repl.) 520, 373.
- (6) *Jennings v. Rundall* (1799), 8 Term Rep. 335; 101 E.R. 1419; 28 Digest (Repl.) 523, 401.
- (7) *Green v. Greenbank* (1816), 2 Marsh. 485; 28 Digest (Repl.) 523, 400.
- (8) *Scroggam v. Stewardson* (1674), 3 Keb. 369; 84 E.R. 771; 28 Digest (Repl.) 499, 156.
- (9) *Jackson v. Hobhouse* (1817), 2 Mer. 483; 35 E.R. 1025, L.C.; 26 Digest (Repl.) 220, 1702.
- (10) *Clarke v. Cogley* (1789), 2 Cox, Eq. Cas. 173; 30 E.R. 80; 28 Digest (Repl.) 525, 413.
- (11) *Watts v. Creswell* (1714), 2 Eq. Cas. Abr. 515; 9 Vin. Abr. 415; 22 E.R. 435, L.C.; 28 Digest (Repl.) 525, 416.
- (12) *Savage v. Foster* (1723), 9 Mod. Rep. 35; 88 E.R. 299; 21 Digest (Repl.) 459, 1584.
- (13) *Hearle v. Greenbank* (1749), 1 Ves. Sen. 298; 3 Atk. 695; 27 E.R. 1043, L.C.; 28 Digest (Repl.) 492, 102.
- (14) *Esron v. Nicholas* (1733), 1 De G. & Sm. 118; 63 E.R. 996; sub nom. *Evory v. Nicholas*, 2 Eq. Cas. Abr. 488, L.C.; 28 Digest (Repl.) 548, 640.
- (15) *Cory v. Gerteken* (1816), 2 Madd. 40; 56 E.R. 250; 28 Digest (Repl.) 523, 392.
- (16) *Overton v. Bannister* (1844), 3 Hare, 503; 8 Jur. 906; 67 E.R. 479; 28 Digest (Repl.) 494, 118.
- (17) *Ex parte Watson* (1809), 16 Ves. 264; 33 E.R. 985; 4 Digest (Repl.) 29, 248.
- (18) *Belton v. Hodges* (1832), 9 Bing. 365; 2 Moo. & S. 496; 2 L.J.C.P. 19; 131 E.R. 652; 4 Digest (Repl.) 28, 233.

- A (19) *Goode v. Harrison* (1821), 5 B. & Ald. 147; 106 E.R. 1147; 36 Digest (Repl.) 451, 222.

Also referred to in argument:

Lord Teynham v. Webb (1751), 2 Ves. Sen. 198; 28 E.R. 128, L.C.; 28 Digest (Repl.) 526, 418.

- B *Earl of Buckinghamshire v. Drury* (1762), 2 Eden, 60; 3 Bro. Parl. Cas. 492; 28 E.R. 818, H.L.; 28 Digest (Repl.) 521, 381.

Beckett v. Cordley (1784), 1 Bro.C.C. 358; 28 E.R. 1174, 35 Digest (Repl.) 512, 2004.

Bill for a declaration and a decree for the transfer of shares.

- C On June 7, 1842, the plaintiffs, Stikeman and Barry, acting as the brokers of the Rev. John Hoole, bought in the market, from Messrs. Ewart and Bell, 45 quarter-shares in the Leeds and Manchester Rail. Co. Messrs. Ewart and Bell were acting in the transaction as the London agents of Middleton and Barber, sharebrokers of Liverpool, and, on June 15, they paid the purchase-money for the 45 quarter-shares into Barclay & Co.'s bank to Middleton's credit, and received the certificate of the shares and a transfer (dated June 14) to Mr. Hoole, duly executed by John Kiddell Dawson, in whose name the shares were registered in the company's books. Ewart and Bell delivered the certificates and transfer to the plaintiffs, and received the purchase-money, of which they apprised Middleton and Barber. Some time after this the transfer was, with others, sent by the plaintiffs to their agents at Manchester who delivered them to the secretary of the company for the purpose of being registered in the name of Mr. Hoole. By a letter dated Sept. 12, 1842, the secretary informed Mr. Hoole that he had received notice from Mr. John Dawson, dated Liverpool, June 28, 1842, not to register any shares in the name of his son, J. K. Dawson, who was under the age of 21 years, and that previous to the receipt of such notice J. K. Dawson had been registered in the books of the company for the 45 quarter-shares, which it appeared Mr. Hoole had purchased. In consequence of the difficulties attending the completion of the purchase, the plaintiffs repaid Mr. Hoole his purchase-money, and took from him an assignment of all his interest in the shares. J. K. Dawson attained the age of 21 years on Sept. 14, 1842.

- E The present action was instituted against J. K. Dawson and his father J. Dawson, and Messrs. Middleton and Barber. The bill charged that the calls on account of sixteen new shares issued in respect of the 45 quarter-shares had been paid by the father, and also that the father and son combined to deprive the plaintiffs of the shares. The bill prayed that it might be referred to the master to inquire whether J. K. Dawson was an infant when he executed the transfer of June 14, 1842; and if he should find that J. K. Dawson was then an infant, that it might be declared that such execution was a fraud on Mr. Hoole and the plaintiffs, and that J. K. Dawson and all other persons claiming under him might be decreed to execute to the plaintiffs a valid transfer of the 45 quarter-shares and of the subsequently allotted shares, the plaintiffs offering to pay for the subsequently allotted shares; or, if the court should consider the plaintiffs not entitled to such transfer, that it might be declared that Middleton and Barber had been guilty of a fraud upon the plaintiffs and they might be decreed to place the plaintiffs in the same position as to the 45 quarter-shares and the allotted shares as they would have been in if the transfer to Mr. Hoole had been valid, the plaintiffs offering to pay all the calls on the shares since June 14, 1842.

- I *Wigram and Malins* for the plaintiffs.

Bacon and Eddis for the defendants, J. K. Dawson and J. Dawson.

Russell and J. Bailly for the defendants, Middleton and Barber.

Cur. adv. vult.

Mar. 5, 1847. **KNIGHT-BRUCE, V.-C.**, delivered a judgment in which he said that on the evidence he must dismiss the bill as against Messrs. Middleton & Barber, and that it was not established that the conduct of Mr. J. Dawson, the father, had been in any respect fraudulent or unfair, and he continued: It has not

been contended at the Bar for the plaintiffs that, on the ground of contract or other ground than that of fraud, the title of the shares of the younger Dawson can be affected in this suit. The plaintiffs' counsel have, in argument, properly put their case for relief against J. K. Dawson on the ground of fraud only. Did he, then, during his minority, commit, in respect of the matters in question, a fraud of such a nature as to render him now amenable to this jurisdiction, and so as to entitle the plaintiffs to relief on the ground of fraud? That is the simple point between him and the plaintiffs. The fraud imputed to him is not that of making a false assertion or any express misrepresentation at all. He made none. The fraud imputed to him is merely that of not disclosing the fact of his minority to Messrs. Middleton and Barber—I say to them, because he had not any dealings with the plaintiffs or Mr. Hoole, except so far, if at all, as the dealings or communications of Messrs. Ewart and Bell, and Messrs. Middleton and Barber, can be considered in any sense as his dealings and communications. If J. K. Dawson committed any fraud otherwise than upon his father, it must be taken to have been a fraud upon Messrs. Middleton and Barber; but the state of the record precludes me from considering them as accomplices of J. K. Dawson in a fraud upon the plaintiffs and Mr. Hoole, nor do I wish to be understood as suggesting that they were. Still, fraud and misrepresentation, if any, upon Messrs. Middleton and Barber, may have been of such a nature and attended by such consequences as to give the plaintiffs a title to complain of it effectually against them. Although the imputed fraud is that of not disclosing the fact of minority, yet it has been said by the plaintiffs' counsel that a fraudulent suppression or concealment may be, and sometimes is, equivalent civilly to a false assertion fraudulently made in express terms. To this proposition I accede. But they, moreover, say in effect that the dealings between J. K. Dawson and Middleton and Barber were such as from their nature could not bind an infant without fraud on his part; that it was his duty to apprise them of his minority; that he did not do so; that from the nature of the dealings his omission to do so was equivalent to a denial by him of the fact of the minority; and that it was a fraud on his part, for which, notwithstanding his minority at the time, he was answerable in equity after he had attained his majority. These are, in truth, the propositions to be tried between him and the plaintiffs, whom I assume, without deciding, to be the proper parties to raise them.

First, the proposition that the dealings between J. K. Dawson and Middleton and Barber were not of such a nature as to be capable of binding the infant without fraud on his part, is, I suppose, indisputably true. But, secondly, was it his duty, as the word is understood in a court of justice, not to enter upon those dealings without mentioning to them his true age? I will, for the present, assume it to have been so. It seems to involve an assumption, not only that the probable or certain fact of his minority, and likewise its material bearing upon the question of his responsibility were known to himself, but, moreover, the broker's ignorance of his minority. Such then being considered to have been his duty, did he commit any breach of it? Is such a breach proved against him? The plaintiffs must be understood as contending that it is proved against him on the ground that the burden of proof in this matter lies upon him, and the proof, as they say, is absolute. But did the burden of proof as to this lie upon him? Generally, it is true, the burden of proof lies upon the party who affirms, and not upon the party who denies. The rule is not unqualified or without exceptions. Neither criminality nor fraud is to be presumed; and though *Williams v. East India Co.* (1) may not go the whole length of establishing the point of the burden of proof lying upon the plaintiff, it may be thought not to be without a bearing upon the subject. The charge against J. K. Dawson is of the fraudulent omission to make any disclosure. I am not aware of any affirmative evidence against him in support of that charge.

Assuming it to be not incumbent upon the plaintiffs to advance material and very strong testimony in support of it, were they entitled to abstain altogether from adducing evidence? It is true that it may be said that a communication, if any, from J. K. Dawson to the brokers is a fact more peculiarly within his own know-

A ledge, of which the burden of proof is, therefore, cast upon him; and this may be so, but the fact itself, as already intimated, and indeed is obvious, is immaterial, unless it be taken that, independently of any communication from him, the brokers neither knew nor had notice he was a minor. The plaintiffs have, indeed, assumed throughout that, independently of any communication from J. K. Dawson, the brokers did not know and had no notice of his minority. But were they entitled to

B assume it? Is their ignorance of that minority to be presumed unless the contrary be shown? Qui cum alio contrahit vel est vel debet esse non ignarus conditionis ejus is a maxim of the civil law, as understood by the best commentators, that is, "An sit paterfamilias vel filius, familias, servus vel dominus." I am not satisfied that, as a general rule, the law of England dissents from that. Prima facie it appears less probable that a man should believe that which is not than that which

C is, in the absence of any false assertion. Assuming it possible, however, that there may be transactions in which the mere fact of a young man engaging himself may justify a belief in those with whom he deals that he is not a minor, I think the case is not so with regard to transactions of the nature which existed between the brokers in question and their unlucky customer. Adolescence is at least as much the age of gambling as any other.

D [HIS LORDSHIP reviewed the evidence, and continued:] Why is the court to conclude that the brokers, under the circumstances of such a case as this, did not know or believe the truth? Nor, perhaps, will it be out of place here to refer to the judgment of a distinguished judge in a well-known criminal case: *R. v. Burdett* (2). It is the language of LORD TENTERDEN, who says (4 B. & Ald. at pp. 161, 162):

E "A presumption of any fact is properly an inferring of that fact from other facts that are known; it is an act of reasoning, and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct

F proof that the party accused actually committed the crime, is or can be given; the man who is charged with theft is rarely seen to break the house or take the goods; and in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be

G afforded either of explanation or contradiction. No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human

H reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected."

I Treating LORD TENTERDEN's observations as applicable to this case, in which, though civil, the charge is that that the minor was guilty of a fraud, it may be asked whether the facts proved between him and the plaintiffs do not, in the absence of explanation or contradiction, warrant a reasonable and just conclusion that the brokers were not unaware of the minority of their youthful-looking townsman, with whom they were in the daily habit of dealing—the son, moreover, of a merchant of the same town. I am not prepared to say that that did not warrant such a conclusion, and I repeat that the question of communication or no communication from him to them does not, as I conceive, become material, or arise until their ignorance of any such communication has been proved or assumed. As, however,

it may be questionable whether it ought to be inserted between these parties that during the transaction in question, or any part of them, Messrs. Middleton and Barber thought J. K. Dawson under age, or had notice of his minority, I proceed to consider the plaintiffs' contention that on the assumption of the young man's acquaintance with his own minority, and with the law on the subject, and also of the brokers' belief during their dealings with him that he was not a minor, as well as his omission to communicate the fact to them that he was a minor, there was a fraud on his part, for which, notwithstanding his infancy at the time, he became, or was after his majority, and is, answerable in a court of equity.

This is, as I consider, a question of importance and general interest. The civil law defines *dolum malum* to be *omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam*. Then ULPIAN (Dig. Lib. IV, Tit. iii, 13, 1; 14, 15):

"Item in causæ cognitione versari Labeo ait, ne in pupillum de dodo detur actio, nisi forte nomine hereditario conveniatur. Ego arbitror et ex suo dolo conveniendum, si proximus pubertati est maxime si locupletior ex hoc factus est."

The DIGEST proceeds:

"Quid enim, si impenetravit a procuratore petitoris, ut ab eo absolveretur: vel si de tutore mentitus, pecuniam accepit: vel alia similia admisit, quæ non magnam machinationem exigunt?"

Then ULPIAN:

"Sed et ex dolo tutoris, si factus est locupletior, puto in eum dandam actionem: sicut exceptio datur."

Unquestionably it is the law of England that an infant, however generally for his own sake protected by incapacity from binding himself by contract, may be deceived in a civil sense and for civil purposes, in the view of a court of equity (though I believe only when pubertati proximus), and not, I suppose, at so early an age as for criminal purposes, and may, therefore, commit a fraud for the consequence of which he may be made, after his majority, civilly answerable in equity. I am not speaking of cases in which infants are liable only, or who, if adults, are suable at law only in respect of acts done during infancy; but, as far as equity is concerned, the practical application of any rule or doctrine to which I have been referring must, not seldom, I conceive, be a matter of much difficulty or delicacy, and I agree with a learned author who says that:

"in what cases in particular courts of equity will thus exert themselves, it is not easy to determine, nor indeed is the jurisdiction of equity the only jurisdiction where difficulties on this subject have arisen, or may arise. Courts of law have not been free from them."

The capacity of infants to commit crime, their punishment for criminal offences, and their liability civilly for various wrongs not connected in any sense with contracts, as for instance, battery and slander, to say nothing of the clear right, in some circumstances, to maintain trover against them, are of universal recognition. But questions which have not been considered free from difficulty have arisen whether or how far persons are civilly liable at law for wrongs or such acts as, if they were the acts of adults, would be wrongs, if done during infancy, supposing them to be connected with contracts.

The case of embezzlement by a servant or an apprentice: *Bristow v. Eastman* (3); that of detinue in *Mills v. Graham* (4); and another in ROLLE'S ABRIDGMENT, title "Court de Admiraltie," with respect to an infant master of a ship, are instances of this kind, in which the objection of minority did not prevail, while in other instances, for example, *Johnson v. Pye* (5), it was ruled that an action of deceit would not lie by the false assertion of the defendant when an infant that he was of age. The case of *Grove v. Neville*, mentioned in *Johnson v. Pye* (5), of the

A assertion of an infant that a false jewel not belonging to him was a diamond and his own; the case of the infant innkeeper in *ROLLE'S ABRIDGMENT*, title "Actions sur Case," and in modern times, *Jennings v. Rundall* (6), a case of overriding a hired mare; *Green v. Greenbank* (7), a case of exchanging mares where the infant plaintiff warranted his mare to be sound, well knowing her to be unsound; are cases in which an objection of minority has prevailed. A case also in which an infant was plaintiff may be mentioned as tending much in the same direction, the plaintiff having recovered though her conduct, if not fraudulent, was very near it or like it. It is *Scroggam v. Stewardson* (8) (3 Keb. 369):

"In trespass by infant, by guardian, the defendant pleads that the plaintiff was above sixteen years old, and agreed for sixpence in hand that the defendant have licence to take two ounces of her hair, to which the plaintiff demurred; and, per curiam, it is no plea, for the infant cannot license, though she may agree with the barber to be trimmed. And judgment for the plaintiff."

The same case is somewhat differently given in *BACON'S ABRIDGMENT*:

"In trespass quare vi et armis insullum fecit, et totum crinem capitis ipsius Annæ abscidit, the defendant, as to all the trespass præter tonsuram crinis, pleads not guilty; and as to that pleads that the plaintiff was of the age of sixteen years, and for a certain sum of money licentiavit the defendant duas uncias crinis dictæ Annæ detondere et abscindere. And upon the demurrer to this plea the court held that the contract was absolutely void, and consequently the tonsure unlawful, and gave judgment accordingly for the plaintiff."

In those instances in which minors succeeded at law, could there have been interposition against them in equity, a jurisdiction generally at least equally considerate with courts of law in favour of infants? Fraud certainly is odious, and is to be repressed, but neither is protection to be withheld from the imbecility of youth. No allowance to be made for its exposure and obnoxiousness to influence, temptation, and seduction? For, especially in cases requiring legal knowledge, very young men may be seduced into the commission of fraud. *LORD ELDON*, in *Jackson v. Hobhouse* (9), with reference to the case of a married woman, who may also commit fraud, glances at the possibility of the husband compelling his wife to join him in a fraud, and may not some consideration be had for a boy taken in the toils of designing and experienced men of mature age? By the last sentence, I do not wish to be understood as deciding or as referring to the present matter, as to which, though I do not say that the whole account given, whether accurate or inaccurate, by the young man in his account of the commencement and progress and nature of the connection between him and Middleton and Barber is in evidence against the plaintiffs, yet I cannot but say that the bill might have been amended after the answer, and that with such an answer before the plaintiffs, they have only adduced the evidence which they have. The story told by the answer is in substance that this young man had unhappily committed himself so far as to abuse the confidence of his father to whom he was cash-keeper, and to misapply some sums not of very inconsiderable amount belonging to his father. The son was anxious to make good that loss, and in this way. Having met Mr. Cobb, clerk of Middleton and Barber, and afterwards Mr. Middleton, at the office of Mr. Surridge (through whom the defalcation took place), the young man was struck by Mr. Cobb representing that he had heard of the probability of large profits being derived from gambling (or, what is the same thing, speculating) in shares in public undertakings, and upon these representations, with a view to deliver himself from his difficulties, he engaged in a series of transactions which ended in a manner that scarcely required inspiration to foretell. If this statement is substantially true, so far as it agrees with Middleton and Barber's representation of the matter, if Mr. Rodrick's [a witness] description of the young man's personal appearance is substantially accurate, and if Middleton and Barber, knowing, as it was probable, they did, that the boy had a father living at Liverpool, allowed him to engage in such dealings, and to contract the debt without making a communication to the father, or asking a question of

him (and no such communication appears to have been made), it may be difficult to account satisfactorily for the conduct of Middleton and Barber, and I think it as difficult to think it likely that they should have been defrauded by the lad. If the brokers and their adventurous young principal were not on equal terms, there appears little difficulty in the way of saying who was probably the weaker party. A

Apart, however, from any peculiarity of circumstances, the plaintiffs seem substantially to contend for not less than this general proposition—that, if a minor deals in a matter of contract with a person who, having no notice of his minority, does, without any representation to him on the subject, believe the minor to be of full age, the minor is, after majority at least, answerable in equity to that person for the contract or the consequence, or is liable to be compelled to restore him to his original position. Not referring, as I do not refer, to any case where the law permits infants to contract, or to any case where the point is purely legal, I am not aware that such a proposition is founded on principle, or supported by the authorities which bind the court. It seems to me full of danger and evil, as was said at law in a case which has been mentioned (*Johnson v. Pye* (5), 1 Sid. 258) where it was held that an action of deceit would not lie on the assertion of a minor that he was of full age; and there seems a great deal of practical good sense as well as good law in it. *Clarke v. Copley* (10), was clearly, I think, decided correctly; nor do I doubt that the decisions in *Watts v. Creswell* (11), and *Savage v. Foster* (12), were required by the peculiar circumstances of those cases. In the latter case Mr. and Mrs. Foster might have barred their title by a fine, and it was, I suppose, considered that she did not commit a fraud under the husband's influence. B

In *Watts v. Creswell* (11) the minor must be supposed to be considered as not having acted under his father's control, and in each of the cases the contract seems to have been of the most gross description—so gross as perhaps to have been obnoxious to criminal proceedings. LORD COWPER says, in *Watts v. Creswell* (11): "If he was made a party to the deed and sealed it, yet that would not bind him." Here, perhaps, it may not be quite out of place to remember LORD HARDWICKE's remarks on the difference between the disability of infants and married women, which he made in *Hearle v. Greenbank* (13). Of *Eson v. Nicholas* (14), decided by LORD KING, I may, perhaps, be allowed to say that the report in 2 Eq. Cas. Abr. 488, does not appear satisfactory. I venture to think that that case, as there stated, affords no sufficient foundation for the decree that was made, and I may possibly be permitted to say the same of the case as it appears in the registrar's book, which, however, does not give the pleadings nor show what the evidence was; nor probably without an examination of the proofs and pleadings is it possible to form a just opinion of LORD KING's decree, which gave no costs. I collect, therefore, that the lease was made three or four years before the defendant's majority, and that his age had not been misrepresented to the plaintiff, but was known from the beginning. Perhaps it might have been true that the defendant had fraudulently represented himself to the plaintiff as able to grant the lease, or that the defendant at or after his majority had received a fine or its value. Upon the decision in *Cory v. Gertcken* (15), and the doctrine in *Overton v. Bannister* (16), by two judges of great weight and consideration, I think it not necessary to express, and I do not intimate, any opinion. Each of them is distinguishable from the present case. By neither of them, nor by *Ex parte Watson* (17) and *Belton v. Hodges* (18), is it, as I conceive, rendered incumbent on me to give to the present plaintiffs their decree against J. K. Dawson. *Ex parte Watson* (17), the case in bankruptcy to which reference was particularly made in *Belton v. Hodges* (18), a case that occurred more than twenty years after in the Court of Common Pleas, is reported by MR. VESEY ex relatione. It is not very well done, though probably not inaccurately. I have read the original affidavits on which the petition was heard. By declining to supersede the commission LORD ELDON did not prevent the petitioner from disputing its validity at law, nor does there appear reason to suppose that LORD ELDON was asked or would have consented to interfere against the petitioner for the purpose of enforcing against him submission to the bankruptcy. C

- A *Goode v. Harrison* (19) may be thought a remarkable case; but, if not opposing, I am sure it does not support the plaintiffs' contention against the younger Dawson. If that action had been by an unpaid vendor for goods supplied in 1818, which was, I suppose, the date of the report, and not by a vendor of goods sold more than six months after the vendor's majority, the case being, in all other respects, as stated, could there have been judgment against Bennion at law? And
- B if there could not, would there have been any title to relief against him in equity? In my opinion, I repeat, the notion of charging a man in equity after his majority on a purchase, or sale, or contract, made during his minority, merely because, without any false assertion by him, the other party believes he is not a minor, and believes it on the ground that adults themselves can only have such dealings, is contrary to principle, and is of dangerous consequence, and is not established by authority.
- C There may be, indeed, a want of delicacy or propriety in the conduct of a young man of twenty buying a picture or a statue, on credit, without mentioning his age, but that can only be on the notion that such conduct is not prohibited. Laws cannot vindicate every deflexion from propriety, and it must be preferable that men of full age, in or out of trade, should sometimes suffer for acts of carelessness than that there should be given an obvious facility and plain encouragement
- D to minors to be their own destroyers and to others to make them their prey, which would be afforded by the rule that mutual silence, with an appearance of manhood, should expose a boy, on the ground of fraud, to be affected after his majority with the consequence of the most rash and foolish conduct, and the liability to restore money wasted in childish extravagance.

- In the cause now before the court, J. K. Dawson's legal title is sought to be taken
- E from him, on the ground of a sale during his infancy, in respect of which he has not received the purchase-money. There seems reason to believe that the purchase-money went into the hands of Middleton and Barber towards satisfying a pecuniary demand of great amount they alleged to have against him, but in respect of which it is possible, if not certain, that he could not have been sued; and any relief against Middleton and Barber cannot be given in this suit, constituted as it is.
- F Their right was and is to be dismissed from it. Upon the whole, if it be assumed that from the beginning to the end of the year 1842, Mr. Hoole and Ewart and Bell believed J. K. Dawson to be of full age (and there is no reason to suspect the contrary), the case is still not one in which, either on principle or on authority, the court ought, in my opinion, to pronounce that fraud has been committed by him, in respect of which relief in equity should be given against him. It follows that I
- G must think it unnecessary for the purposes of the question of relief to decide whether the father has any lien on the shares or any interest in them. Without determining that point, I conceive the bill ought to be dismissed against the Dawsons, with costs as to the father, without costs as to the son, and without prejudice to any action, or any other suit.

Bill dismissed.

H

DOWELL v. DEW AND ANOTHER

[VICE-CHANCELLOR'S COURT (Knight-Bruce, V.-C.), March 7, 8, 1842]

[Reported 1 Y. & C.Ch. Cas. 345; 12 L.J.Ch. 158; 62 E.R. 918]

[LORD CHANCELLOR'S COURT (Lord Lyndhurst, L.C.), June 7, 8, 12, 22, 1842, January 17, 1843]

[Reported 12 L.J.Ch. 164; 7 Jur. 117]

Contract—Conclusion—Contract signed by one party—Subsequently accepted and acted on by other party—Renewal of lease—Undertaking to grant new lease on expiration of existing lease—No new lease executed—Lessee continuing in occupation.

To establish the validity of an agreement, it is not necessary to show that it was binding on both parties at the time of its being made. It is sufficient if an agreement signed by one party be afterwards accepted and acted on by the other.

Accordingly, where a lessor signed and gave to the lessee at his request an undertaking to grant him a new lease on the expiration of the existing lease on the same terms and for the same period as the existing lease, and the lessee continued to occupy and cultivate the land after the end of the existing lease, but no lease was executed,

Held: there was an enforceable contract which, the lessor having died, was binding on her estate.

Landlord and Tenant—Agreement for lease—Renewal of existing lease—Power under settlement to lease in possession—Agreement made within reasonable time before expiration of old lease—Compliance with terms of power.

Under a settlement a lessor had power to lease in possession, but not in reversion. The lessor entered into an agreement between herself and the lessee a short period before the expiration of an existing lease for a renewal of the lease upon the same terms as before.

Held: the lapse of time between the agreement and the expiration of the old lease being in the circumstances of the case reasonable and the terms of the agreement being in compliance with the still subsisting power in the settlement, the agreement was valid and enforceable by the court.

Landlord and Tenant—Covenant—Covenant not to assign without consent—Breach—Waiver—Breach not continuing breach.

An assignment of a lease in breach of a covenant not to assign except by licence is not a continuing breach, but a breach committed once and for all, and, therefore, it can be waived by the acceptance by the landlord of the assignee as tenant.

Landlord and Tenant—Lease—Agricultural lease—Forfeiture—Lack of repair—Improper cultivation—Strict interpretation not to be put on covenants.

Per KNIGHT-BRUCE, V.-C.: It is a very old principle of law, on a claim by a landlord for the forfeiture of an agricultural lease, that unimportant matters of want of repair and of improper cultivation should be disregarded. In these cases the court must make reasonable allowance and not put too strict and precise an interpretation on the covenants relating to these matters. If the repairs and management of a farm were to be viewed in a strict and literal manner, there would be endless war between landlord and tenant.

Notes. Distinguished: *Purchase v. Lichfield Brewery Co.*, [1915] 1 K.B. 184. Applied: *Curtis Moffat v. Wheeler*, [1929] 2 Ch. 224. Referred to: *Buckland v. Papillon* (1866), L.R. 1 Eq. 477; *Gas Light and Coke Co. v. Towse* (1887), 35 Ch.D. 519.

As to forming a contract, see HALSBURY'S LAWS (3rd Edn.), vol. 8, p. 69 et seq.; as to renewal of leases and covenants against assignment, see *ibid.*, vol. 23, pp.

- A 625-629, 629-637; as to powers to lease, see *ibid.*, vol. 30, pp. 220-226; and as to agricultural tenancies, see *ibid.*, vol. 1, p. 255 et seq. For cases see 12 DIGEST (Repl.) 53 et seq.; 31 DIGEST (Repl.) 66 et seq., 122, 123; 40 DIGEST (Repl.) 771 et seq., and 2 DIGEST (Repl.) 7 et seq., respectively.

Cases referred to:

- B (1) *Harnett v. Yielding* (1805), 2 Sch. & Lef. 549; 40 Digest (Repl.) 775, *496.
 (2) *Martin v. Mitchell*, *Martin v. Peile* (1820), 2 Jac. & W. 413; 37 E.R. 685; 44 Digest (Repl.) 50, 360.
 (3) *Shannon v. Bradstreet* (1803), 1 Sch. & Lef. 52; 40 Digest (Repl.) 772, *494.

Also referred to in argument:

- Walton v. Stamford (1692), 2 Vern. 279.
 C Robertson v. St. John (1786), 2 Bro.C.C. 140; 29 E.R. 81, L.C.; 31 Digest (Repl.) 84, 2359.
 Crosbie v. Tooke (1833), 1 My. & K. 431; 1 Mont. & A. 215, n.; 2 L.J.Ch. 83; 39 E.R. 745, L.C.; 30 Digest (Repl.) 423, 659.
 Morgan v. Rhodes (1834), 1 My. & K. 435; 1 Mont. & A. 214; 39 E.R. 746, L.C.; 30 Digest (Repl.) 423, 660.
 D Flood v. Finlay (1811), 2 Ball & B. 9; 30 Digest (Repl.) 436, *250.
 Weatherall v. Geering (1806), 12 Ves. 504; 33 E.R. 191; 31 Digest (Repl.) 410, 5395.
 Buckland v. Hall (1803), 8 Ves. 92; 32 E.R. 287, L.C.; 30 Digest (Repl.) 436, 782.
 Morphett v. Jones (1818), 1 Wils. Ch. 100; 1 Swan. 172; 37 E.R. 45; 30 Digest (Repl.) 406, 497.
 E Doe d. Potter v. Archer (1796), 1 Bos. & P. 531; 126 E.R. 1049; 40 Digest (Repl.) 829, 3055.
 Luffkin v. Nunn (1805), 1 Bos. & P.N.R. 163; 127 E.R. 422; sub nom. Doe d. Nunn v. Lufkin, 4 East 221; 1 Smith, K.B. 90; sub nom. Lufkin v. Nunn, 11 Ves. 170.
 F Richardson v. Evans (1818), 3 Madd. 218; 56 E.R. 490; 31 Digest (Repl.) 429, 5560.
 Francis v. Wigzell (1816), 1 Madd. 258.
 Aylett v. Ashton (1835), 1 My. & Cr. 105; 5 L.J.Ch. 71; 40 E.R. 316; 30 Digest (Repl.) 451, 916.
 Wills v. Stradling (1797), 3 Ves. 378; 30 E.R. 1063, L.C.; 30 Digest (Repl.) 409, 533.
 G Savage v. Carroll (1810), 1 Ball & B. 265; 20 Digest (Repl.) 477, *325.
 Hill v. Barclay (1811), 18 Ves. 56; 34 E.R. 238, L.C.; 30 Digest (Repl.) 428, 712.
 Doe d. Ellis and Medwin v. Sandham (1787), 1 Term Rep. 705; 99 E.R. 1332; subsequent proceedings, sub nom. Medwin v. Sandham (1789), 3 Swan. 685; 40 Digest (Repl.) 784, 2678.
 H Mortlock v. Buller (1804), 10 Ves. 292; 32 E.R. 857, L.C.; 44 Digest (Repl.) 7, 19.

Appeal from a decree made by KNIGHT-BRUCE, V.-C., on a bill for a declaration, specific performance of an agreement to grant a lease, and an injunction.

- By indentures of settlement, dated July 23 and 24, 1819, and made previously to the marriage of Thomas Tyringham Bernard and Sophia Charlotte, his wife, certain freehold estates, including the Clifford Court Farm, all of which were the property of Mrs. Bernard, were conveyed to the use of trustees for the separate use of Mrs. Bernard for her life, with remainder to trustees for a term of 150 years, with remainder to the use of Mr. Bernard for his life, with remainder to trustees to preserve, etc., with remainder to trustees for the term of 700 years, with remainder to the first son of the marriage in tail male, with divers remainders over. The trusts of the terms were for raising maintenance and portions for younger children. The settlement contained a proviso that it should be lawful for Sophia Charlotte, during her life, and after her decease for Thomas Tyringham Bernard during his
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life, and after the decease of the survivor of them, for the person or persons who under or by virtue of the limitations thereinbefore contained should for the time being be entitled to the first estate of freehold or inheritance in the said hereditaments, in case such persons should be of full age, but if not, then for the guardian or guardians of such persons, to demise or lease all or any part or parts of the hereditaments expressed to be thereby granted and released, with the appurtenances, for any term of years not exceeding 21 years in possession, but not reversion, remainder, or expectancy, or by way of future interest, and so that upon every such lease there should be reserved and made payable the best and most improved yearly rent that could be reasonably had for the same, without taking any sum of money or other thing by way of fine, premium, or foregift for the making thereof, and so that in every such lease there should be contained a condition of re-entry on the non-payment of the rent to be thereby reserved by the space of 21 days next after the same should become due and payable, and so that the lessee to whom such lease should be made should seal and deliver a counterpart of such lease, and so that no lessee should be authorised to commit waste or exempted from punishment for committing waste.

The marriage took effect, and there were children of the marriage, David William Bernard being the eldest son. By an indenture dated Feb. 8, 1823, and made between Sophia Charlotte Bernard, of the first part, Thomas Tyringham Bernard, of the second part, and William Dowell, of the third part, it was witnessed, that, in consideration of the rents thereafter reserved and the covenants thereafter contained on the part of the lessee, Sophia Charlotte Bernard, by virtue and in exercise of the power given to her for that purpose by the indenture of July 24, 1819, and of all other powers, etc., and with the privity and approbation of Thomas Tyringham Bernard, did demise, lease, and let, and Thomas Tyringham Bernard did let and confirm to William Dowell, his executors, and administrators, all that Clifford Court Farm, to hold the same, with the appurtenances, unto William Dowell, his executors and administrators, for the term of fourteen years, to be computed from Feb. 2 then instant, at the yearly rent of £525, deducting land-tax and a chief-rent of £15 per annum, provided always that if the rent should be unpaid for the space of 21 days, or if William Dowell, his executors, administrators, or assigns, should at any time or times during the continuance of the demise, assign, transfer, set over, underlet, or otherwise part with the indenture or the premises thereby demised, or any part thereof, except certain cottages with their appurtenances, to any person or persons whomsoever, without the special licence and consent of the person or persons for the time being entitled to the next and immediate reversion or remainder in the demised premises first had and obtained in writing under hand and seal, or if William Dowell, his executors, or administrators, occupiers of the demised premises, or any part thereof, except the said cottage, should at any time during the continuance of the demise commit any act or acts of bankruptcy wherein a valid commission or commissions of bankrupt should be sued and prosecuted, or if the then present lease or the tenant's term and interest in the demised premises or any part thereof should be taken or seised under or by virtue of any execution, or warrant, or process in the nature thereof, or should otherwise become legally assignable or saleable, without such consent as aforesaid, or if William Dowell, his executors, administrators, or assigns, should not in all things well and truly observe, perform, fulfil, and keep all and every the covenants, conditions, stipulations, and agreements therein expressed and contained on the lessee's part to be observed, performed, fulfilled, and kept, then or in any or either of the said cases, and at any time thereafter, it should be lawful for the person or persons for the time being entitled to such next and immediate reversion and remainder as aforesaid, into and upon the said demised premises or any part thereof, in the name of the whole, wholly to re-enter in forfeiture of the lease. The lease then contained covenants by the lessee for payment of rent and taxes, for the cultivation of the lands according to the custom of the country, and for keeping the premises in repair.

A William Dowell executed a counterpart of this lease, and entered into the occupation of the premises. He died on Mar. 15, 1832, having made his will, dated July 25, 1825, whereby he bequeathed all his farms and effects to his son John Dowell, whom he appointed sole executor of his will. John Dowell proved the will, and entered into possession and occupation of the premises. In 1832 Mr. Bernard, who was a partner in the house of Duckett, Morland & Co., became bankrupt with his co-partners. In 1835 John Dowell, in contemplation of his lease expiring, and with the intention, as stated by Mr. Bernard, who was examined as a witness for the plaintiff, of laying down part of the farm in grass, applied to Mr. and Mrs. Bernard for a renewal of the lease, upon which he received the following undertaking in writing, signed by Mr. and Mrs. Bernard, and dated July 27, 1835:

C "Mr. John Dowell, as you have expressed a wish to continue in the occupation of our farm at Clifford Court, we will undertake to grant you a lease on the same terms as the last, for a period of 14 years, when the present lease expires; and we hope you may live long enough to renew it at a future period."

D No new lease was executed in pursuance of this memorandum, but John Dowell continued in occupation of the premises beyond the expiration of the original lease, which took place on Feb. 2, 1837, and the death of Mrs. Bernard, which took place on May 15, 1837, until he relinquished such occupation in favour of his brother, the plaintiff, in July, 1837.

E In July, 1838, the assignees under Mr. Bernard's bankruptcy caused the life-interest of the bankrupt in the estates comprised in the settlement of July, 1819, to be put up to auction, when the defendant Dew was declared the purchaser. This purchase was completed by conveyance in May, 1839. In the particulars and conditions of sale which were circulated on the occasion of the auction the farm occupied by the plaintiff was described as being in his occupation under an agreement for a lease of 14 years from Feb. 2, 1837, at a rent of £525 per annum, from which land-tax was to be deducted, and subject, among other annual outgoings, to a chief rent of £15. In June, 1839, the defendant Dew served the plaintiff with notice to quit the farm. This the latter refused to do on the ground of having a good equitable title to the premises under the memorandum of July 27, 1835, which had been given to his brother. He, however, in order to strengthen his title, took a release from his brother, dated Aug. 29, 1839, of all his brother's interest in the farm under or by virtue of that memorandum. Ultimately, he filed G the present bill, to which David William Bernard was made a defendant, praying a declaration that the plaintiff was entitled to occupy the premises for the term of 14 years from Feb. 2, 1837, upon the terms contained in the lease, for the specific performance of the agreement of July, 1835, and for a perpetual injunction to restrain proceedings at law to recover the premises from the plaintiff.

H The defendant Dew, by his answer, insisted principally on the following points: (i) That the undertaking of July 27, 1835, did not amount to a contract as the same was merely voluntary, but that, even if it had been made for valuable consideration, it would have been inoperative, except as to the separate estate of Mrs. Bernard during the joint lives of herself and her husband, she being a married woman and her husband having become bankrupt; (ii) that the transfer of John Dowell's interest and the delivery of the possession of the premises by I him to the plaintiff were made without the consent in writing, or otherwise, of the assignees of Bernard, and without any subsequent confirmation on their part, and that, if such assignees had been under any obligation to grant a lease to John Dowell upon the terms mentioned in the undertaking of July, 1835, which the defendant submitted was not the case, such transfer and delivery were a direct violation of one of the covenants to be contained in such lease; (iii) that the rent of £525 was not the best and most improved yearly rent which could at the expiration of the lease of February, 1823, be had or gotten for the premises; (iv) that the plaintiff had not, since he had been in possession of the premises, duly kept

the covenants of the lease of February, 1823, more particularly the covenants for repairs and good husbandry, according to the custom of the country; and (v) (in denial of allegations in the bill), that no sums of money had been expended by John Dowell on the farm since 1835, which would not have been expended by a tenant occupying merely from year to year. A

Russell and Parry for the plaintiff.

Simpkinson, James & Bayley for the defendant. B

KNIGHT-BRUCE, V.-C.—The first question to be considered is whether the plaintiff's case fails on the ground of the coverture of Mrs. Bernard, who was a married woman when she signed the agreement in question, and during the remainder of her life. I think this circumstance not material as the case stands. She was tenant for her life, or for the joint lives of herself and her husband, for her separate use, with or without power of alienation, but with the power of leasing in question, which legally, at least, was not a power annexed to the life estate. [In any case this matter is of no practical importance now for, since the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1, a married woman has been capable of acquiring, holding, and disposing of, any property as if she were a feme sole.] C

It is then argued that there was no consideration for this agreement—that it was merely nudum pactum. It is not, however, considered requisite in this court that an agreement should at the time be binding on both parties. It is sufficient if an agreement signed by one party be afterwards accepted and acted on by the other. The agreement in this case was to demise for a certain rent to be paid, and under certain covenants to be entered into and performed. If Mrs. Bernard had died before the time at which a lease under the agreement could with propriety have been granted, the agreement possibly could never have been carried into effect. In point of fact, however, she did not do so. The old lease, the expiration of which was a preliminary to the commencement of the new demise, expired in February, 1837. Mrs. Bernard lived more than three months afterwards. The tenant under that agreement was in possession under the former lease at the date of the agreement, and continued in possession in that character up to the time of the expiration of the old lease. From that time his possession was only referable to the new agreement, and without laying too much stress on those acts done on the farm between the agreement and the death of Mrs. Bernard, which are proved to have been done solely with reference to the new agreement and by reason of it, it is sufficient to say that this agreement was in part performed by the continuance of the possession of the tenant after the expiration of the old lease until the death of Mrs. Bernard, and at the time of her death she was in a condition to enforce the performance of the agreement in equity against him by reason of that part performance. The continued possession was, it may be added, at no unimportant period of the year for a farmer, between Candlemas and the middle of May, at which period Mrs. Bernard's death happened. I think, therefore, that this forms no objection to the plaintiff's case. D E F G H

It is then said that the contract was future in its nature and the prohibition against reversionary leases and the authority of *Harnett v. Yielding* (1) are cited in support of that argument. To *Harnett v. Yielding* (1) I entirely accede. The decision there did not depend on the question of the agreement having been a fraud on the power, and would have been equally right if that ingredient had not formed part of the case, but even if that circumstance had been the main foundation of the decision, I should have thought the present case not affected by it. In *Harnett v. Yielding* (1) there were two agreements. The first was for renewal at any time on request during the life of the tenant for life; and the second, on which the bill seems mainly to have proceeded, was one, as I have always considered the report, utterly unintelligible in its nature. In the present case a lease for 14 years of a large farm was to expire at Candlemas, 1837. In the summer of 1835, it being obviously material to the tenant to know what he was to do both I

- A with respect to his mode of treating the farm and with respect to the disposition of himself and his capital after the expiration of the term, and it being equally material to the landlady to know how she was to stand with respect to her farm after the termination of the lease in February, 1837, the agreement was made for a renewed lease at the old rent after the expiration of the term. There is nothing to impeach the fairness of the agreement, and admitting, for the purpose of the
- B argument, the rent to have been sufficient in the spring of 1837 and the covenants proper, I do not see any rational ground upon which such a contract ought to fail. I think the lapse of time between the agreement and the expiration of the old lease nothing beyond that which is ordinary and reasonable. Therefore, supposing the rent and covenants sufficient, and supposing no act to have been done in material contravention of the settlement, but that all things in other respects had remained
- C the same, and that this bill had been a bill by John Dowell, the original tenant, no effectual resistance to the relief sought could, in my judgment, have been offered.

- [His LORDSHIP dealt with two questions of fact which do not call for report, and continued:] The next question is whether the lease which was agreed to be granted was conformable to the power. Of course, if it was not conformable to the power,
- D it would be useless and improper to grant any relief. It is another question how the court is to arrive at the conclusion whether it was or was not conformable to the power. I do not understand that the answer raises any issue with regard to the sufficiency of the covenants, and, therefore, for the purpose of this suit at present I must take it for granted that there is no such objection, not, however, meaning to preclude the landlord from raising any such question hereafter, if he
- E thinks fit. As to the rent, it is obvious that, in a case of difficulty, this is a question which, from its nature, cannot be very satisfactorily discussed and considered by a judge in equity without the assistance of a jury or the opportunity of seeing and hearing the witnesses. [His LORDSHIP, having discussed the evidence, said that he must send this matter to a jury.]

- We come next to consider whether the acts done have amounted to that which
- F would have been a forfeiture of the lease, if a lease had been granted. It is, of course, plain, if this court were satisfied that the lease, if granted, would have been forfeited by breaches of covenant, that it would be impossible to direct such a lease to be granted. It is another question how the court is to arrive at that satisfaction. Not to consume too much time in delivering the reasons which I feel it my duty, to some extent, to deliver on this part of the case, I may very
- G shortly dispose of one head of breaches of covenant—namely, the allegations of want of repairs and of improper cultivation. The evidence on the part of the plaintiff on this subject would, if unmet, be sufficient to show that the farm had been properly treated and conducted. On the other hand, there is strong evidence on the part of the landlord, going into more particulars, the other way. The observations, however, that I have made as to the danger and difficulty of deciding
- H in a court of equity finally on the notion which the court may entertain of the effect of conflicting written evidence as to the sufficiency of rent bear with much more strength on the question, whether this court is in a condition satisfactorily to decide on the repairs and management.

- An obvious observation is this, that, if the particulars of the repairs and management of a farm were to be viewed in a strict and literal manner, there would be
- I endless war throughout the country between landlord and tenant. No tenant could hold a farm in safety. It has been a very old principle of the law to disregard unimportant matters of waste. When LORD ELDON was in the Common Pleas an application, if I recollect right, was made to that court in an action of waste in which there was a verdict, I think with a farthing damages, to convert the judgment into a judgment for the defendant. LORD ELDON was very much struck with it, and at first objected, but he was satisfied by old authorities that that had always been the course. It is also a mode of viewing the subject which juries take still more largely—in some cases perhaps too largely, in others not unwholesomely for

justice, for if, according to a literal interpretation of strict covenants, a tenant was to be ejected for a foul turnip-field, an unhinged gate, a broken shutter, or small matters of that description which frequently occur on the best-managed farms, there would scarcely be a lease in existence throughout the kingdom. It is necessary that in these cases juries and judges should make a reasonable allowance, and not put too strict and precise an interpretation on such covenants. There is the evidence of surveyors. When I began to read a catalogue of defects given by one at least of these gentlemen I was struck with its apparent bulk, but when I came to the conclusion of the list, I found that the summing-up was about £280. It is, however, not new. No man who has ever been a householder or landholder is a stranger to this kind of operation. An occupier of a house or a farm may be constantly laying out money upon it, allowing no seeming want of repair to go unremedied, fancying the property to be in the best order and condition, but let a surveyor be called in as to the state of repairs and a thick volume of defects in and out of the house will be the probable result. I do not, I confess, pay any very great attention to the list of dilapidations which is given by the surveyors here. That is, however, a matter which may most properly be submitted to a jury, and to a jury it must go. I feel myself utterly unable, on the evidence, to decide as to their extent, or materiality, or immateriality.

The only remaining question, I believe, is, as to the effect of the assignment without licence. It is said, and truly, that John Dowell agreed for a lease subject to the obligations of the old one, including a provision on pain of forfeiture against assignment except by licence under hand and seal; and that, without any licence in writing, he assigned to Thomas Dowell in the month of July, 1837. Such a breach, however, it is plain, may be waived. An underletting may or may not be what is called a continuing breach, on which, perhaps, all the authorities do not agree, but I apprehend an assignment is a breach once committed and for all. If, therefore, after the assignment to Thomas Dowell, Thomas Dowell was accepted as the tenant, that matter is waived. Am I to say that there is no evidence in this case that Thomas Dowell was accepted as tenant, and, therefore, that the breach in this respect has not been waived? In my opinion, there is very strong evidence that he was. It is said by Mr. Dew that the payment of rent to the assignees was after his equitable title had commenced. Whether it was or was not so, perhaps, does not very clearly appear, but Mr. Dew has received rent himself from this very man, and I have the assignees themselves, when advertising the estate for sale—the sale at which, or under which, Mr. Dew bought—describing Thomas Dowell as being in possession under this agreement. A judge and jury may take such a view of that matter as they may think just and right, but it is impossible that I can decide on this evidence that that breach has not been waived.

Accordingly, the learned vice-chancellor pronounced a decree declaring that the written undertaking, signed by Mr. and Mrs. Bernard, was a valid execution of the power contained in the marriage settlement, and that the circumstances of the transaction between the parties constituted an agreement which had been in part performed, and was capable of being enforced in a court of equity. He directed an action to be brought for the purpose of trying the questions whether the best rent had been reserved and whether there had been a waiver of the breach of the covenant not to assign. From this decision the defendant appealed.

Tinney, J. Russell and Billingsley Parry for the plaintiff.

Simpkinson, James and Bayley for the defendant.

Jan. 17, 1843. **LORD LYNTHURST, L.C.**—This was a bill filed by the plaintiff, Thomas Dowell, for the specific performance of an agreement for a lease, entered into by Mrs. Bernard under a power contained in her marriage settlement.

The first question in the case is as to the agreement. Mrs. Bernard had a life estate in the property for her sole and separate use, and a power to lease the premises in question for any term not exceeding twenty-one years, with the usual restrictions. Mrs. Bernard must, therefore, be considered with reference to this

A property as a feme sole, and there is, I think, no sufficient reason why her agreement to execute the power should not have the same effect as if she were unmarried—not, indeed, as to any remedy against her personally, but as to the estate in respect of which the power was to be exercised. It is true that SIR THOMAS PLUMER in *Martin v. Mitchell* (2) expressed some doubt on the point, but he abstained from deciding the question, and his reason, if we are to look at it according to the language of the report, would, as was justly observed, have applied equally to a case of defective execution of a power, whereas it has been long established that such a defective execution by a married woman would be supplied. Notwithstanding the doubts to which I have referred, I am of opinion, on principle, that such an agreement is binding on the estate, and may be enforced in a court of equity.

C It is objected, that there is in fact no agreement in this case; that the paper, called an agreement, was signed only by Mr. and Mrs. Bernard, and not by Dowell the tenant, and that there was no mutuality; but I think that there is sufficient evidence to show that this agreement was acted upon by Dowell, and that he continued in possession under it after the expiration of his lease. He states this expressly in his examination, and his mode of managing the farm, which does not depend on his evidence alone, strongly corroborates his testimony. Indeed, the very ground on which he made the application for a renewal, tends to the same conclusion. The agreement having been acted on by Dowell and he having continued in possession under it, this objection cannot prevail.

E It is further objected that this was an agreement for a reversionary lease, and that it is at variance with the power, which authorises only the granting of a lease in possession. But there was nothing, I conceive, in the terms of the power to prevent the party in whom it was vested from agreeing beforehand to grant a lease in possession when the proper time should arrive for that purpose. In fact, were it otherwise, an agreement entered into for such a purpose before the expiration of the existing lease would be invalid. An agreement of this nature is binding, and the execution of it may, I think, be enforced by the court if, as in the present case, the power is still subsisting at the expiration of the existing lease: *Shannon v. Bradstreet* (3). It is true, that, in this instance, the interval was considerable, but the reasons assigned for it appear to me satisfactory, namely, that it was material, in order to regulate the course of cultivation which was to be pursued in the subsequent year, that the tenant should know what he had to depend on in respect of the future.

G It is further contended, that the rent fixed on by the agreement is insufficient. If it was not the best and most improved yearly rent that could reasonably be obtained at the expiration of the former holding, the lease granted according to the agreement would not be a good execution of the power, and, whatever other remedy there might be on such an agreement, specific performance could not under such circumstances be enforced. Subject, therefore, to this question of fact as to the amount of the rent, I am of opinion that, if John Dowell had continued in possession under the agreement, his possession could not have been disturbed, and he might have enforced the granting of the renewed lease.

H The next objection is founded on the assignment without previous licence by John Dowell, the tenant, to his brother Thomas. If a lease had been granted in pursuance of the agreement and that lease had been assigned, it would have been a forfeiture, but such a forfeiture might have been waived. The question, however, remains to be decided whether, with reference to the object of the present suit, the same principle would apply to the agreement. It is clear that, if it were not for the clause against assigning without leave, the agreement would be binding, and might be enforced by Thomas Dowell the assignee. The same consequence would follow, notwithstanding the renewal of the lease had been previously obtained. The restraint is introduced for the benefit of the owner of the estate and he may dispense with it, if he thinks proper, either before or after the assignment. If he does so, the tenant is in the same situation as if there were no stipulation. This, therefore, is a question of fact, whether there has been in this case a waiver.

Then with respect to the rent, and the alleged breach of covenant with respect to the repairs, I have read the voluminous mass of evidence on these points, and, having had some experience as to questions of this kind, I feel satisfied that it would be impossible to come to a safe conclusion on these points merely on the written evidence and that an opportunity must be offered of sifting the truth by a viva voce examination, and by a cross-examination of the witnesses. The course pursued by the vice-chancellor in this respect was, in my opinion, proper and necessary. I think it, therefore, better to say nothing that might prejudice the question as to the impression which the evidence in its present shape has made on my mind, and for the same reason I abstain from saying anything on the effect of the evidence as to the waiver. I am, therefore, of opinion, that the decree on the whole case must be affirmed with costs.

Appeal dismissed.

Re BLOYE'S TRUST

LEWIS AND OTHERS v. HILLMAN AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Cottenham, L.C.), November 8, 9, 10, 1849]

[Reported 1 Mac. & G. 488; 2 H. & W. 140; 19 L.J.Ch. 89;
15 L.T.O.S. 517; 14 Jur. 49; 47 E.R. 1630]

[HOUSE OF LORDS (Lord St. Leonards, L.C., and other Lords) March 22, 25, 1852]

[Reported 3 H.L.Cas. 607; 19 L.T.O.S. 329; 10 E.R. 239]

Agent—Sale—Agent for sale—Duty to principal—Purchase by agent—Duty to make full disclosure.

Agent—Sale—Agent for sale—Inability to effect sale which principal unable to make legally.

Solicitor—Duty to client—Sale of property by client to solicitor—Purchase through nominee—Non-disclosure by solicitor of identity of effective purchaser.

Solicitor—Solicitor to trustee—Sale by trustee of trust property under power—Purchase by solicitor—Validity.

Trustee—Sale of trust property—Incapacity to purchase property himself—Sale to agent—Validity.

B. was entitled to a reversionary interest under a will, which he charged with the payment of an annuity, the annuitant having a power of sale over the reversionary interest in the event of the annuity falling into arrear. The annuity having fallen into arrear, the administratrix of the annuitant employed a firm of solicitors to sell the reversionary interest, but, as the title to the annuity was defective, the solicitors procured the consent to the sale of B.'s personal representative. The reversionary interest was then sold to a nominee of the solicitors, it not being disclosed to the personal representative that the solicitors were the effective purchasers.

Held: (i) the solicitors were agents for the sale for the administratrix of the annuitant and B.'s personal representative, and as such could not, at least not without full explanation to the parties interested, become purchasers; (ii) even if the sale was by the administratrix of the annuitant alone, she was a trustee for the sale, and the solicitors, who were her agents, could not sell to themselves, any more than she could sell to herself; and, therefore, the sale was invalid.

- A *Trustee—Power of sale—Exercise—Trustee for balance of purchase money—Incapacity to purchase property himself—Conflicting interests.*

Per LORD COTTENHAM, L.C.—A party who proceeds under a power of sale is a trustee for that sale. He is not selling for himself, but for those to whom the property belongs. He is selling, it is true, under a power which enables him to pay himself in the first instance, but he is a trustee for the surplus and bound to account for it. The reason why a trustee is not permitted to purchase is because the court will not permit a man to have an interest adverse to and inconsistent with the duty which he owes to another, and, as a trustee for sale is bound to get the best price for property to be sold that he can, the court will not permit him to have an interest of his own adverse to the discharge of his duty to his cestui que trust. If he is the purchaser he is interested in getting the property at the lowest price he can.

Notes. Considered: *McPherson v. Watt* (1877), 3 App. Cas. 254; *Luddy's Trustee v. Peard*, [1886–90] All E.R.Rep. 968; *Bath v. Standard Land Co.* [1911] 1 Ch. 618. Referred to: *Guest v. Smythe* (1870), 5 Ch. App. 533, n.; *Re Postlethwaite*, *Postlethwaite v. Rickman* (1888), 59 L.T. 58; *Nutt v. Easton* (1899), 68 L.J.Ch. 367; *Hodson v. Deans*, [1903] 2 Ch. 647.

As to disability of a trustee to purchase, see 14 HALSBURY'S LAWS (3rd Edn.) 626–627, and 38 HALSBURY'S LAWS (3rd Edn.) 961–962; as to sale by mortgagee to himself, see 27 HALSBURY'S LAWS (3rd Edn.) 307; and for cases see 43 DIGEST 664–666, 807–808.

Cases referred to:

- E (1) *Woodhouse v. Meredith* (1820), 1 Jac. & W. 204; 37 E.R. 353; 1 Digest (Repl.) 534, 1632.
(2) *Downes v. Grazebrook* (1817), 3 Mer. 200; 36 E.R. 77, L.C.; 43 Digest 781, 2211.

- F **Appeal** from a decree of LORD COTTENHAM, L.C., reversing a decree of the Vice-Chancellor of England made on a petition presented under the Trustee Relief Act, 1847, directing the payment out to the appellants of a fund in court.

- W. M. Bloye, being entitled to one-fifth of the real and personal estate of Francis Bloye expectant on the death of R. Bloye, by indenture, dated April 6, 1840, in consideration of £600, granted an annuity to E. Pratt, secured on the reversionary interest. This indenture contained a power of sale by E. Pratt, her executors, administrators, or assigns on the annuity being in arrear for forty days. W. M. Bloye died on June 4, 1840, and by his will, of which his widow A. S. Bloye and another party were executors and trustees, after bequeathing a legacy of £200 to his wife, gave the residue of his property, in trust, for the benefit of his children. The annuitant, E. Pratt, died on Jan. 15, 1841, and on Sept. 19, 1846, the annuity having fallen into arrear, her administratrix, acting under the power contained in the indenture, put up the reversionary interest for sale, and the same was bought by Robert Barker for £900. In order to obviate difficulties in reference to the disposal of the purchase money, it had been found desirable, previously to the sale to obtain the concurrence of A. S. Hillman, formerly A. S. Bloye, and a formal consent in writing had accordingly, on Sept. 17, 1846, been procured from her by Messrs. Overton and Hughes, the solicitors who were conducting the sale on behalf of the representative of the annuitant. This consent, addressed to the auctioneer and signed by A. S. Hillman, was added to the conditions of sale, and was expressed in the following terms:

"I do hereby, as executrix of the will of my late husband, William Mitchell Bloye deceased, authorise you to sell the reversionary interest, referred to in this particular for not less than £900; and when sold, I do hereby agree, out of the purchase money and in consideration of the vendor Georgiana Woodman, administratrix of Elizabeth Pratt deceased the annuitant, consenting to the sale thereof at the said sum of £900, to redeem the annuity above referred to,

upon the understanding that the balance of the purchase money of the above-mentioned property, after payment of your and all other charges and expenses, be paid over to me as such executrix." A

At the time of the sale, A. S. Hillman had not proved her husband's will, but did so subsequently, Messrs. Overton and Hughes acting professionally on the occasion. The sale to R. Barker was not completed, in consequence of an objection to the title being taken, on the ground that the grant of the annuity was void for want of proper enrolment. B

In these circumstances, Messrs. Overton and Hughes determined to purchase the property on their own account for £900, and it was, by deed dated Nov. 27, 1846, of which due notice was given to the trustees of F. Bloye, conveyed to W. Lewis, who was in fact, a trustee for Messrs. Overton and Hughes. On Nov. 9, 1846, Messrs. Overton and Hughes enclosed to A. S. Hillman an account of the transaction, entitled, "Mrs. Hillman's account with Overton and Hughes." The trustees of F. Bloye having refused to pay to Lewis the share of W. M. Bloye in the trust estate on the ground of inadequacy of the consideration given, and having, on Feb. 2, 1849, under the provisions of the Trustees Relief Act, 1847, paid into court £1,770 1s. 9d. cash, being the share in question, Messrs. Overton and Hughes and W. Lewis, on Feb. 5, 1849, presented a petition, praying that the sum in court might be paid to Hughes. This petition, which was served on A. S. Hillman and the children of W. M. Bloye, having come on before the Vice-Chancellor of England on Mar. 2, 1849, it was then agreed that the matter should be argued as if A. S. Hillman and the children had presented a cross-petition in assertion of their title to the fund. His Honor thereupon made the order as prayed, and the fund (which then remained in cash) was received by Messrs. Overton and Hughes. A. S. Hillman and her children appealed. Affidavits were filed on both sides, the petitioners endeavouring to show, not only that an adequate consideration had been paid for the purchase, but also that A. S. Hillman had been a party to the transaction after a full explanation had been given to her of the matter. C D E

Bethell and Rogers for A. S. Hillman and the children. F

Stuart and Lovell in support of the order of the vice-chancellor.

Martindale for the trustees.

LORD COTTENHAM, L.C.—The vice-chancellor seems to have assumed, as far as I am enabled to learn what passed before him, that this question turned on its being a purchase of a reversionary interest, and, therefore, he proceeded to inquire into the price given. But the view which I take of this case makes it quite immaterial to consider that point. At the same time I cannot but observe that, if the rule be that a person purchasing a reversionary interest is bound to show he gave a fair price for it, the purchaser has, in the present instance, entirely failed in proving that proposition. I do not, however, deal with that question at all, and it is unnecessary I should, for, although I am dealing with the case of the purchase of a reversionary interest, yet, if it had been an interest in possession, the conclusion to which I have come would have been precisely the same. G H

The facts, except on one or two points where there is a degree of contradiction or obscurity remaining on the evidence, are very short and simple. A person being entitled to an interest in certain property (in fact it was a reversionary interest), grants an annuity, with a power of sale for the purpose of answering any arrears which might arise in the payment of the annuity; that party dies, and his interest is represented by a person who administered to his property. Of course the power of sale, being only for the purpose of paying what might be due on the annuity, if there was a surplus arising from the sale, it would belong to the grantor. The annuity being not a mortgage, but an incumbrance, the property was liable, in the first instance, to pay the charge, and, subject to such payment, the surplus belonged to the original owner. It is quite clear that, in the first instance, the intention was to sell under the power, because there was the power to sell, and the particulars and I

- A conditions of sale show, on the face of them that it was a sale intended to be carried into effect by virtue of that power. There is no question made, nor can there be any doubt upon the evidence, that Messrs. Overton and Hughes were the solicitors and agents for the purpose of effecting this sale on behalf of the annuitant or the party who represented the annuitant. Before, however, the sale actually took place it occurred to them that, if the personal representative of the grantor was to concur in the sale, it would probably very much facilitate the sale, and, accordingly a written memorandum was added to the conditions of sale by which the person entitled to be personal representative who afterwards became so (there described as the personal representative) agreed to join in the sale. That memorandum is very important, and, therefore, I will read its terms, which I think material for the consideration of the present case. [His LORDSHIP read the memorandum, see C p. 1093, ante]. This memorandum was procured from Mrs. Hillman by Messrs. Overton and Hughes, they being about to sell, and thinking it convenient (about which no complaint can be made) that the owner of the fund subject to the charge should join in the sale along with the encumbrancer who had the power to sell. Having got this memorandum, but Mrs. Hillman not being at that time the personal representative, they afterwards took steps for the purpose of investing her D with the character which she had assumed in authorising the sale. The sale which took place under the printed particulars, with the addition of the authority or agreement, was a sale of the whole interest, a sale of the property discharged, in fact, from the incumbrance. The grantor and grantee, or those who represented them, had agreed among themselves in what manner and proportions the fund was to be divided for the purpose of paying off the incumbrance, but as between the vendor and the purchaser it was a sale of the two interests by a joint authority given to the auctioneer through the intervention of Messrs. Overton and Hughes.

- E It is impossible to say that Messrs. Overton and Hughes were not agents for the sale. They were the agents for the sale, and the sale was with the joint authority of the two parties. It is not contended, nor can it for a moment be contended, that they, being agents for the sale, could become purchasers, at least not without F full explanation to the parties interested and putting them in full possession of the facts and the knowledge that they (the solicitors) were to become purchasers for themselves. I do not say to what extent parties so circumstanced, may or may not be permitted to deal with property where they know all the facts, but beyond all question, their agents and solicitors cannot surreptitiously, by which I mean without the knowledge of their principals, become purchasers: *Woodhouse v. Meredith* G (1).

- Then comes another question, which, looking at the case from a different point of view, would make it perfectly immaterial whether the conclusion to which I have thus come is correct or not. Supposing it to be a sale merely by the annuitant, nobody can dispute that the annuitant proceeded under the power of sale, but a party who proceeds under a power of sale is a trustee for that sale. He is not H selling for himself, but for those to whom the property belongs. He is selling, it is true, under a power which enables him to pay himself in the first instance, but he is a trustee for the surplus, and bound to account for it. If Messrs. Overton and Hughes were acting for the annuitant, the annuitant being a trustee for the sale, and not being able to purchase for herself, am I to hold that her attorney or agent can do it? If the principal is incapacitated, can the agent do that which the principal could not? The question arose (though I am not aware that it was the subject of decision), and was matter of observation by LORD ELDON in *Downes v. Grazebrook* (2). There LORD ELDON laid it down, not as a new proposition, but as a necessary result of the doctrine of the court, that an encumbrancer with a power of sale was in the first instance a trustee for sale, and, being such, was affected with all the disability of purchasing which any other trustee would be. That was the case there, and the only point calling for decision, but LORD ELDON alludes to the fact of the attorney purchasing, and asks the question (in a way in which those who are familiar with LORD ELDON's mode of putting a question may know

what answer he would have given, if he had been called on to answer it) whether the attorney could do that which the principal could not; whether, if a party is incapacitated from purchasing, he can employ an agent to do that which he could not do himself; and whether that agent had a power to purchase which his principal had not whether, if that were so, it would not be the most absurd distinction in the world. The reason why a trustee is not permitted to purchase is because the court will not permit a man to have an interest adverse to and inconsistent with the duty which he owes to another, and, as a trustee for sale is bound to get the best price for property to be sold that he can, the court will not permit him to have an interest of his own adverse to the discharge of his duty to his cestui que trust. If he is the purchaser he is interested in getting the property at the lowest price he can, but, if he is acting bona fide for the owner of the property, his duty is to sell at the best price he can obtain, and the court will not permit a party to place himself in a situation in which his interest conflicts with his duty, for, taking mankind at large, it is not very safe to allow a man to put his private interest in conflict with the duty which he owes to another. This, then, is the rule. Practically, the agent is the party who is to conduct the sale, for in ninety-nine cases out of a hundred the principal takes no part in it. He directs the sale of the property, but the solicitor, the auctioneer, or the agent, is the party who is to conduct it, and on whose exertions the result of the sale depends. Therefore, to say that the principal is incapacitated, but that the agent is not, would be an absurd distinction, the reason remaining the same, and being as applicable to one as to the other. I am of opinion that it is clearly made out that the sale was on behalf of Mrs. Hillman, who was one of the vendors. But if that were not so, there is no question that the sale was on behalf and by direction of the annuitant, and that Messrs. Overton and Hughes were the solicitors and agents for that annuitant, and, as such, became ultimately the purchasers. The original purchaser objected to the title, and was desirous to be released from his bargain.

[His LORDSHIP commented on the circumstances under which Messrs. Overton and Hughes determined to become the purchasers of the property, but stated that these circumstances were not material to the merits of the case. He examined at some length, the evidence relating to Mrs. Hillman's concurrence in the sale, and to Messrs. Overton and Hughes having previously communicated to her all the particulars of the transaction, but considered that it did not establish the representations made by Messrs. Overton and Hughes. At the close of his observations, he adverted to the circumstance that the deed conveying the property to W. Lewis in no way recited the facts as they really existed, and continued:] I think I have stated quite enough to show that, according to my view, Messrs. Overton and Hughes were not in a situation to be purchasers, without fully communicating to the party all the circumstances of the sale, and the value of the property. The title of Messrs. Overton and Hughes is that of purchasers, though they were agents for the sale. I have already stated the reasons for which I disregard the statement made by them of Mrs. Hillman having been a party to the transaction after full explanation, and of having agreed to deal with them as purchasers, and when I look at the deed which they prepared and tendered to her for execution, it negatives the transaction altogether. If the transaction was as they represent it, there was no objection to Mrs. Hillman knowing they were to be the purchasers, and if they had prepared a deed reciting the real facts and had secured her concurrence, whatever title they might thus have obtained, their case would have been free from the imputation of suppression. Instead of doing this, they put on the face of the deed a transaction totally inconsistent with the facts. They represent another party as the purchaser for his own benefit, and carefully suppress all allusion to themselves as being interested in the purchase. When I look, therefore, to the deed, and to the evidence in the case, I consider the statement of approbation and concurrence on behalf of Mrs. Hillman as being entirely contrary to the fact.

We have thus the direct case of agents for a sale, solicitors employed for the purpose of sale, surreptitiously, clandestinely, and by concealment and misrepre-

A sentation of the facts, endeavouring to become purchasers for themselves and obtaining a conveyance to an assignee for themselves, that assignee being represented as the real purchaser. It is only necessary to state the proposition to show that such a transaction cannot, for a moment, be sustained in a court of equity, and if I had been able to collect these facts with that degree of certainty with which it is the duty of the court to ascertain them, before it disposes of property, and more especially where it has to make a decision which cannot but affect the conduct and character of those interested in it, many hours of the discussion might have been saved. I consider the case, therefore, is entirely made out as against these proposed purchasers, and I am bound to make such an order as I should have made, if there had been a bill filed to set aside the deed.

C [The order, so far as material, directed Overton & Hughes to repay into court the sum £1,757 16s. 8d. (the £1,770 1s. 9d. less certain costs).]

W. Lewis and Overton and Hughes appealed to the House of Lords. The case came before the House on Mar. 22 and 25, 1852, sub nom. LEWIS AND OTHERS v. HILLMAN AND OTHERS.

Stuart and Cairns for the appellants.

Bethell and Rogers for the respondents.

D LORD ST. LEONARDS, L.C., reviewed the facts, and said that their Lordships had been told that that was a fair transaction and that the order made in the court below was a harsh order. With that order he entirely concurred. He agreed that the deed was invalid and not worth the ink with which it was written. To a contract there must be two persons. Two minds were essential to constitute a contract. For a contract of the present sort there must be, not only a buyer but also a seller. On this occasion there was a buyer, no doubt, in one sense of the term, but there was no seller. Contract there was none, but contrivance there was, in order to obtain a good title from Mrs. Hillman, so as to give validity to the acts which had taken place to enable the appellants to complete the sale of the property.

F His LORDSHIP continued: I have been surprised, I confess, at this matter being pursued, when the rules of equity are so clear. No man in a court of equity is allowed himself to buy and sell the same property. He cannot sell to himself. Even in the case of a fair trustee, he cannot sell to himself. If he has the power or the trust to sell, he must have some one to deal with. Courts of equity do not allow a man to assume the double character of seller and purchaser, and it is necessary, in order to preserve the interests of persons entitled beneficially to property, to maintain that rule. But here is a case which goes infinitely beyond that. I should lay it down as a rule, my Lords, that ought never to be departed from, that, if an attorney or agent can show he is entitled to purchase, yet, if instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fact, no such purchase as that can stand for a single moment. Such a transaction, to stand, must be open and fair, and free from all objection. And if a man purchases, as these appellants purchased, by putting forward a clerk of his own, not as a clerk, not as an agent, but as an actual bona fide purchaser upon an absolute and independent contract, he does that which, the moment it is stated, renders the deed powerless for the purpose for which it was framed and executed, and the court will hold the parties responsible for everything that results from it. If, therefore, a bill had been filed, this contract had been attempted to be set up, and it had come before your Lordships, I cannot hesitate to say that you would have rescinded that contract, and thrown the whole costs of the proceeding upon the parties who had entered into it.

His LORDSHIP then dealt with a point of procedure under the Trustee Relief Act, 1847 (repealed by the Trustee Act, 1893), which does not now call for report.

Appeal dismissed.

MONYPENNY *v.* DERING

[COURT OF APPEAL IN CHANCERY (Lord St. Leonards, L.C.), July 17, 19, 20, 1852]

[Reported 2 De G.M. & G. 145; 22 L.J.Ch. 313; 19 L.T.O.S. 320;

17 Jur. 467; 42 E.R. 826]

Perpetuities—Will—Application of rule—Gift to unborn child of unborn child—Validity of gift over—Alternative independent limitations.

Will—Condition—Defeasance of vested estate on happening of event—Shifting of A estate if devisee becomes entitled to interest in possession in B estate—Operation of shifting clause.

Where an estate is given to an unborn person for life with remainder to the children of that unborn person in tail, the court may, in order to effectuate the testator's intention, create an estate tail in the first donee, contrary to the words of the will.

A gift to A. for life then to his issue and in default of issue generally of A. over, raises first, an estate tail, and secondly, creates a remainder over on that estate tail, the testator's intention being that the estate should not go over until there was a general failure of A.'s issue.

The court cannot by implication, or by the doctrine of *cy-près*, carry an estate to a class or portion of a class for whom the testator did not intend to provide; but for persons for whom the testator has shown an intention to provide the court can raise estates although in a different manner from that indicated by the testator.

The court will not hold a gift over, made in words comprising only one event, as made on two events, although it may consist reasonably of two branches, unless the testator has himself so expressed it.

J. M. devised "the Maytham Hall Estate" to trustees upon trust (inter alia) for P. M. for life, then in trust for the first son of the body of P. M. for life, "and from and immediately after his decease upon trust for the first son of the body of such first son, and the heirs male of his body, and in default of such issue upon trust for all and every other the son and sons of the body of P. M. severally and successively, according to their seniority of age, for the like interests and limitations as before directed respecting the first son and his issue, and in default of issue of the body of P. M. or in case of his not leaving any at his decease, upon trust for T. M. for life; and after his decease upon trust for T. G. M. the eldest son of T. M. for life, and after his decease upon trust for the first son of the body of T. G. M. and the heirs male of his body, and in default of issue of the body of T. G. M. upon trust for all and every other the son and sons of the body of T. M. for like estates," etc.; "and in failure of all such issue of the body of T. M. upon trust for him, his heirs and assigns, for ever," provided that if P. M. or T. M. "or either of them, their, or either of their issue, shall become entitled to the Joddrell estate then the trustees shall stand seised of my devised estates upon trust for the next person entitled thereto, under this my will, in the same manner as they would have done if the person so succeeding to the Joddrell estate were actually dead."

T. M. died after the date of the will, and the testator, by a codicil, declared that his trustees should stand seised of the devised estates upon trust for his [the testator's] wife for her life, and after her decease upon the trusts declared by his will subject to the declaration therein contained with reference to the Joddrell estate. P. M. had no children.

Held: (i) P. M. took an estate for life subject to the life estate of the testator's widow; and the limitation "to the first son of the body of such first son [of P. M.] and the heirs male of his body" was void for remoteness.

(ii) the gift over contained in the words "in default of issue of P. M. or in case of his not leaving any at his decease on trust for T. M." for life, did not

A depend on the previous void limitations, that is, it could be read as a gift over in the alternative, and was perfectly valid. Accordingly, T. G. M. "in default of issue of the body of P. M." took an estate for life, determinable on his becoming entitled to the Joddrell estate, and also a remainder in tail general after the estate tail of his eldest son.

B (iii) The eldest son of T. G. M. took a contingent remainder in tail male after the life estate of his father.

C J. devised "the Joddrell estate," to P. M. (subject to certain life estates) for life, with remainder to his sons and daughters in tail, with remainder to T. M. with like remainders to his sons and daughters in tail, with divers remainders over, provided "that if P. M. and T. M. or either of them, their, or either of their issue male or female, or any other son or sons of T. M." (who were provided for by the will), "hereafter to be born, or his, their, or any of issue male or female shall, at any time or times, be or become entitled to any estate of freehold, or inheritance in possession [in the Maytham Hall estate] or the greatest part of the same, . . . so as to be in the possession or in the actual receipt of the rents and profits thereof," then and in that case the estates devised by the will should shift.

D On the death of P. M. without issue these estates became vested in T. G. M. (the eldest son of T. M.). At the date of J.'s will, R. M. was entitled to the Maytham Hall estate; he devised it to J. M. who disentailed it, and under the limitations in his will (vide supra), it became vested in T. G. M.:

E **Held:** T. G. M. did succeed to the Joddrell estate in the sense contemplated by the testator, and the shifting clause operated.

Notes. In considering the effect of this decision it should be borne in mind that the rule in *Whitby v. Mitchell* (1890), 44 Ch.D. 85 (whereby, in respect of legal limitations of real estate, a remainder could not be limited to the children of an unborn person, as purchasers) was abolished by the Laws of Property Act, 1925, s. 161. Section 130 of the Act of 1925 should also be considered. So far, therefore, as this case depends on the rule in *Whitby v. Mitchell* it is obsolete, but it is still used as an authority on shifting clauses and the validity of limitations taking effect after limitations which are void.

Approved: *Whitby v. Mitchell* (1890), 44 Ch.D. 85. Considered: *Re Rising, Rising v. Rising*, [1904] 1 Ch. 533; *Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502. Applied: *Re Mill's Declaration of Trust, Midland Bank Executor and Trustee Co. v. Mill*, [1950] 1 All E.R. 789. Referred to: *Re Clulow's Trust* (1859), 1 John. & H. 639; *Evers v. Challis* (1859), 7 H.L.Cas. 532; *Sanatum Bysack v. Sreemutty Juggutsoondree Dossee* (1859), 8 Moo. Ind. App. 66; *Re Thatcher's Trusts* (1859), 26 Beav. 365; *Parfitt v. Hember* (1867), L.R. 4 Eq. 443; *Hampton v. Holman* (1877), 5 Ch.D. 183; *Re Farncombe's Trusts* (1878), 9 Ch.D. 652; *Hodgson v. Halford* (1879), 11 Ch.D. 959; *Re Roberts, Repington v. Roberts-Gawen* (1881), 19 Ch.D. 520; *Re Bence, Smith v. Bence*, [1891-94] All E.R.Rep. 253; *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54; *Re Stevens, Clark v. Stevens* (1896), 40 Sol. Jo. 296; *Re Richardson, Parry v. Holmes*, [1904] 1 Ch. 332; *Re Bowles, Pape v. Pape*, [1905] 1 Ch. 371; *Whitting v. Whitting* (1908), 53 Sol. Jo. 100; *Re Davies and Kent's Contract*, [1910] 2 Ch. 35; *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1; *Re Wilmer's Trusts, Wingfield v. Moore*, [1910] 2 Ch. 111; *Re Norton, Norton v. Norton*, [1911] 2 Ch. 27; *Re Bullock's Will Trusts, Bullock v. Bullock*, [1915] 1 Ch. 493; *Re Davey, Prisk v. Mitchell and Bawden* (1915), 113 L.T. 60; *Re Hewett's Settlement, Hewett v. Eldridge*, [1915] 1 Ch. 810; *Re Curryer's Will Trusts, Wyly v. Curryer*, [1938] 3 All E.R. 574; *Re Wilson's Will Trusts, Tryon v. Bromley-Wilson*, [1950] 2 All E.R. 955; *Re Hubbard's Will Trusts, Marston v. Angier*, [1962] 2 All E.R. 917.

As to the cy-près doctrine generally, see 29 HALSBURY'S LAWS (3rd Edn.) 276-277; as to alternative independent limitations, see *ibid.*, 320-322; as to failure of a limitation under the rule against perpetuities, see *ibid.*, 322-325. For cases see

37 DIGEST (Repl.) 131 et seq. As to conditions of defeasance (shifting clauses), A see 34 HALSBURY'S LAWS (3rd Edn.) 503-509; and for cases see 44 DIGEST 551 et seq.

Cases referred to :

- (1) *A.-G. v. Sutton* (1721), 3 Bro. Parl. Cas. 75; 1 P. Wms. 754; 1 E.R. 1187, H.L.; 44 Digest 1272, 10,996. B
- (2) *Pitt v. Jackson* (1786), 2 Bro.C.C. 51; 37 Digest (Repl.) 366, 1023.
- (3) *Stackpoole v. Stackpoole* (1843), 4 Dr. & War. 320; 2 Con. & Law. 506; 6 I.Eq.R. 18; 44 Digest 554, q.
- (4) *Routledge v. Dorril* (1794), 2 Ves. 357; 30 E.R. 671; 37 Digest (Repl.) 133, 599.
- (5) *Nicholl v. Nicholl* (1777), 2 Wm. Bl. 1159; 96 E.R. 683; 37 Digest (Repl.) 136, 625. C
- (6) *Montgomery v. Montgomery* (1845), 3 Jo. & Lat. 47; 44 Digest 951, 8041 v.
- (7) *Seaward v. Willock* (1804), 5 East, 198; 1 Smith, K.B. 390; 102 E.R. 1046; 37 Digest (Repl.) 188, 638.
- (8) *Mortimer v. West* (1828), 2 Sim. 274.
- (9) *Longhead v. Phelps* (1770), 2 Wm. Bl. 704; 96 E.R. 414; 37 Digest (Repl.) 106, 389. D
- (10) *Beard v. Wescott* (1813), 5 Taunt. 393; 128 E.R. 741; subsequent proceedings (1822), Turn. & R. 25, L.C.; 44 Digest 1271, 10,992.
- (11) *Somerville v. Lethbridge* (1795), 6 Term Rep. 213; 101 E.R. 517; 37 Digest (Repl.) 135, 613.
- (12) *Proctor v. Bishop of Bath and Wells* (1794), 2 Hy. Bl. 358; 126 E.R. 594; 37 Digest (Repl.) 109, 407. E
- (13) *Leake v. Robinson* (1817), 2 Mer. 363; 35 E.R. 979; 44 Digest 1056, 9092.

Also referred to in argument :

- Robinson v. Hardcastle* (1788), 2 Term Rep. 241; 100 E.R. 131; 37 Digest (Repl.) 124, 506.
- Langley v. Baldwin* (1707), 1 Eq. Cas. Abr. 185; 1 P.Wms. 59; 21 E.R. 976; 44 Digest 1271, 10,995. F
- Smith v. Lord Camelford*, *Lord Camelford v. Smith* (1795), 2 Ves. 698, L.C.; 37 Digest (Repl.) 366, 1021.
- Langston v. Langston* (1834), 2 Cl. & Fin. 194; 8 Bli.N.S. 167; 6 E.R. 1128, H.L.; 44 Digest 547, 3650.
- Lethieullier v. Tracy* (1753), 3 Atk. 774; Amb. 204; Keny. Ch. 40; 26 E.R. 1243; 44 Digest 1182, 10,220. G
- Robinson v. Grey* (1807), 9 East, 1.
- Lees v. Mosley* (1836), 1 Y. & C.Ex. 589; 5 L.J.Ex. Eq. 78; 160 E.R. 241; 44 Digest 851, 7051.
- Baker v. Tucker* (1850), 3 H.L.Cas. 106; 14 Jur. 771; 10 E.R. 41, H.L.; 44 Digest 1281, 11,086. H
- Crozier v. Crozier* (1843), 3 Dr. & War. 353; 37 Digest (Repl.) 363, *156.
- Turke v. Frencham* (1559), 2 Dyer, 171 a.; 73 E.R. 375; sub nom. *Tuck v. Frencham*, Ben. 68; Moore, K.B. 13; sub nom. *Buck v. Frencham*, 1 And. 8; 44 Digest 933, 7889.
- Doe d. Gallini v. Gallini* (1833), 5 B. & Ad. 621; 2 Nev. & M.K.B. 619; 3 L.J.K.B. 71; 110 E.R. 920; affirmed (1835), 3 Ad. & El. 340; 4 Nev. & M.K.B. 894; 4 L.J.Ex. 337; 111 E.R. 442, Ex. Ch.; 44 Digest 553, 3704. I
- Morse v. Lord Ormonde* (1820), 5 Madd. 99; affirmed (1826), 1 Russ. 382; 4 L.J.O.S.Ch. 158; 38 E.R. 148, L.C.; 44 Digest 1138, 9846.
- Ellicombe v. Gompertz* (1837), 3 My. & Cr. 127; 40 E.R. 873, L.C.; 44 Digest 1139, 9850.
- Southby v. Stonehouse* (1755), 2 Ves. Sen. 610; 28 E.R. 389; 44 Digest 1272, 10,999.

- A** *Doe d. Blandford v. Applin* (1790), 1 Term Rep. 82; 100 E.R. 906; 44 Digest 1272, 11,002.
Greenwood v. Rothwell (1843), 6 Scott, N.R. 670.
Doe d. Cock v. Cooper (1801), 1 East, 229; 102 E.R. 89; 44 Digest 1129, 9771.
Brooke v. Turner (1836), 2 Bing.N.C. 422; 2 Scott, 611; 132 E.R. 165; 44 Digest 1284, 11,123.
- B** *Toller v. Attwood* (1850), 15 Q.B. 929; 20 L.J.Q.B. 40; 16 L.T.O.S. 42; 15 Jur. 623; 117 E.R. 709; 44 Digest 932, 7883.

Appeal from a decision of WIGRAM, V.-C.

Wigram, Rolt and C. Hall for the plaintiff, the eldest son of T. G. M.

Bethell, Malins, Willcock, Rogers, Faber, F. T. White, Browell, Borton and

C *Bagshaw* for the several parties interested.

July 19, 1852. **LORD ST. LEONARDS, L.C.**—As I entertain no doubt on the principal question in this case, I will at once dispose of that; with regard to the question arising on the shifting clauses obtained in these wills, I will postpone disposing of that until tomorrow. Both questions are of great importance.

- D** James Monypenny seems to have had a great desire to provide only for the first son of the person to whom he gave one of the properties. It is given to the use of his nephew for life and then for the first son of the body of that nephew and the heirs male of the body of such first son. There he leaves off and, except that the reversion would fall into the general devise of a portion of the residue, an event that I cannot give him credit for being aware of, there would be no further disposition of that estate; it would not go to any person except the first son and the heirs male of his body; no other person is in any manner provided for; but that is different from the question which arises under the general gift.
- E**

The testator gives the legal fee to trustees who are to raise the debts, and then limits the estates in trust for his brother Phillips for life without impeachment of waste, then in trust for the first son of the body of Phillips for his life, and

- F** “immediately after his decease to the first son of the body of such first son and the heirs male of his body; and in default of such issue in trust for all and every the son and sons of the body of my said brother Phillips Monypenny, severally and successively according to seniority of age for the like interests and limitations as I have before directed respecting the first son and his issue, and in default of issue of the body of my said brother Phillips Monypenny, or in
- G** case of his not having any at his decease, upon trust for my said brother Thomas Monypenny for and during the term of his natural life without impeachment of waste, and from and immediately after his decease upon trust,”

- and so on. Stopping there and without including the gift over, if the issue had been born in the lifetime of the testator, those would have been valid devises; but Phillips Monypenny never had any issue, and the rule of law forbids you to raise successive estates by purchase to unborn children, that is, to an unborn child of an unborn child. There is, therefore, taking the limitations as they stand, a good life estate to Phillips and to his first unborn son, if he had one, and the remainder to the other sons and their issue would be absolutely void as being on too remote a contingency. Did the testator intend to provide for the other sons of the first son, beyond a first son? The gift is
- H**

- I** “upon trust for the first son of the body of such first son, and the heirs male of his body, and in default of such issue, ”

not on trust for the second son, and every other the son and sons of the body of such first son, but on trust

“for all and every other the son and sons of the body of Phillips, severally and successively.”

So that, had he intended to provide for other sons of a person for whose first son he had provided, he knew perfectly well how to do so, for he has done it in clear and

express words. As it stands, the whole would be void after the first life estate to the first unborn son; and can I, by construction or otherwise, raise estates to the other sons of that first son? It was argued that I might, on these grounds: First, by the doctrine of *cy-près*; secondly, by a particular construction of the will itself; and thirdly, on the rule which gives to a general intent a preference over a particular intent. A

The doctrine of *cy-près*, as I understand it, is nothing more than the giving effect to a general at the expense of a particular intent. It is this. Where there is a valid particular intent and a valid general intent and the former, in the opinion of the court, not effectuating all the intention of the testator, the court looks to his general intent and will effect that general intent at the sacrifice of the particular intent. But here you sacrifice nothing. In the case of a limitation where there is a good gift under a power to the objects of a limited estate, and an ulterior gift to children who are not objects, the court, if it can, will effectuate the further intention of the testator by giving to the parent himself an estate of inheritance through whom it will descend to his children. There you effectuate the general intent but at no expense of the particular, because there was no particular intent to which you could give validity. In the present case there is a limitation to an unborn son for life, with remainder to his unborn children for life; now you cannot give effect to that intent because you cannot give successive estates to an unborn person and to the issue of that unborn person; but were that limitation to be effected, it would be as a general intent and not at the sacrifice of any particular intent. B C D

The words of the will are, "And in default of issue of the body of Phillips, or in case of his not leaving any at his decease," then a gift over. That gift over would, by construction in an ordinary case, give an estate tail to Phillips himself. Some of Phillips's issue being provided for, and Phillips himself having a life estate, and then the estate being given over in default generally of issue of Phillips, the true construction would, I think, be that the testator intended to provide that that estate should not go over until there was a general default of the issue of Phillips, and if so, then there would be an estate tail general raised by those words, which would have a double operation; first of all, to raise an estate tail, and secondly, to create a remainder over on that estate tail. That construction would, according to *A.-G. v. Sutton* (1), leave the express limitations of the will to operate as they were directed. In that way, although in remainder, all the issue of Phillips could be provided for. The will then goes on, E F

"in trust for his brother Thomas for life, and immediately after his decease in trust for Thomas Gybbon, the eldest son of Thomas for life, and immediately after his death upon trust again for the first son of the body of the said Thomas Gybbon and the heirs male of his body [there he creates an estate tail] and in default of issue of the body of the said Thomas Gybbon upon trust for all and every other the son and sons of Thomas for the like estates, and on failure of all such issue of the body of Thomas upon trust for him in fee." G H

It is quite clear then that the limitation over in default of the issue of Thomas Gybbon would give Thomas an estate tail in remainder expectant on the estate tail to Thomas Gybbon, and in that way all the intention of the testator would be effected as to the issue of Thomas.

Looking at the whole frame of this will there is ground to suppose that the testator did fancy that he had provided for all the issue. But can that intention be effected by the rule of law? Some doubt was thrown out during the argument on *Pitt v. Jackson* (2). I have always held it to be law. I followed it in *Stackpoole v. Stackpoole* (3), and so did LORD ALVANLEY in *Routledge v. Dorril* (4). The clear doctrine is that where an estate is given to an unborn person for life, with remainder in tail to the children of that unborn person it shall be construed, in order to effectuate the intention, as an estate tail in the person to whom it is given for life, contrary to the words in the first part. Supposing, then, that the I

- A cy-près doctrine is not to be applied to the case before me, it must be on this ground and this ground only, that although the doctrine may be applied to cases where the intention of the testator is not by such application carried into effect because that intention was illegal, yet it must be so applied in favour of a class intended to be provided for by the testator. I apprehend the rule is this, that neither by implication nor by the doctrine of cy-près, can an estate be carried to
- B a class, or a portion of a class, for whom the testator never intended to provide. For persons for whom the testator did intend to provide, a different provision may indeed be made, as was done in *Pitt v. Jackson* (2). There the estate was intended to go to the children as purchasers as tenants in common but it was not within the power of the testator to give them that estate and the court, therefore, would not raise it, but it raised an estate which, although it would not go modo et
- C forma as the testator had provided, would go to all the class for whom he intended to provide.

As to *Nicholl v. Nicholl* (5), I am disposed to think that it is not open to the criticism which was made on it in this case in the Court of Exchequer, for it appears to me as if the court had seen on the whole of the will in *Nicholl v. Nicholl* (5) that the second son of the second son was only intended to be excluded

D in case the paternal estate devolved on him and that they also collected an intention to provide for everybody else. Accordingly we find that the second opinion which the judges gave was this :

"We are also of opinion that, in order to effectuate the general intent of the devisor, such second son will take an estate to him and the heirs male of his body, determinable on the accession of the paternal estate."

- E It is certainly a singular case and the construction put on the devise a very bold one; but I do not apprehend that the court meant to introduce or that they did, in fact, by the doctrine of cy-près introduce, any person or class of persons for whom the testator did not intend to provide. I think, therefore, that *Nicholl v. Nicholl* (5) is not an authority against the decision of the Court of Exchequer in the present
- F case. Applying the rule I have stated to the limitations now under consideration, I think that I am not at liberty to disregard the clear words of the testator which I am perfectly satisfied he meant to use according to their import, although he may possibly have also meant something else which he has not sufficiently expressed. Being clear that he meant both to give the estate to his brother Phillips for life and to the first son of his brother for life and to the first son of that first
- G son and the heirs male of his body, and also that he meant nothing to interfere with that disposition, I cannot by the doctrine of cy-près, include any limitations which would provide for the second and other sons of the first grandson, contrary to the words of the will. I am, therefore, of opinion that the doctrine does not enable me to give effect to any supposed intention of the testator beyond the clear expressions contained in his will.

- H I may here dispose of the third point submitted to me, namely, that I can give effect to the assumed intention by means of the doctrine of providing for the general intention at the sacrifice of the particular intention. There is no case that I am aware of that would enable me, on that doctrine, to cut down the clear estate in tail male given by this will to the first grandson. If the child had been born in the testator's lifetime neither I nor any other judge would have a right to say
- I that the testator might not give the estate to his brother for life, to his brother's first son for life, and to the first son of that son and the heirs male of his body. On the face of them the limitations are valid, they are also unambiguous and require no aid whatever from any rules of construction; and I cannot, therefore, on the ground of a general intention, affect them.

The question then arises whether I can in any other way, effectuate what is supposed to be the general intent. Immediately after the limitation just considered. the testator gives the estate,

"for all and every other the son and sons of the body of my said brother Phillips

Monypenny severally and successively according to seniority of age for the like interests and limitations as I have before directed respecting the first son and his issue."

The words here are also express and plain and I do not see how I can, on the ground of a general intent, cut down this particular limitation and exclude the second and other sons of the brother Phillips Monypenny, to whom the testator has expressly given the estate on failure of the heirs male of the body of the first grandson. I had occasion to review the authorities on this point in *Montgomery v. Montgomery* (6), and I took great care in going through them to see what the rule really was. Although always willing to give effect to the general intention when I can do so without unreasonably and improperly destroying a particular intent, I there found myself bound to give effect to the particular intent which, though not embracing everything, embraced a great deal, and gave a proper legal operation to the will according to the expressed intention of the testator. By that rule I desire to abide, being ready to give effect to the general intent, and even to sacrifice to it a particular intent if requisite, but not doing so without an actual necessity.

It has also been argued here very ingeniously that wherever you find an estate tail given to the parent, either under an actual limitation which would admit of no difficulty, or by implication (as, for example, to A. and if he dies without issue to B., where an estate tail arises by implication from the gift over), if the preceding or following limitations in the will are to the children of that person, they may be rejected, and that it is utterly unimportant that successive estates are by these limitations attempted to be raised which would be void for perpetuity. I know of no such rule, and must deny that any such exists.

Two cases were, however, cited in support of the argument. One was *Seaward v. Willock* (7), in which there was nothing but the devise of successive estates for life, which were held to be void, the successive estates which were given were not followed by any other limitation; and I understand the argument with which I am now dealing to depend on what was said by LORD ELLENBOROUGH in delivering the judgment of the court. After holding the successive estates to be void, he cites various cases, and says:

"In all these cases expressions were used denoting an intention that the lands should continue in the descendants of the first taker as long as there were any, without specifying or marking what estates such descendants should take: but in this case the deviser has not used general terms, from whence an intent to give a descendable estate to the issue of the first devisee may be collected; but has in express terms narrowed the estates which the issue were to take to estates for life: and this, properly speaking, is not a case of a particular and a general intent, both of which cannot be effectuated, and where the one must give way to the other; but a case of single intent to create, as I have said, a succession of estates for life not warranted by law: we do not, therefore, feel ourselves warranted by any rules of construction to say that under this devise Thomas Southcomb, the bankrupt, took any greater estate than for his life."

I, however, think that this, so far from sustaining the argument, is rather the other way and tells against it. The other case referred to was *Mortimer v. West* (8), in which, although there were void estates for life, SHADWELL, V.-C., relied on a general gift over (whether properly or not I need not now consider); but it is no authority on which I can act for the general proposition which I do not think can be maintained.

I do not mean to say that if I could see a clear general intention to provide for the issue in a way in which effect could be given to it, and a superadded intention to provide for that issue in a manner not allowed by law, I might not, in such a case, reject that which was illegal, and give effect to that which was legal; and what now falls from me must not, therefore, be considered as an expression of opinion that cases may not exist in which a limitation to issue void for remoteness

A may not be properly rejected and the legal intention effectuated by giving an estate tail to the parent. I cannot, however, do this in the case before me: I cannot give the estate to the father in possession for that would clearly not effect the intention and I cannot give it to him in remainder expectant on the void estates, for that would immediately expose it to the same objection as the preceding estates and render it equally void with them.

B I now come to the argument raised on the question of construction simply. It is said that, if I could give to the first son of the body of the first son, that is, to the grandson, of Phillips Monypenny an estate tail, then the other estates would naturally follow under the actual gifts of the will. That is certainly the most reasonable construction that could be adopted of this will and one which would do less violence to the terms used than any other. If, therefore, I could adopt it, I would;

C but I cannot do so consistently with the words of the will; for, in the first place, I must not only introduce lines of issue for whom the testator has not provided but I must exclude and postpone lines of issue for whom he has expressly provided. I must not only introduce second and other sons of the first son but I must exclude, until they or all those so introduced are dead without issue, the second and other sons of Phillips Monypenny. This I am not at liberty to do. I am, therefore, of

D opinion as to the construction of this will, that I cannot give any other than the general legal construction to the limitations; the consequence of which is, that Phillips Monypenny took a good estate for life, and his first unborn son, if he had been born, would have taken a good estate for life, and that all the remainders over, so far as they are remainders over, are void and inoperative and cannot be considered as standing in the way of anybody who is entitled otherwise in this

E property.

This brings me to the clause containing the gift over and a very important question is certainly raised on that clause. After having provided for the unborn children and issue of unborn children of Phillips Monypenny, the testator says:

F "And in default of issue of the body of my said brother Phillips Monypenny, or in case of his not leaving any at his decease, upon trust for my said brother Thomas Monypenny for and during the term of his natural life," etc.

If this was a regular remainder, depending on the previous limitations, it would of course be open to the same objections as those limitations, and those limitations being void it could not take effect.

The law, as to this part of the case, stands in a peculiar position. *Longhead v. Phelps* (9) shows that where there are two clauses containing a gift over, the first being a good gift over on a particular event and the second being one which would be too remote and, therefore, void, advantage may be taken of the former without any notice being taken of the latter clause. The point did not arise in the case just mentioned on a gift over following any disposition illegal on account of perpetuity; but it did so arise in a very important case which was not cited, and which was very much canvassed both in this court and the courts of common law, *Beard v. Wescott* (10). There were in that case, successive life estates for terms of years to the testator's grandson and his unborn issue (as in *Somerville v. Lethbridge* (11)), which were clearly void beyond the first son, and then followed a disposition to this effect:

I "And in case there shall be no issue male of the same John James Beard (the testator's grandson), nor issue of such issue male at the time of his death, or in case there shall be such issue male at that time, and they shall all die before they shall respectively attain their respective ages of twenty-one years without lawful issue male,"

then the estate was to go over. The case was sent to the Court of Common Pleas, and they were of opinion (that part of the case is cited in a note to GILBERT ON USES, p. 270) that the several gifts after the gift to the unborn son of the grandson were void, but they were also of opinion that, if the event mentioned arose, the

gift over would take effect, the event in question being within the legal limits of perpetuity. With this decision I could not agree and for this reason, that the testator never meant that the gift over should take effect unless the parties interested under the previous limitation if they had lived were capable themselves of taking, and that consequently the gift over must be void. Having had great difficulty in prevailing on Sir William Grant to send the case to the Court of Common pleas originally and that court having decided that the consideration I have just stated did not affect the validity of the gift over, I applied to and prevailed on LORD ELDON, L.C., to send a case to the Court of King's Bench. That court held that the gift over was void, not because it was not within the line of perpetuity but expressly on the ground I have adverted to, namely, that that limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would, if they had been alive, been capable of enjoying the estate and that he did not intend that the estate should wait for persons to take in a given event, where the person to take was actually in existence but could not take LORD ELDON affirmed that decision. This shows that where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuities, effect cannot be given to such a clause unless it will dovetail in and accord with previous limitations which are valid. This reasoning will apply to the case before me in this manner; if the gift in question can be read as a gift in the alternative, that in case there is no issue living at the death of the brother the estate is to go over, then effect may be given to it consistently with *Beard v. Wescott* (10), and every other authority, because the estate over would not be carried under the limitation at the expense of any person whom the testator intended to take, and no objection on this ground could consequently be raised.

The cases as to limitations over have also taken another shape. In *Proctor v. Bishop of Bath and Wells* (12), there was a disposition to the first son of Thomas Proctor who should be bred a clergyman and be in holy orders, and if Thomas Proctor should have no such son, then over: and there was no son. As the son could not take holy orders until the age of twenty-four, the limitation, taking it as it stood, was too remote; but it was argued, and it might be said reasonably that the limitation over embraced two events, namely, if no son was ever born, or that being born he did not take holy orders, and that the first was perfectly good. The court, however, held expressly that they could not divide the limitation, saying that they

"were clearly of opinion that the first devise to the son of Thomas Proctor was void, from the uncertainty as to the time when such son, if he had any, might take orders; and that the devise over, as it depended on the same event, was also void; for the words of the will would not admit of the contingency being divided, as was the case in *Longhead v. Phelps* (9); and there was no instance in which a limitation, after a prior devise, which was void from the contingency being too remote, had been let in to take effect."

Thus the courts have gone at least to this extent, that they will not hold a gift over made in words comprising only one event as made on two events although, in point of fact, it may consist very reasonably of two branches, unless the testator has himself so expressed it. What is contended in the case before me is that I am to consider the words which at all events point to different events as pointing only to one event. There is no doubt that in the sense in which the words, "and in default of issue of the body," are generally used, they mean a failure of issue at any time which would, of course, embrace a failure of issue at any particular time; but then I find the testator, while using these words, also using words which embrace an event falling within them. I am, therefore, bound to consider that he did not use the general words in the sense in which the court would use them for if he did, the other clause would be insensible and inoperative. As, then, I have before refused to add to the words which he has used, so I refuse, and on the

A same solid ground as it appears to me, to strike out his words, and I feel myself bound to give effect to every word in the will, as far as the law will enable me to do so.

There is also another reason which on this part of the case is quite satisfactory to my mind. LORD HARDWICKE lays it down that it is utterly immaterial what words come first or what words come last in a will; that, in fact, there is no magic in words. I am clearly of opinion, therefore, that if there be ambiguity in the clause in question I am at perfect liberty to clear it up and to read the clause in this way, "And in case of his not leaving any issue at his decease or in default of his issue," meaning "if upon his death" (looking at an event which may soon be ascertained) "he shall leave no issue behind him, or if he do and at any period however remote that issue shall fail, I give the estate in such and such a way."

B

C There is nothing at all insensible in this; it may be expressing unnecessarily in the former branch of the clause that which would be included in the latter but it shows that, unlike *Proctor v. Bishop of Bath and Wells* (12), the testator has provided under two forms of expression for what he might have provided under one. I can hardly suppose any clause providing for an event which must happen, but may happen at different periods, that might not be read in the same way. It might be so read in *Leake v. Robinson* (13), and every other case. Nothing is so dangerous with regard to a man's will as to strike out words which admit of a reasonable interpretation; and I am clearly of opinion that effect must be given to this clause as an independent clause, and that the gifts over are perfectly valid.

I shall, therefore, affirm the decision of the court below, so far as it relates to the first question in the case; the other point I will, after looking into the materials before me, endeavour to dispose of tomorrow morning.

E

July 20, 1852. LORD ST. LEONARDS, L.C.—The case on the point which now remains to be disposed of is one of considerable difficulty and complication and I will now state the opinion which I have formed on it, after having given it that consideration which it ought to receive.

F By the will of Mrs. Jodrell, who died in 1775, the Jodrell estate was given to Mary Jefferson for life, then to her sons and daughters in tail, then to Sylvestra Monypenny for life and her sons and daughters in tail, then to Phillips Monypenny for life and his sons and daughters in like manner, and then to Thomas Monypenny for life and his sons and daughters in like manner; then there was the shifting clause that,

G "if the said Phillips Monypenny and Thomas Monypenny or either of them their or either of their issue male or female, or any other son or sons of the said James Monypenny, of Greenwich" (who are provided for by her will) "hereafter to be born or his their or any of their issue male or female, shall at any time or times be or become entitled to an estate of freehold or inheritance in possession of or in the messuages lands tenements and hereditaments in the said county of Kent now of or belonging to my cousin Robert Monypenny, Esq., of Rolvenden, elder brother of the aforesaid James Monypenny of Greenwich or the greatest part of the same messuages lands tenements and hereditaments, so as to be in the possession or in the actual receipt of the rents and profits thereof,"

H

I the estate was to shift over.

In regard, then, to the Jodrell estate, the shifting clause was to operate in case the parties named became entitled to the Maytham Hall estate. I very much doubt, looking at the limitations of the Maytham Hall estate at the time that this will was made and the subsequent acts in regard to that estate, whether that estate ever did become vested in a person claiming under the will of Mrs. Jodrell in a way to make her estate go over; but this is not important, as, strictly speaking, the question before me does not relate to the shifting of the Jodrell estate but to that of the Maytham Hall estate.

The Maytham Hall estate was settled after the death of the testator's widow to Phillips Monypenny for life, then to his first unborn son, then came the remainders void for perpetuity, and then the gift over, which has been held to be good. The shifting clause was in effect, that if the testator's brothers or either of them should become entitled to the Jodrell estate, then the next person entitled under the will should take as if the party so becoming entitled were dead. Phillips Monypenny came into possession of the Maytham Hall estate on the death of the testator's widow in 1826, having at that time an estate in remainder in the Jodrell estate. This, however, could not be held to be within the terms of the shifting clause, as the testator could never have intended that a mere accession to a life estate in remainder, which might never be enjoyed, should take away an estate in possession. In 1836, however, the event contemplated did happen when, on the death of Sylvestra Hutton, Phillips Monypenny took the Jodrell estate; and the Maytham Hall estate then went over, and it was to go over as if the party taking were dead. The effect, however, of what occurred would not be to carry the estate to Thomas Gybbon Monypenny because the death of Phillips Monypenny could not have done so; for if there had been a son of Phillips Monypenny, he would have taken it, and Thomas Gybbon Monypenny never could take unless Phillips Monypenny had died without issue living at his death, under the clause which has been sustained by the court. The consequence is, that Thomas Gybbon Monypenny did not, upon the estate going over, acquire an estate for life; but the estate remained in the trustees for whom I need not now inquire. Then, in 1837, Thomas Gybbon Monypenny, Phillips Monypenny and Sylvestra Hutton, joined in executing mutual cross conveyances; and I am clearly of opinion that these instruments are binding and effectually convey whatever estates the parties severally had in the property. Thomas Gybbon Monypenny also suffered a recovery of the Jodrell estate, Sylvestra Hutton and Phillips Monypenny joining in the deed making a tenant to the præcipe. Phillips Monypenny too suffered a recovery of the Maytham Hall estate (which has had no operation), under which he claimed the fee simple, and this recovery was recited in the deed by which Thomas Gybbon Monypenny conveyed to him in fee. The effect was, in my opinion, to pass whatever estate Thomas Gybbon Monypenny had, that is, as I have already explained, in consequence of the shifting clause, an estate for life contingent on the event which afterwards happened. This estate he was, I think, capable of transferring and did transfer by the conveyance of 1837 to Phillips Monypenny, and the parties who now claim under the will of Phillips Monypenny would no doubt be entitled to it.

Then comes this other question. When Phillips Monypenny died, Thomas Gybbon Monypenny became, as the court has already held, entitled to a life estate in the Maytham Hall estate, being also then in possession of the Jodrell estate; did the shifting clause in James Monypenny's will operate or not? One thing is here quite clear, that the conveyance by Thomas Gybbon Monypenny passing to Phillips Monypenny the life estate in contingency could not prevent that clause from operating; and I am also of opinion that its operation was not affected by the dealings by Thomas Gybbon Monypenny with the Jodrell estate. Those dealings left everything as it stood, except that the limited estate of inheritance which Thomas Gybbon Monypenny had was enlarged into an estate in fee. I think, therefore, that Thomas Gybbon Monypenny did succeed to the Jodrell estate in the sense in which the testator, James Monypenny, used the expression, and that his dealings with that estate did not prevent the shifting clause from operating. Looking to the words of the clause, they are no doubt ambiguous and might mean that there should be only one shifting. The testator uses the terms of "then and in that case and immediately upon such an event taking place," which certainly have a bearing towards the clause operating only once. However, on the other hand, the express declaration is, that if the said brothers or either of them their or either of their issue shall become entitled to the said estates, then the clause is to operate. I must suppose the testator to have known what the limitations of the Jodrell estate

A were and that it was settled on his brothers in succession, for he provides expressly for the two events, namely, of both brothers becoming entitled, or either of them becoming entitled; and, therefore, when he afterwards seems to confine the clause to but one event, the expression may be a little ambiguous but there is nothing really insensible or contradictory in it. I think, then, that the true construction is, that this clause is to operate toties quoties as regards the particular persons named,

B and, that being so, the consequence is that in the event which happened the person became entitled who would have taken if the person succeeding to the Jodrell estate had been then dead. If Thomas Gybbon Monypenny had been then dead, his son, the plaintiff, would have taken.

The case is exceedingly complicated, and open to very great difficulty; but it appears to me that the decision which has been come to in the court below is right.

Appeal dismissed.

D

MEEK v. KETTLEWELL

[LORD CHANCELLOR'S COURT (Lord Lyndhurst, L.C.), February 15, 23, 24, December 6, 1843]

[Reported 1 Ph. 342; 13 L.J.Ch. 28; 2 L.T.O.S. 205; 7 Jur. 1120;
41 E.R. 662]

Chose in Action—Assignment—Voluntary assignment—Assignment of expectant interest—Enforcement by court of equity.

F A testator bequeathed a sum of money to trustees in trust for his daughter for life, and in case she died without leaving issue, for her next-of-kin, exclusive of her husband. During the lifetime of the daughter, her mother, as presumptive next-of-kin, by a voluntary deed assigned her expectant interest in reversion to the husband. On the death of the daughter without leaving issue,

G **Held:** the assignment operated only as an agreement to assign, and, consequently, being voluntary, a court of equity would not enforce it.

Notes. This case should be compared with *Re Lind, Industrials Finance Syndicate, Ltd. v. Lind*, [1914–15] All E.R.Rep. 527.

H Approved: *Price v. Price* (1851), 14 Beav. 598. Considered: *Kekewich v. Manning* (1851), 1 De G.M. & G. 176; *Bridge v. Bridge* (1852), 16 Beav. 315. Not Followed: *Voyle v. Hughes* (1854), 2 Sm. & G. 18. Considered and Explained: *Penfold v. Mould* (1867), L.R. 4 Eq. 562. Considered: *Harding v. Harding* (1886), 17 Q.B.D. 442; *Re Parsons, Stockley v. Parsons* (1890), 45 Ch.D. 51. Followed: *Re Ellenborough Towry Law v. Burne*, [1903] 1 Ch. 697. Considered: *Re Mudge*, [1914] 1 Ch. 115; *Re Bowden, Hulbert v. Bowden*, [1935] All E.R.Rep. 933. Referred to: *Re Way's Trusts* (1864), 2 De G.J. & Sm. 365; *De Hoghton v. Money* (1865), L.R. 1 Eq. 154; *Richardson v. Richardson* (1867), L.R. 3 Eq. 686; *Baddeley v. Baddeley* (1878), 38 L.T. 906; *Re Lind, Industrials Finance Syndicate, Ltd. v. Lind*, [1914–15] All E.R.Rep. 527; *Re Brooks' Settlement Trusts, Lloyds Bank, Ltd. v. Tillard*, [1939] 3 All E.R. 920.

As to assignment of expectancy, see 4 HALSBURY'S LAWS (3rd Edn.) 494; and for cases see 8 DIGEST (Repl.) 560, 561.

Cases referred to:

(1) *Grey v. Kentish* (1749), 1 Atk. 280.

- (2) *Chauncy v. Graydon* (1743), 2 Atk. 616; 26 E.R. 768, L.C.; 44 Digest 475, A
2937.
(3) *Antrobus v. Smith* (1805), 12 Ves. 39; 33 E.R. 16; 25 Digest (Repl.) 581,
217.
(4) *Edwards v. Jones* (1836), 1 My. & Cr. 226, L.C.; 25 Digest (Repl.) 603, 384.
(5) *Sloane v. Cadogan* (1806), cited in 12 Sim. at p. 291; 8 Digest (Repl.) 630,
667. B

Also referred to in argument :

Colman v. Sarel, Sarel v. Colman (1789), 3 Bro.C.C. 12; 1 Ves. 50; 29 E.R. 379,
L.C.; 44 Digest (Repl.) 11, 41.

Holloway v. Headington (1837), 8 Sim. 324; 6 L.J.Ch. 199; 59 E.R. 128; 40
Digest (Repl.) 580, 840.

Dearle v. Hall, Loveridge v. Cooper (1828), 3 Russ. 1; 38 E.R. 475, L.C.; 8
Digest (Repl.) 599, 430. C

Jones v. Roe (1789), 3 Term Rep. 88; 100 E.R. 470; 44 Digest 189, 178.

Higden v. Williamson (1732), 3 P.Wms. 132; 24 E.R. 1000, L.C.; 5 Digest
(Repl.) 701, 6125.

Douglas v. Russell (1831), 4 Sim. 524; 58 E.R. 196; affirmed (1833), 1 My. & K.
488; 39 E.R. 766, L.C.; 41 Digest 638, 4691. D

Hinde v. Blake (1840), 3 Beav. 234; 9 L.J.Ch. 346; 49 E.R. 91; 8 Digest (Repl.)
586, 330.

Wright v. Wright (1750), 1 Ves. Sen. 409; 27 E.R. 1111, L.C.; 8 Digest (Repl.)
560, 134.

Dillon v. Coppin (1839), 4 My. & Cr. 647; 9 L.J.Ch. 87; 4 Jur. 427; 41 E.R. 249,
L.C.; 25 Digest (Repl.) 581, 218. E

Ex parte Pye, Ex parte Dubost (1811), 18 Ves. 140; 34 E.R. 271, L.C.; 25 Digest
(Repl.) 585, 251.

Re Row, Ex parte South (1818), 3 Swan. 392; 36 E.R. 907, L.C.; 8 Digest (Repl.)
553, 75.

Blakely v. Brady (1839), 2 Dr. & Wal. 311; 8 Digest (Repl.) 632, *297. F

Appeal by the plaintiff from a decree of WIGRAM, V.-C., reported 1 Hare, 464,
dismissing the bill without costs.

John Kettlewell, by his will, dated Aug. 4, 1838, devised all his real estate to
trustees, on trust to pay the rents, issues, and profits thereof to his daughter,
Hannah Kettlewell, during her life, for her sole and separate use, and after her
decease he directed that his said trustees should stand seised of his said real estate
in trust for such child or children of his said daughter, living at her decease, as
she should by will appoint, and in default of appointment in trust for such child
or children in equal shares, and in default of such issue on such trusts as his
daughter should by will appoint. And the testator bequeathed to the said trustees
£11,000, on trust to place the same out at interest on government or real securities,
and directed that they should stand possessed of the same, and the dividends and
interest thereof on the same trusts, in favour and for the benefit of his said
daughter and her children as were thereinbefore declared of his real estate, or as
near thereto as the nature of the property, and the rules of law, would admit; but
if his said daughter should have no child living at her decease, then as to £100 (part
of the said £11,000), in trust for R. L. Dawson, and as to the residue of the said
£11,000 in trust for the next-of-kin of the testator's said daughter Hannah (ex-
clusive of a husband), in a course of distribution according to the statute. The
testator appointed the same trustees the executors of his will. G

On Mar. 11, 1839, the testator died, leaving the defendant, Mary Kettlewell, his
widow, and also the said Hannah, his daughter, surviving. The will was proved
by the executors, and the £11,000 was duly invested in their names. On June 20,
1839, Hannah, the daughter, married the plaintiff, J. Meek, the younger. H

By an indenture, dated Sept. 10, 1839, and made between the defendant, Mary
Kettlewell, of the first part, and the plaintiff, of the second part, reciting the will I

- A of the testator, and his death, and that the defendant, in the event of the death of the testator's daughter, without leaving issue her surviving, would become entitled to the residue of £11,000 as the next-of-kin of her daughter, and reciting that the defendant had contracted and agreed with the plaintiff to grant and assign the residue of the £11,000 to him, his executors, administrators, and assigns, it was witnessed, that, in pursuance of the said contract, and in consideration of the
- B natural love and affection of the defendant for the plaintiff, as the husband of her daughter, and in consideration also of 10s. by James Meek, the younger, to the defendant paid, the receipt whereof was thereby acknowledged, the defendant, Mary Kettlewell, granted, bargained, sold, assigned, transferred, and set over unto the plaintiff, his executors, administrators, and assigns, all that the said reversionary or expectant estate of her the defendant, of, in, and to the £11,000,
- C and of and in the interest and proceeds to grow due and payable for the same: and also the said £11,000 (after paying thereout the said £100), and every part thereof, and all interest and proceeds thereafter to grow due or become payable for the same, on trust, as to the said £100 (part of the said £11,000), for R. L. Dawson, according to the purport of the will—as to £3,000, other part of the said sum of £11,000, in trust for the defendant, her executors, administrators, or assigns, to
- D and for her and their own absolute use and benefit—and as to £7,900 (the residue of the said £11,000), in trust for the plaintiff himself, his executors, administrators, and assigns, to and for his and their own absolute use and benefit: and for the better enabling the plaintiff to receive and take the said money and premises, the defendant constituted him, his executors, administrators, and assigns, her attorney, and attorneys irrevocable, in her name to demand, receive, and take the said
- E premises of and from the said trustees, or whom else it should concern to pay or transfer the same, on the decease of the said Hannah, the daughter of the said testator, without issue her surviving; and then followed the usual power to the plaintiff to give effectual receipts for the moneys which he should receive, and the common covenants for good title, and for further assurance. On Dec. 21, 1839, the plaintiff signed a memorandum on the back of the indenture of Sept. 10, 1839, which was in the following words:

“Memorandum,—That I, the within-named James Meek, the younger, at the request of the within-named Mary Kettlewell, and upon condition that the will of my dear wife, Hannah, dated Aug. 23 last past, shall remain valid, unrevoked, unaltered, and uncanceled, at the time of my said dear wife's death, have agreed, and do hereby agree, to allow and pay to the said Mary Kettlewell the further sum of £3,000 out of the within-named sum of £7,900. Witness my hand, this Dec. 21, 1839.”

- On Jan. 7, 1840, Hannah, the plaintiff's wife, died without issue, and thereupon defendant, her mother, became under the limitation in the will entitled to the £11,000, subject to the payment of £100 to Dawson. The fund remained standing
- H in the names of the trustees, appointed by the testator. It did not appear that any notice had been given to the trustees, either of the assignment of Sept. 10, or of the subsequent endorsement thereon. The defendant, Mary Kettlewell, did not consent to the application of the fund according to the terms expressed by the assignment, or the memorandum; and the trustees declined to act in conformity with those instruments without her sanction. The bill was then filed against the
- I window and the trustees, praying that the performance of the trusts of the indenture of assignment might be decreed.

*The Solicitor-General (Sir W. Follett) and Hetherington for the plaintiff.
Bethell, Wilbraham and Willcock for the defendant.*

Cur. adv. vult.

Dec. 6, 1843. **LORD LYNTHURST, L.C.**—This was an appeal from a decree of WIGRAM, V.-C. The question depends on the effect of the deed of assignment, of Sept. 10, 1839, executed by Mrs. Kettlewell, the defendant. At the date of the

execution of that instrument her interest was this: In the event of her daughter dying in her lifetime without leaving issue, she would become entitled, under the trusts of her husband's will, to £11,000, subject to a small deduction, as the next-of-kin of her daughter. During the lifetime of her daughter she assigned this expectant interest to the plaintiff, in trust, as to a part of it, for herself, and as to the residue, in trust for the plaintiff for his own use and benefit. The daughter afterwards died without leaving issue, and the defendant, as the next-of-kin of her daughter, became entitled to the fund in question, which was in the hands of trustees under her late husband's will. The bill was filed against the widow and the trustees, to enforce the performance of the trusts of the deed of assignment.

It is not disputed that the assignment was purely voluntary. But the assignment of an expectancy, such as this is, cannot be supported unless made for a valuable consideration. If there is such a consideration a court of equity will give effect to it. Thus, in *Grey v. Kentish* (1), LORD HARDWICKE is reported to have said (1 Atk. at p. 280):

"A husband cannot assign in law a possibility of the wife, nor a possibility of his own; but this court will, notwithstanding, support such an assignment for a valuable consideration."

Again, in *Chauncy v. Graydon* (2), he says (2 Atk. at p. 621):

"Though in law a possibility is not assignable, yet in equity, where it is done for a valuable consideration, it has been held to be assignable."

The deed, therefore, being in this case merely voluntary, it was as an assignment altogether inoperative; and the only remaining question will be, whether, although void as an assignment, it is effectual as a declaration of trust. The residue is assigned to the plaintiff in trust for himself. There can be no difference between an assignment to the plaintiff in trust for himself and an assignment to him simply. The assignment fails, and with it the trust. If such an assignment be inoperative it does not convert the assignor into a trustee for the assignee. It has been repeatedly decided that where a gift is intended, as in the present case, and it is imperfect or ineffectual, this cannot be converted into a declaration of trust so as to make the donor a trustee for the donee.

The authorities are conclusive on this point. *Antrobus v. Smith* (3) and *Edwards v. Jones* (4) were cases of imperfect gifts. It was contended that the donors were trustees for the donees. But in both cases the court held that an incomplete gift would not operate as a declaration of trust. The judgment of SIR WILLIAM GRANT on this point, in *Antrobus v. Smith* (3), is conclusive in the reasoning. It is stated fully by LORD COTTENHAM in *Edwards v. Jones* (4), and it is unnecessary to repeat it. In *Sloane v. Cadogan* (5), which was so much relied on in the argument, Bromley Cadogan had a vested interest in the property assigned; he conveyed it by a voluntary deed to trustees in trust for the earl his father. SIR WILLIAM GRANT considered that a trust was thereby created, and on that his judgment was rested. It is obvious, however, that that case is distinguishable from the present, which is the assignment of a mere expectancy, that conveys no estate or interest to the assignee, although when made for a valuable consideration, which is wanting here, it would be supported in equity.

I am of opinion that the judgment of the vice-chancellor was correct, and that the appeal ought to be dismissed. The plaintiff must pay the costs.

Appeal dismissed.



